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THE LAW
OF
PLEADING AND EVIDENCE
IN
Civil Actions,
ARRANGED ALPHABETICALLY:
WITH
PRACTICAL FORMS:
AND THE
PLEADINGS AND EVIDENCE TO SUPPORT THEM.

BY
JOHN SIMCOE SAUNDERS, ESQ.

The Second Edition.

BY ROBERT LUSH, ESQ.

BARRISTER-AT-LAW.

FIFTH AMERICAN EDITION,

WITH REFERENCES, BY A MEMBER OF THE PHILADELPHIA BAR.

VOL. I.

PHILADELPHIA :

ROBERT H. SMALL, LAW BOOKSELLER AND PUBLISHER.
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P R E F A C E

TO THE SECOND LONDON EDITION.

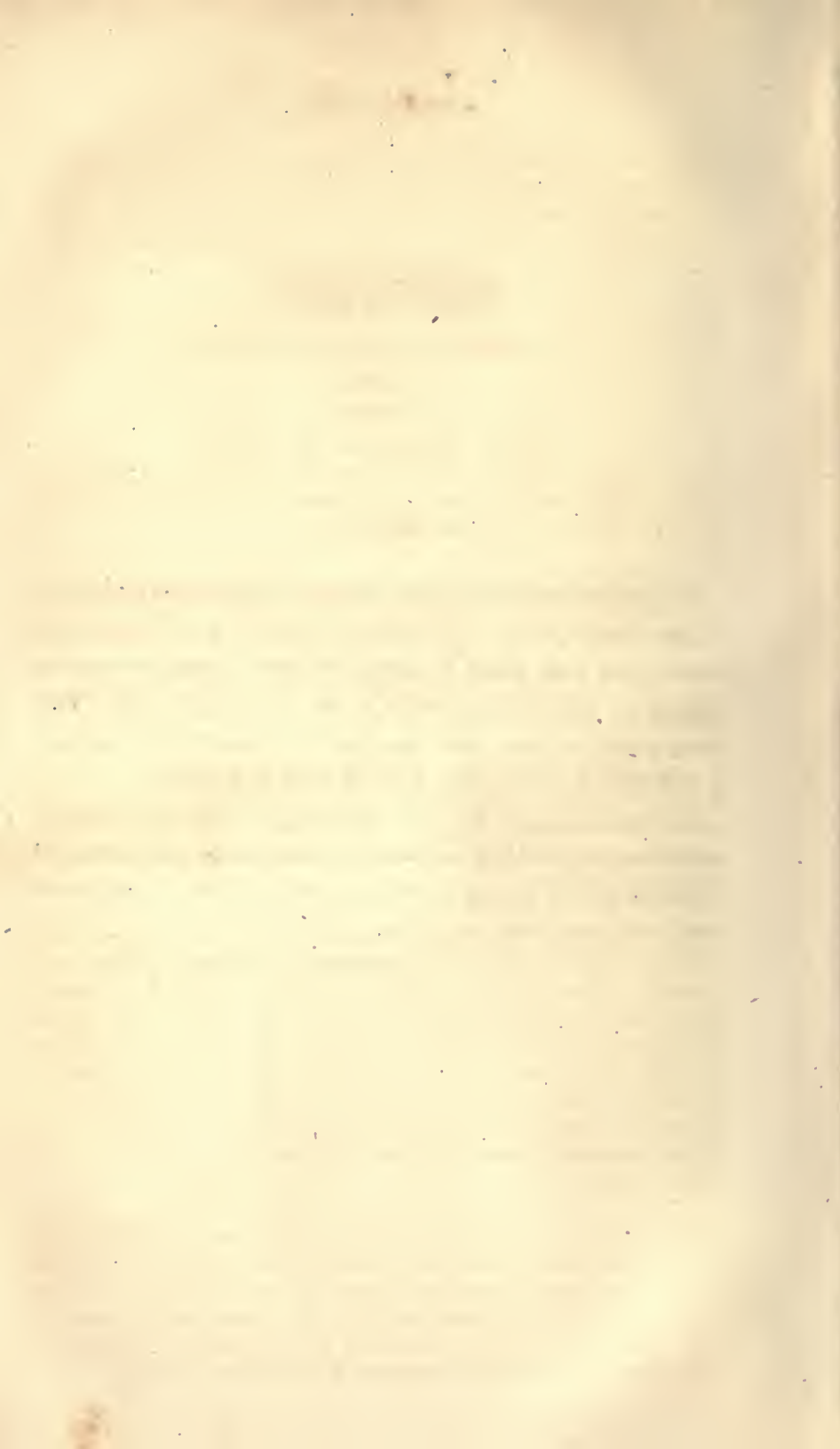
IT is some years since the Editor commenced the preparation of this Second Edition. He found that the various and important changes in the Law which had taken place, and the large accumulation of reported cases since the publication of the First Edition, rendered the labour much greater, and increased the bulk of the work much more, than was anticipated. Hence the delay which has occurred in its publication.

The original plan has been closely adhered to. Some divisions, however, have been necessarily left out as obsolete, while many more have been introduced; and it is believed that no material omission, either as regards subjects or cases, will be detected. Throughout the work the names of the cases are now given; there are copious headings to almost all the titles, and a further aid to reference is afforded by a full Index.

The Editor thankfully acknowledges the valuable assistance rendered to him, in the compilation of some of the earlier parts, by P. M'MAHON and H. A. SIMON, Esqs. The portions respectively done by those gentlemen have been continued, down to the time of printing, by STANDISH GROVE GRADY, Esq., to whom the Editor is also indebted for unremitting aid in the completion of the work, including its conduct through the press.

4, INNER TEMPLE LANE,

January 1, 1851.



ADVERTISEMENT

TO THE FIRST EDITION.

THE object of the Author, in the following work, has been to collect and digest the Law relative to Pleading and Evidence into the smallest compass, and under the most convenient arrangement.

The work, consequently, not only contains the general principles of the Law respecting Pleading and Evidence, and the forms of Civil Actions, but also the form of the remedy, the pleadings, and the evidence necessary for the support of *every ground of action*; likewise, the pleading and evidence necessary to the support of *every defence*, with the Precedents of most common use in *all* these cases.

The contents of the work are alphabetically arranged, each title containing such portions of the Law of Pleading and Evidence as are peculiar to it;—this arrangement having been considered the most proper, to compress and simplify the work, as well as to render it more convenient for the purpose of reference.

The arrangement of each separate title is, as nearly as possible, uniformly the same; and, wherever subdivision is required, is explained by the list of contents at the head of each. Whenever the laws of pleading and evidence have been combined, the arrangement of the title is as follows:—As regards the plaintiff,—first, his remedy is described; then the law which governs the form of that remedy; next, the form itself; and, lastly, the evidence required to support that form. As regards the defendant, a similar course is pursued: instructions are first given as to the choice of his plea; next, as to the manner of framing it; and, lastly, the evidence required to support it.

The work, to those who are not familiar with such undertakings, will convey a very inadequate idea of the pains and time employed in composing it: they, however, who have experienced the trouble of such a task, will appreciate the difficulties attendant on it. The Author, therefore, hopes for their indulgence, if, in the multitude of points of which it treats, and of references which it contains, errors may have chanced to occur.

The Author has spared no labour to render the work of extensive practical utility, and has to acknowledge the kind assistance of some of his friends, whose knowledge and experience in the profession have materially aided him in completing it.

INNER TEMPLE LANE.

September, 8, 1828.

PLEADING AND EVIDENCE;

WITH

PRACTICAL FORMS.

ABATEMENT.(a)

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PLEAS IN ABATEMENT IN GENERAL.

THESE pleas differ from pleas in bar, inasmuch as they are not addressed to the merits of the claim, but to some matter which tends merely to defeat the *present* suit. Hence, it is essential to a plea in abatement, that it should not only point out the defect, but that it should show how it may be corrected; or, in technical language, that it should give the plt. a better writ. Formerly, pleas in abatement were arranged in the following order:—

1st. To the jurisdiction of the court.

2nd. To the disability of the person.

1st. Of plt.

2nd. Of deft.

3rd. To the court.

4th. To the writ.

1st. To the form of the writ.

1st. Matter apparent.

2nd. Matter *dehors*.

2nd. To the action of the writ (1 Ch. Pl. 7th ed. 456).

Pleas in abatement to the court could only be pleaded in actions by original, and upon oyer of the writ (Hole v. Finch, 2 Wils. 394); consequently, when oyer of the writ was prohibited by rule of court (see Tidd, 9th ed. 588), this class of pleas, as well as pleas to the writ itself for matter apparent on the face of it, became obsolete (1 Ch. Pl. 7th ed. 466).

Pleas in abatement may now, therefore, be thus arranged :

(a) Vide for American authorities, 1 U. S. Dig. "Abatement," p. 2. 1 Supp. to U. S. Dig. p. 1. U. S. Annual Dig. 1847, p. 5; 1848, p. 1; 1849, p. 1.

1st. To the jurisdiction of the court.

2nd. Of the disability, or privilege of the person :

1st. Plt.

2nd. Deft.

3rd. To the writ for matter *dehors*, as nonjoinder, &c.

4th. To the action of the writ ; as, that another action is pending for the same cause, &c.

*In this order all pleas in abatement must be pleaded. The deft.

[*2] cannot after pleading, for example, the nonjoinder of a co-contractor, plead to the jurisdiction, or, to the disability of the plt. (Co. Litt. 303; Com. Dig. Abt. C.); but, by pleading according to the above arrangement, he may go through the whole series (Com. Dig. Abt. I, 3, 4; Bac. Ab. Pleas, K, 1).

When to be pleaded.] Pleas in abatement must be pleaded within four days after delivery, or, notice of declaration, and this, though no rule to plead has been entered, or demand of plea given (Anon. Ca. Pr. C. P. 23; Biddleston v. Atcherley, ib. 63). The time is computed as in other cases (Ryland v. Wormald, 2 M. & W. 393); viz. exclusively of the first day and inclusively of the last. And if the last day fall on a Sunday, Christmas-day, or day appointed for a public fast, or thanksgiving, the time is to be reckoned exclusively of that day also (R. G. H. T. 2 Will. IV. r. 8; 2 M. & W. 393, *supra*). If the time be not expired on the Thursday next before Easter, or on the 10th of Aug. the deft. will in the one case be entitled to the residue of the time counting *from* the Tuesday in Easter-week, and in the other, he will have the full four days after the 24th of Oct., as if the declaration had been originally delivered on the latter day (R. E. 2 Will. IV. r. 1; Harrison v. Tait, 4 B. & C. 443; R. M. 3 Will. IV. r. 11; see Severin v. Leicester, 2 Dec. 1848, Q. B.). Where oyer has been demanded, the deft. has as much time, or, as many pleading days to plead a plea in abatement as he had when he demanded oyer (Kerfoot v. Edwards, 12 Jur. 440). If the plea be not pleaded in proper time the plt. may treat it as a nullity; and after the full time of pleading is out, sign judgment; *semble*, not before (Nollekin v. Severn, 2 C. & J. 333; Smith v. Rathbone, 5 Dowl. 401; Macker v. Billing, 1 C. M. & R. 577; Pepperell v. Burrell, ib. 372; Dakins v. Wagner, 3 Dowl. 535; Warne v. Beresford, 4 Dowl. 361); and he need not previously return the plea (see Garratt v. Hooper, 1 Dowl. 28; Haugh v. Bond, 1 M. & W. 314; 1 Arch. Pr. 8th ed. 263). The courts will not in general enlarge the time for pleading in abatement (see Milner v. Milnes, 3 T. R. 632, and note; Sowter v. Dunston, 1 M. & R. 508); nor allow a plea in abatement to be amended (Dockary v. Laurence, Ca. Pr. C. P. 29; Tidd, 9th ed. 298). A plea in abatement for the nonjoinder of a contractor, which prays judgment of the declaration only, is informal; it ought to pray judgment of the writ and declaration (Whitling v. Des Anges, 3 C. B. 910; 4 D. & L. 678). A plea in abatement of the nonjoinder of co-contractors resident within the jurisdiction of the court, alleging that the contract was made with the deft. and such resident co-contractors, and also with other co-contractors resident without the jurisdiction of the court, is bad; the stat. 3 & 4 Will. IV. c. 42, s. 8, requiring the deft. to state in his plea that all are resident within the jurisdiction, and to verify the residence of all by affidavit (Joll or Gell v. Curzon (Lord), 4 C. B. 249; 4 D. & L. 810).

Qualities of Pleas in Abatement.

Title.] Pleas in abatement, like all other pleas, must now be entitled of

the day of the month and year when pleaded (R. H. 4 Will. IV. r. 1). If the plea be entitled of a different day from that on which it is pleaded, this, which would only be an *irregularity* in a plea in bar, would, it seems, render a plea in abatement a nullity, since such plea is not amendable (Ca. Pr. C. P. 29; Tidd, 9th ed. 298).

Commencement.] Care must be taken that the deft.'s and plt.'s names be stated properly; if there be a material variance plt. may sign judgment. (Munden v. Brunswick, Duke, C. P., T. T. 1847; 9 Law J. 126). Most pleas in abatement may be pleaded by attorney; a married woman, however, can only plead her coverture in person, as she cannot appoint an attorney (2 Saund. 309 b). An infant must plead by guardian, and not by attorney or *prochein amy* (2 Saund. 117 f, n. 1; 212 a, n. 4; Sinamarsh v. Chandler, 1 Moore, 250; Bird v. Pegg, 5 B. & A. 418). And all pleas to the jurisdiction must be pleaded in person (2 Saund. 209 c).

Subject-matter of Plea.] The greatest possible precision and certainty* are required in a plea in abatement. It must be certain to [*3] every intent, and be good *in omnibus* (2 Saund. 299 c, 299 d; Bleakley v. Jay, 13 M. & W. 464. It must not be repugnant (Tallant v. Germyn, Carth. 207; Roberts v. Moon, 5 T. R. 487); nor double, as pleading two outlawries (Trevellian v. Seecomb, Carth. 8, 9; 1 Show. 80; Reed v. Mattern, Hardw. 286; Dacres v. Duncan, 2 Lev. 82); or, the pendency of two actions (Esdaile v. Lund, 3 M. & W. 607). It must be, or, be accompanied by an answer to the whole declaration (see Phillips v. Claggett, 10 M. & W. 102); that is, the whole matter of complaint must be covered by the plea, or, pleas pleaded (Herries v. Jamieson, 5 T. R. 553); for, there may be a plea in abatement to part, and in bar to the residue, or the like (Powell v. Fullerton, 2 B. & P. 420). A plea to an action on a *sci. fa.* stated, that a writ had been issued by the same plt. against the same public officer of the company, and for the same amount as that now sought to be recovered: it was held not sufficient without averring in terms that the cause of action is the same (Esdaile v. Truswell, 11 Law J. 68, Ex.). The plea must also give the plt. a better writ; for, if it show that plt. could not have any writ at all, the plea should be in bar, and not in abatement (Evans v. Stevens, 4 T. R. 227; Mainwaring v. Newman, 2 B. & P. 224, n.; Haworth v. Spraggs, 8 T. R. 515; Peake v. Davis, 5 Taunt. 653). A plea that disputes and differences had arisen between the plt. and deft. as to whether, or not, the deft. was indebted to the plt. in any, and what sum of money in respect of the causes of action in the declaration, and that thereupon the plt. and deft. had referred the matters in dispute to arbitrators, and that a reasonable time for making their award had not yet elapsed, and that the said matters in dispute were still under their consideration, is not a good plea in bar; and not commencing or concluding in abatement, cannot be treated as a plea in abatement (Harris v. Reynolds, 14 Law J. 241, Q. B.). A variety of cases peculiarly applicable to the subject-matter, in the forms hereafter given, will be found there.

Conclusion, &c.] In pleas in abatement, the court will give no other judgment than that prayed for by the party (King v. Shakspeare, 10 Ea. 87; Attwood v. Davis, 1 B. & A. 172, but see Powel v. Fullerton, 2 B. & P. 420). Great care must therefore be taken in stating a proper conclusion (1 Ch. Pl. 476; Attwood v. Davis, 1 B. & C. 172; Vivian v. Jenkins, 3 At. & El. 748). Where the matter of the plea goes to the writ, or action itself, the conclusion should be by praying judgment that the *writ* and *declaration* may be quashed (Davies v. Thompson, 14 M. & W. 161; 3 D. & L. 49;

3 Ch. Pl. 7th ed. 10, 16). Where it is to the disability of the plt. the conclusion is "if the plt. ought to be answered;" when to the jurisdiction, or, the deft.'s privilege, it prays judgment, "if the court ought to take cognizance," &c. (see 3 Ch. Pl. *supra*, 19).

Affidavit of Truth of Plea.

Affidavit.] Stat. 3 & 4 Anne, c. 16, s. 11, enacts "that *no dilatory plea* (see 3 Dowl. 129) shall be received, unless, the party pleading do, by affidavit, prove the truth thereof, or show some probable matter to the court to induce them to believe that the fact of such plea is true." It must verify the plea as to the whole declaration (Dobbin v. Wilson, 3 N. & M. 260). It is not necessary that the affidavit should be made by the party himself; his attorney, or, even a stranger will do (Lumley v. Foster, Barnes, 344; 2 Saund. 211 f; Anon. 1 Ch. R. 58). When made by the deft. he need not describe himself other than, as the "above-named deft. in this cause," notwithstanding the rule *(H. T. 2 Will. IV. r. 5; 1 Dowl. 693; Shirer [*4] v. Walker, 9 Dowl. 667). It must be positive (Pearce v. Davey, Say, R. 293), and be properly *entitled* of the cause (Rex v. Jones, 2 Str. 1161; see Prince v. Nicholson, 5 Taunt. 333; Richards v. Setree, 3 Price, 197; Dobbin v. Wilson, *supra*; Fletcher v. Lechmere, 2 D. N. S. 848; 2 Arch. Pr. 819). If the plea be not filed in due time (*ante*, p. 2), with such affidavit annexed, or, the affidavit be irregular (Sherman v. Avery, 1 Str. 639; 3 Pri. 197; 3 Tyr. 387; 1 Dowl. 699, S. C.), the plt. may treat the plea as a nullity, and sign judgment (Bray v. Haller, 2 Moore, 213; King v. Cooke, 2 B. & C. 618; Garratt v. Hooper, 1 Dowl. 28; Lush's Pr. 408). If the truth of the plea appear to the court upon an inspection of their own records, an affidavit is not necessary (Cassley v. Sheen, 2 W. Bl. 1088; Gray v. Sidneff, 3 B. & P. 397). A plea in replevin of *cepit in alio loco* does not require any affidavit (see *post*, "Replevin"). Pleas of nonjoinder require an additional affidavit (see *post*, "Nonjoinder"). The affidavit in support of a plea in abatement for the nonjoinder of other co-defts., under 3 & 4 Will. IV. c. 42, s. 8, must state the residences at the time of the plea pleaded; and therefore an affidavit which states the residences of such co-defts. at the time of the commencement of the suit is bad, although the plea gives the residences at the time of the pleading thereof, and the affidavit states the plea to be true in substance and in fact (White v. Gascoyne, 3 Exch. 36; 18 Law J. 110, Exch.). The provision in the 4 Ann. c. 16, s. 11, "that no dilatory plea shall be received," unless verified by affidavit, is introduced for the sole benefit of plts.; and a plt. may therefore waive, if he so chooses, an irregularity in, or the omission of, any such affidavit (Graham v. Ingleby, 5 D. & L. 737, Exch.)

Qualities of Replication and other Proceedings.

When a plea in abatement is regularly put in, the plt. may either reply, or demur, or may by entering, or rather delivering a *cassetur breve*, thus discontinue, and commence a fresh action (Owens v. Dubois, 7 T. R. 698; Stafford (Mayor) v. Bolton, 1 B. & P. 40; 4 B. & C. 871; Gardner v. Walker, 3 Anst. 935). If the plea be untrue in fact, he should reply, in which case he will have judgment, *quod recuperet*, and the jury should assess the damages (Gilb. C. P. 53; Medina v. Stoughton, 1 Raym. 594; 2 Saund. 210-1; 3 Wils. 267; 1 Ch. Pl. 480; see *post*, "Statute of Limitations"). It is necessary to enter the *cassetur* before bringing the second action (Knight's case, 1 Salk. 329; S. C. 2 Raym. 1014). Plt. is not liable to costs on a *cassetur*,

(Grumble v. Sheppherd, 12 Mod. 145; Barnes, 120; Poiklington v. Peck, 1 Str. 638; 2 Ch. Arch. 7th ed.; Lush's Pr. 410).

Commencement.] When the plea consists of matter of fact which the plt. denies, the replication may begin, without any allegation, that the writ, or bill ought not to be quashed (Sabine v. Johnstone, 1 B. & P. 61). It must not commence, as, to a plea in bar (Carter v. Davis, Carth. 187; Com. Dig. Abt. I, 15), unless the plea commence or conclude improperly (Bac. Ab. Abt. 8). But if a replication, to a plea in abatement, begin, "that the said declaration ought not to be quashed," but conclude properly, it is sufficient, and such words may be rejected as surplusage (Sabine v. Johnstone, 1 B. & P. 60; 1 Ch. Pl. 481).

Conclusion.] It should conclude, "to the country;" and it is not necessary that it should conclude with a verification and formal traverse (Sabine v. Johnstone, 1 B. & P. 60; Owen v. Shapcott, 1 Ea. 542). But, if it do so conclude, it is said, the plt. ought to pray damages (2 Saun. 211, n. 3), unless he confess deft.'s plea, and avoid it by other new matter, when he should not pray damages, but must maintain his writ. (Ib.)

Demurrer.] A general demurrer to a plea in abatement is sufficient (Lloyd v. Williams, 2 M. & S. 485). It was, formerly, thought advisable to demur specially, where the plea was merely informal (Hixon v. Binns, 3 T. R. 186), but this is unnecessary (Esdaile v. Lund, 2 D. & L. 565; 12 M. & W. 607; Davis v. Thompson, 14 Law J., N. S. 384; 9 Jur. 736). And the court will not, in general, allow the defendant to amend (Car. Pr. 29; Tidd, 9th ed. 298). *Judgment will be given against the plea for a defect in it, without regard to any objection to the declaration, for [*5] nothing, but the writ, is in question (Hustrop v. Hastings, Salk. 212; Ballasyse v. Hester, Lut. 1592; Rich v. Pilkington, Carth. 172); except where the plea contains matter which ought to have been pleaded in bar. And then deft. may object to the declaration (Dundalk Railway Comp. v. Preston, 1 Q. B. 667).

Judgment.] If issue be joined on a plea of abatement, a judgment for the plaintiff upon a verdict is final, *quod recuperet* (Eichorn v. La Maitre, 2 Wils. 368; Garfund v. Extor, 1 Ld. Raym. 992; Tidd, 979; 1 Ch. Pl. 481). But judgment for him upon demurrer to, or arising out of, a plea in abatement, at whatever stage it may arise (Bowen v. Shapcott, 1 Ea. 542), is not final, but merely a *respondeat ouster* (Ib. Yelv. 112; 1 Vent. 137; Raym. 992; Tidd, 979), upon which judgment, however, the plt. is now entitled to costs (3 & 4 Will. IV. c. 42, s. 34). A judgment for the deft. in all cases, is, that the writ and declaration be quashed, and upon this judgment the deft. is, also, now entitled to costs. (Ib.) After judgment of *respondeat ouster* signed, the deft. has four days' time to plead (Cantwell v. Stirling (Earl), 8 Bing. 177), and it seems that no new rule to plead is necessary, nor, a fresh demand of plea. The deft. may plead again in abatement, provided the subject-matter pleaded be not of the same, or, of any preceding degree, or class with that before pleaded (Com. Dig. Abt. I, 3; 2 Saun. 40).

1. Pleas to the Jurisdiction.

These pleas, though, technically different from most other pleas in abatement in the following points of form—1. In being always pleaded in person; 2. In concluding "if the court will take cognizance, &c., of the said action,"

instead of "that the writ and declaration be quashed;" yet, in other respects, are the same, as they have the effect of abating or putting an end to the particular action (Bac. Ab. Pleas, E. 2; 3 Bl. C. 301; Gilb. C. P. 187; 1 Ch. Pl. 457).

The office of pleas of this description is not to show that the superior courts have no jurisdiction to entertain the suit, for that is matter for a plea in bar (see *Dundalk Western Railway Comp. v. Tapster*, 1 Q. B. 667); therefore, if an action, in its nature local, be brought for a cause of action arising abroad, the defence is open, on general demurrer, if the matter appear on the record, otherwise, on the general issue (*Doulson v. Matthews*, 4 T. R. 583). So, when a statute creating a court of requests, expressly takes away the jurisdiction of the superior courts, this is matter of defence by special plea, or on the general issue, according as the language of the statute requires the one mode or the other (see *Parker v. Elding*, 1 Ea. 352; *Rex v. Johnson*, 6 ib. 583; *Reynold v. Talmon*, 2 Q. B. 644; *Hildyard v. Webster*, 1 D. & L. 950; *Tidd*, 9th ed. 954); but a plea to the jurisdiction is, in substance, a plea of *privilege*. It ousts the jurisdiction of the superior court by reason of an *exclusive* privilege in another, and therefore "wherever the deft. can plead to the jurisdiction of the courts at Westr., there the franchise may demand cognizance" (Bac. Ab. Courts, D, 3, p. 393), but not *vice versa*. A grant *habere cognitionem placitorum* entitles the lord to claim cognizance, but not the defendant to plead to the jurisdiction. If, however, such a grant be given, with exclusive words, the exemption may be claimed by the lord, or, pleaded by the deft. (Vin. Ab. Cognizance, V. 5, 569; Bac. Ab. Courts, D).

[*6] The essential quality of these pleas is to show "a more proper *and sufficient jurisdiction, for, if there be no other mode of trial that, alone gives the superior courts jurisdiction." (*Rex v. Johnson*, 6 Ea. 583; *Mostyn v. Fabricas*, Cowp. 172.)

In transitory actions, it is said, the deft. cannot plead to the jurisdiction, unless, the plt., by his declaration, show that the cause of action accrued within an exclusive jurisdiction (Bac. Ab. Courts, D. 4 Ins. 212; 1 Ch. Pl. 459); but, this must be understood of pleas which are *strictly* pleas to the jurisdiction, and not to pleas of personal privilege, as, by an attorney of one court sued in another, or, *semble*, by a scholar of Oxford or Cambridge. These, though formerly, ranked under, are now determined not to be pleas to the *jurisdiction* (*Hunter v. Neck*, 3 Sc. N. R. 448; 3 M. & G. 181, S. C.; *Groom v. Wortham*, 5 Sc. N. R. 799). For the form, and other particulars of pleas to the jurisdiction, see Ch. Pl. 1st and 3d vols. 7 ed.

In ejectment this plea cannot be pleaded without the special leave of the court, inasmuch as, by entering into the consent rule the deft. will have admitted the jurisdiction (*Doe v. Roe*, 2 Burr. 1046; *Doe v. Roe*, 10 Ea. 523).

2. Of the Disability or Privilege of the Person.

Outlawry of the plt. his attainder of treason or felony, and alien enemy, may always be pleaded in abatement, and in many cases, either in abatement, or, in bar (Bac. Ab. Abt. N; Com. Dig. Abt. E, K, L, 3; Co. Litt. 128; *Bullock v. Dodds*, 2 B. & A. 258; 3 Camp. 152), to an action by him in his own right. But when he sues *in autre droit* these matters cannot be pleaded (*Walford v. Masham*, Moore, 431; *Brocks v. Phillips*, Cro. Eliz. 684; *Villa v. Dimock*, Skin. 370; 3 Buls. 310; *Curzon's case*, Cro. Car. 9); nor can a deft. plead his own attainder, &c. (*Fost. 61*). That the plt. being an infant, sues by attorney (2 Saun. 212, n. 5; 1 Ch. Pl. 464); that one of several plt. or

defts. was dead at the time of suing out the suit may be pleaded in abatement (Bac. Ab. Abt. F, L; 1 Ch. Pl. 464). *Ne unques executor, or administrator*, whether of plt. or deft. is a plea in bar (Com. Dig. Pleader, 2 D, 7, E. 2). So, is the bankruptcy or insolvency of plt., or deft. or one of several plts. or defts. (Echeart v. Wilson, 8 T. R. 140); and a plea that plt. is not assignee; but, the nonjoinder of a co-executor, co-assignee, or other person suing in *autre droit* is pleadable only in abatement (Snelpore v. Hunt, 1 Ch. 71).

Coverture and *privilege* are pleas belonging to this class, the latter having been held not to be a plea to the jurisdiction (Hunter v. Neck, 3 Sc. N. R. 448; 3 M. & G. 181, S. C.; Groom v. Wortham, 5 Sc. N. R. 799). These require a separate notice (see *post* "Coverture," "Privilege"). "Infancy" was formerly pleadable by way of *suspension* of the action where deft. was sued as heir; but this plea is abolished by stat. 11 Geo. IV. & 1 Will. IV. c. 47, s. 10.

Pleas in Abatement of the Writ are so termed from their effect, as, strictly speaking, the refusal of oyer of the writ prevents an objection to it; but, as the declaration is presumed to agree with the writ, any mistake carried also into it may be the subject of a plea in abatement to the writ, as well as to the declaration or bill (Murray v. Hubbart, 1 B. & P. 648; Gray v. Sidneff, 3 B. & P. 399; Davies v. Thompson, 14 M. & W. 161; 3 D. & L. 49, S. C.) Matter *apparent on the face* of the writ, such as an omission of the deft.'s addition, and other defects which do not appear in the declaration, are *no longer subjects of abatement (1 Saun. 318; Gray v. Sidneff, 3 [*7] B. & P. 399); but matter *dehors*, such as misnomer, nonjoinder, &c., which are defects existing at the time of suing out the writ, are (see 1 Ch. Pl. 466). See *post*, as to these pleas.

Pleas in Abatement to the Action are, that there is another action pending (Sparry's case, 5 Co. 62, a.,) in the same court, or, in another (Boyce v. Bailiffe, 1 Camp. 60-1; see *post*, "Pendency of another Action,") or, that the action is prematurely brought; but, as the latter is a ground of nonsuit (1 C. & M. 492, 768; 1 & 2 Vict. c. 110, s. 2,) it is never pleaded in abatement.

COVERTURE.

1. *Of Plaintiff.*] Wherever a *feme covert* sues without her husband for a cause of action which would survive to her on her husband's death, her *coverture* may be pleaded in abatement. And it cannot otherwise be objected to (Bendix v. Wakeman, 12 M. & W. 97; 1 D. & L. 450, S. C.; Guyant v. Sutton, 3 C. B. 153.) So if a *feme sole* marry pending the action (Morgan v. Panter, 6 T. R. 265; Le Brett v. Papillon, 4 Ea. 502.) But it is no defence, in abatement or otherwise, if she marry after verdict and before the day in *banc* (Cro. Car. 135; Shrewsbury (Earl) v. Rutland, (Earl), 1 Buls. 5.) Where she sues, having no legal interest, the defence is one of substance, and available on the general issue, or, by plea in bar, or demurrer, as the case may be (Caudell v. Shaw, 4 T. R. 361; Nelthrop v. Anderson, 1 Salk. 114; 1 H. Bl. 108; Abbott v. Blofield, Cro. Jac. 644;) whether she sues alone, or jointly with her husband. If a person, not being her husband, join in the action as husband, this matter may, it is said, be pleaded in abatement (Bac. Ab. Abt. G.) but in an action by husband and wife for slander of the

wife, a plea that the female plt. was not the wife of the other, was held a good plea in bar (*Chantler v. Lindsay*, 16 M. & W. 82.) The court will not permit a deft. to plead at the same time in abatement and in bar to the same matter, as *non est factum* and coverture of the plt. since making the bond (*Holt v. Mabblerley*, Hardw. 135.) But if there be two defts. each may plead distinct matter in abatement of the same suit, or one may plead in abatement, and the others in bar, unless they be husband and wife (*Com. Dig. Abt. I.*, 6; 1 Ch. Pl. 474; *Walsh v. Bishop*, Cro. Jac. 239.)

2. *Of the Defendant.*] Where a *feme covert* is sued without her husband for a cause of action which would survive against her, as upon a contract made before, or a tort committed after marriage (*Manby v. Scott*, 1 Sid. 109,) the coverture is pleadable in abatement (*Milnes v. Milnes*, 3 T. R. 627,) and not otherwise (*Lovell v. Walker*, 9 M. & W. 299.) If the marriage is after action, it cannot be pleaded (*King v. Jones*, 2 Lord Raym. 1525; *S. C.* 2 Stra. 811; *Barnard. K. B.* 70.) When the wife is sued alone upon a contract alleged to have been made by her after marriage, her coverture is pleadable in bar (*Ib.*; *Marshall v. Rutton*, 8 T. R. 545;) and must now be specially pleaded (*R. G. M. T.* 4 Will. IV.) Such a plea is an issuable plea (*Burch v. Leake*, 8 Sc. N. R. 66; 7 M. & G. 377.) Where the coverture is not pleaded, and judgment is given against the wife, the husband may bring error (*Latch.* 24; *Hayward v. Williams*, Style, 254; *Milnes v. Milnes*, 3 T. R. 627.) As to when a wife may sue and be sued, see *post*, "Husband and Wife."

*The acceptor of a bill of exchange cannot in an action by the [*8] indorsee against him plead the coverture of the drawer at the time of drawing the bill (*Smith v. Marsack*, 9 Jan. 1849, C. P.)

The plea of deft.'s coverture, when pleaded in abatement, must be verified under stat. 3 & 4 Anne, c. 16, s. 11 (*Lovell v. Walker*, 9 M. & W. 299; 1 D. N. S. 952;) but it does not require an affidavit of the husband's residence under 3 & 4 Will. IV. c. 42, s. 8 (*Jones v. Smith*, 3 M. & W. 526.) It must be pleaded by the *feme* in person (2 Saun. 209 *b.*) Where parties have pleaded in abatement for non-joinder of a deft., the court of B. R. will not set aside the plea or allow the writ to be amended on the ground that the plt. is barred by the Statute of Limitations from bringing a fresh action (*Roberts v. Bate*, 6 Ad. & E. 778.)

Forms in Coverture.

Plea of Plt.'s coverture.

In the Q. B. (or C. P., or Ex. of P.) On the _____ day of _____ A. D. 1850.
John Hall } And the said John Hall, in his own person (if by attorney, say, by
 ats. } _____, his attorney,) prays judgment of the said writ and declara-
Sarah Moss. } tion, because he says that the plt., before and at the time of the commence-
 ment of this suit, was and still is married to one James Moss, then and yet her husband,
 which said James Moss is still living. And this the deft. is ready to verify. Wherefore,
 inasmuch as the said James Moss is not named in the said writ and declaration, the
 deft. prays judgment of the same, and that the same may be quashed, &c. (*Add affi-
 davit, as post, infra.*)

Plea of deft.'s coverture.

In the Q. B. (or C. P., or Ex. of P.) On the _____ day of _____ A. D. 1850.
Jane Mills, } And the said Jane Mills, in her own proper person,
 sued by the name of *Jane Ord,* } prays judgment of the said writ and declaration, because
 ats. } she says, that at the time of the commencement of this
John Stone. } suit she was, and still is, married to one Henry Mills,

who is still living. And this she is ready to verify. Wherefore, because, the said Henry Mills is not named in the said writ and declaration, she prays judgment of the same, and that the same may be quashed. (*Add affidavit, as post, infra.*)

Affidavit to verify plea.

In the Q. B. (or C. P., or Ex. of P.) Between } John Stone, plt.
and
} Jane Ord, deft.
Jane Mills (sued by the name of Jane Ord,) of ———, the defendant in this cause, maketh oath and saith, that the plea hereunto annexed is true in substance and in fact.
Sworn, &c. Jane Mills.

Replication to plea of coverture denying the fact.

In the Q. B. (or C. P., or Ex. of P.) On the day of A. D. 1850.
John Stone } The plt. saith that his said writ and declaration, by reason of any thing by
ats. } the deft. in her said plea above alleged, ought not to be quashed, because he
Jane Ord. } says, that at the time of the commencement of this suit, she, the deft., was
not married to the said Henry Mills, in the said plea mentioned, in manner and form as
the deft. hath above in her said plea in that behalf alleged; and this the plt. prays may
be inquired of by the country, &c.

Evidence in Coverture.

Who is to begin.] Where coverture is the only plea, and the plt. has nothing to prove as part of his case, the deft. ought to begin. But where the *essence of the inquiry is the amount of the plt.'s damages, he is entitled to begin. Therefore, on a plea of coverture to assumpsit for [*9] goods sold, &c., Abbott, C. J., "intimated that, as the plt. had to prove the amount of his damages, his counsel was, if he elected to do so, entitled to begin; the deft.'s counsel, however, agreeing to admit that goods had been delivered to the amount claimed, was permitted to open the case for the deft. (*Lacon v. Higgins*, 3 Star. 178.) And it was so ruled on a *plea of nonjoinder* in assumpsit, (by Abbott, C. J., in *Robey v. Howard*, 2 ib. 555-6; and by Alderson, B., in *Bonfield v. Smith*, 2 M. & R. 519; and by Lord Denman, C. J., in *Morris v. Lotam*, 1 M. & R. 233; see *Mercer v. Whall*, 5 Q. B. 447; *Chapman v. Rawson*, 10 Jur. 287.) And it has been held that the question of damages is a distinct inquiry that never arises until the issue on the plea is determined, and that it ought not therefore, to regulate the right to begin (see *Jackson v. Kesketh*, 2 Stark. 518; *Cotton v. James*, M. & M. 278, 281, n.) In an action on a bill of exchange, where the nonjoinder of a joint contractor was pleaded in abatement, Lord Tenterden said, that the most correct rule was, that wherever it appears on the record, or by the statement of the counsel, that there is really no dispute about the sum to be recovered, that the damages are nominal, or mere matter of computation, then, if the affirmative is on the deft. he is entitled to begin (*Fowler v. Coster*, M. & M. 241.) The order of proof is discretionary with the court, such discretion to be governed by a consideration of convenience in each cause (2 Stark. Ev. 90-1.) But in *debt*, as the plt., if the plea were not made out, would be entitled to a verdict for the sum demanded, the defendant is entitled to begin (*per Parke, B.*, Trin. Term. 1847.) It was ruled by Abbott, C. J., in *Lacon v. Higgins*, *supra*, that plt., if he began, must go into the whole of his case relating to the coverture; but *quare*; see *Stansfield v. Levy*, 3 Stark. 8,

where it was held that he must confine himself to proof of the damages, and reserve his case in reply to the deft.

Proof for Defendant.] It will be sufficient to prove cohabitation under marriage by repute, which may be established by "general reputation, the acknowledgment of the parties, and reception of their friends as man and wife," &c. (*per* Lord Kenyon, *Leader v. Barry*, 1 Esp. Ca. 354; *Evans v. Morgan*, 2 C. & J. 453; *Doe v. Fleming*, 4 Bing. 266, 12 Moo. 500; *Tracey v. M'Arlton*, 7 Dowl. 532). But unless the parties live together, some proof of an actual marriage seems necessary (*Wilson v. Mitchell*, 3 Camp. 394; *Horn v. Noel*, 1 Camp. 61). The usual and best proof is the production and proof of register of marriage, or an examined copy of it, with proof of identity of parties; for which, and the best evidence of marriage, whether in England or abroad, see *post* "Crim. Con." The husband cannot be called to prove the marriage (*Bensley v. Cooke*, 3 Doug. 422). It must be found that the husband was alive at the commencement of the action. Where a person goes abroad, and has not been heard of for seven years, the law presumes that he is dead (*Doe v. Nepean*, 5 B. & Ad. 93; 2 N. & M. 225, *S. C.*; *in error*, 2 M. & W. 894); but not that he died at any particular period. It may be presumed, from circumstances, within a shorter period (*Sillick v. Booth*, 1 Y. & C., N. C. 117).

Proof for Plaintiff.] Supposing the coverture to be put in issue, the plt. may prove any facts which make the marriage void; such as that the parties were married since the 5 & 6 Will. IV. c. 54, and are within the prohibited degrees.

[*10]

*MISNOMER.

This is no longer the ground of a plea in abatement, but simply of a summons to compel the plt. to amend the declaration (3 & 4 Will. IV. c. 42, s. 11.)

NONJOINER.

When it may be pleaded, p. 10.

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When it may be pleaded.

Of Plaintiffs.] When a joint contractor, parcener, tenant in common, or a party who has received a joint injury, and is jointly interested in the thing

which was the subject of the action, is not, when he ought to be, joined as a *plaintiff*, the deft. may plead such nonjoinder in abatement (Com. Dig. Abt. E. 12; 1 Saun. 291 *g*; Davis v. Evans, 6 C. & P. 619; and this is the only mode of deft.'s availing himself of the objection in an action for a *tort* (1 Saun. 291 *g*; Addison v. Overend, 6 T. R. 766; Sedgeworth v. Overend, 7 T. R. 279; Blossam v. Hubbard, 5 Ea. 407); and so as to detain (11 A. & E. 209; 3 P. & D. 45; 1 Gale, 128). In an action on a contract, however, unless the party is suing *in autre droit*, the objection, if it do not appear on the pleadings, is available as a ground of nonsuit at the trial under the general issue (1 Saun. 153, n. 1, 291 *f, g*; Leglise v. Champante, 2 Str. 820); and for which reason it is best not to plead in abatement. If the plt. claims *in autre droit*, as executor or administrator, the objection, if it do not appear on the pleadings, can be only taken advantage of by plea in abatement after oyer of probate, or letters of administration (1 Saun. 291 *g, h*; Brasington v. Ault, 2 Bing. 177); but if, though suing *in autre droit*, he declare on a cause of action accruing to himself in that character, the objection is open on the general issue (Snellgrove v. Hunt, 1 Ch. Rep. 71). If the objection appear on the pleadings, deft. may demur (Vernon v. Jefferys, 2 Str. 1146; Anderson v. Martindale, 1 Ea. 497; 1 Saund. 153, n. *l*. 291 *f*); or move in arrest of judgment, or bring error (*lb.*). But, in such case, on account of costs, it is best to demur (Cameron v. Reynolds, Cowp. 407; Tidd, 983). If one of several part-owners of a chattel sue alone for a *tort*, and the deft. do not plead in abatement, the other part-owners may afterwards sue alone for the injury to their undivided shares, and the deft. cannot plead in abatement to such action (Bloxam v. Hubbard, 7 T. R. 279). As to nonjoinder in cases of marriage, see *ante*, 7.

[*Of Defendants.*] If a person be omitted as deft. who ought to be joined in any action founded on a joint contract, whether on a specialty or not, the objection can only be taken advantage of by a plea in abatement (1 Saun. 291 *b*, n. 4; Mitchell v. Tarbutt, 5 T. R. 651; *Wright v. Hunter, 1 Ea. 20; Saville v. Robertson, 4 T. R. 725; Forster v. Taylor, [*11] 3 Camp. 50; Walton v. Granger, 2 Jur. 48, C. P.); and, though, the joint obligation be in writing, and the declaration show it to have been made by the party not joined, it is no variance at the trial (Mountstephen v. Brooke, 1 B. & A. 224; 1 Saun. 291; South v. Tanner, 2 Taun. 254); nor ground of demurrer (Morrison v. Trenchard, 4 M. & S. 709). In actions for *torts*, the nonjoinder of a party who was jointly concerned in the *tort* cannot be pleaded in abatement, or otherwise taken advantage of, as the plt. may in such action join all the parties who committed the *tort*, or not, at his election (1 Saund. 291 *e & g*, and cases there cited; Sutton v. Clark, 6 Taun. 29, 35, 42); and this though it appear on the pleadings there were other wrong-doers (*lb.*) In an action against a coach proprietor, or common carrier, for not safely carrying passengers or goods, defendant cannot plead in abatement the nonjoinder of a co-proprietor (1 Will. IV. c. 68, s. 5; see Ansell v. Waterhouse, 2 Ch. R. 1; 6 Moore, 154; 7 Price, 408; Bretherton v. Wood, 3 B. & B. 54); nor can he in any case where even *one* of the co-contractors is out of the jurisdiction (3 & 4 Will. IV. c. 42, s. 8; Goodson v. Good, 6 Taun. 587; Joll v. Lord Curzon, 11 Jur. 737); nor where one has been discharged by the Statute of Limitations (9 Geo. IV. c. 14, s. 2). But, though plt. change his form of action to *tort*, he is still liable to a plea of abatement for nonjoinder of any joint contractor, &c., if the action be substantially founded on a breach of contract, and so appear from the declaration, and it is not maintainable without proving a contract between the parties (Powell v. Layton, 2 N. R. 365; Green v. Greenbank, 2 Mars.

485; Theobald v. Long, Carth. 452). Where goods which were delivered to a ship-owner to be carried from A. to B., were lost by negligence, a plea of abatement of nonjoinder lies (Riddle v. Wilson, 6 T. R. 369; Theobald v. Long, Carth. 454). And actions which concern *real* property materially differ in this respect from mere personal actions of tort; for, if one tenant in common only be sued in trespass, &c., for anything respecting the land held in common, as for not setting out tithe, &c., he may plead the tenancy in common in abatement (1 Saun. 291 *e*; Mitchell v. Tarbutt, 5 T. R. 651).

Misjoinder.] If persons join as *plaintiffs* in an action who should not, the deft. may plead the misjoinder in abatement (Cro. E. 143; Worsley v. Worsley, ib. 473; 12 H. IV. 15, 54;) or, if the objection do not appear on the plt.'s pleadings it will be a ground of nonsuit at the trial (Brand v. Boulcott, 3 B. & P. 235; Co. Litt. 197, *b*.; Lovett v. Badnidge, 3 Ea. 62;) for which reason it is best not to plead in abatement. If the objection appear on the plt.'s pleadings, deft. may demur, or move in arrest in judgment, or bring error (2 Saun. 115-6; Cook v. Batchelor, 3 B. & P. 150; 1 Roll. Ab. 31, pl. 9; Vaux v. Stewart, Sty. 156; Sands v. Child, 3 Lev. 352.) If too many persons be joined as *defendants* in an action on a contract or specialty, if the objection do not appear on the plt.'s pleadings, the plt. may be nonsuited at the trial (Sheriff v. Wilks, 1 Ea. 52; Porter v. Harris, 1 Lev. 63; Hannay v. Smith, 3 T. R. 662; 1 Ch. Pl. Misjoinder;) but upon a plea of the Statute of Limitations, the plt. may recover against one or more, though he fail as to the rest (9 Geo. IV. c. 14.) If the objection appear on the pleadings, deft. may demur, move in arrest of judgment, or bring error (Mansell v. Burridge, 7 T. R. 352.) If several persons be made defendants jointly for a tort, where the tort could not, in point of law, be joint, as in slander or the like, they may demur, or, if a verdict be taken against all, move in arrest of judgment or bring error (2 N. R. 454; 2 Saun. 117 *a*.)

[*12] **Replication to Plea of Nonjoinder.*] If the plea seek to add too many, or too few (Goodson v. Good, 6 Taun. 487;) or, if, as to some the Statute of Limitations (9 Geo. IV. c. 14, s. 2) has barred the action; or, if, the deft. at the time of making the contract represented to the plt. or otherwise induced him to believe that he was dealing with the deft. alone, the plt. may safely take issue on the plea (De Mautort v. Saunders, 1 B. & Ad. 398, overruling Dubois v. Luders, 5 Taun. 609; Bonfield v. Smith, 12 M. & W. 405.) If one, or more have been discharged by bankruptcy and certificate, or under an act for relief of insolvent debtors, that fact may be replied as to such parties (3 & 4 Will. IV. c. 42, s. 9.) So if one is not liable by reason of infancy (Burgess v. Murrell, 4 Taun. 468.) To a plea of nonjoinder of a co-executor *as plt.* it is no answer that he is an infant, or has not proved, or has refused probate (1 Saun. 291 *g*; 2 Saun. 209, 221-2.)

Commencing a New Action.] Instead of replying the plt. may deliver a *cassetur breve*, which does not entitle deft. to costs (Ca. Pr. C. P. 29,) and commence a new action. "In all cases in which, after such plea in abatement, the plt. shall, without having proceeded to trial upon issue thereon, commence another action against the deft. or defts. in the action, in which, such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or, on the evidence at the trial thereof, that all the original defts. are liable, but, that, one or more of the persons named in plea in abatement is, or, are not liable, as a contracting party or parties,

the plt. shall, nevertheless, be entitled to judgment, or, to a verdict, and judgment, as the case may be, against the other deft. or defts. who shall appear to be liable, and every deft. who is not so liable, shall have judgment, and shall be entitled to his costs as against plt. who shall be allowed the same as costs in the cause against the deft. or defts. who shall have so pleaded in abatement the nonjoinder of such person: provided that any such deft. shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defts. named by him in such plea in abatement." (3 & 4 Will. IV. c. 42, s. 10.)

Where, under this provision, a new action was brought against all the persons named in the plea, and the original deft. proposed to give evidence of the liability of one of the new defts., his counsel was allowed to reserve his address to the jury till this evidence should have been given (Beale v. Moule, 1 C. & K. 1, *per* Lord Denman.)

"In all cases under 3 & 4 Will. IV. c. 42, s. 10, in which, after a plea in abatement of the nonjoinder of another person, the plt. shall, without having proceeded to trial on an issue thereon, commence another action against the def. or defts. in the action in which such plea in abatement shall have been pleaded, and the persons or person named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the following form:—

"*Venue.*] A. B. by E. F. his attorney (or in his own proper person, &c.) complains of C. D., and G. H., who have been summoned to answer the said A. B., and which the said C. D. has heretofore pleaded in abatement the nonjoinder of the said G. H.," &c. (R. G. H. T. 4 Will. IV. pl. 20.)

Form of Plea.] "No plea in abatement for the nonjoinder of any person as a co-deft. shall be allowed in any court of common law, unless, it shall be stated in such plea that such person is resident within the jurisdiction of the court, and *unless the place of residence *of such person* [*13] *shall be stated with convenient certainty in an affidavit verifying such plea.*" (3 & 4 Will. IV. c. 48, s. 8.) For the general qualities of pleas in abatement, see *ante*, p. 2.

Affidavit of Residence.] This may be incorporated into the affidavit, required by statute 3 & 4 Anne, c. 16, s. 11, (*ante*, p. 3,) or may be made separately. It must state with "convenient certainty," the *residence* of the party at the time of making the affidavit (Wheatley v. Golney, 9 Dowl. 1019.) By *residence* is meant "domicile," or "home," and, therefore, where the party had left for a few months for the benefit of his health, intending to let his house furnished till his return, the court held it sufficient, though no one knew where to find him (Lambe v. Smythe, 3 D. & L. 712; 15 M. & W. 433.) But the residence stated must be accurate. Where the residence of one was stated to be "No. 20," Gower Street, Bedford Square, and the other, at "Watling Street," Canterbury, and it appeared that the former resided at "22" instead of "20," and the other in "High Street," which was sworn to be close to Watling Street, the court, without determining whether it would have been sufficient to mention, in the one case the street without the number, and in the other the city without the street, held, that, as the defts. had condescended to particularize, and they were inaccurate, the plea must be set aside (Newton v. Stewart, 4 D. & L. 89; 15 Law J., N. S., 384, Q. B.) The affidavit stated the residence to be 89, Leadenhall Street, in the city of London. A counter affidavit of B. stated that he was the occupier of that house, and that no one of the name of D. had resided there for some time. In answer to B.'s affidavit, there was one by D. who deposed that the party did

reside there, and that his name was over the door, and that B. was his nephew, and managed the business at that place for him, but stating that he had another residence elsewhere. Held, that this was an insufficient description of D.'s residence, and the plea was set aside on motion. Held, also, that the truth of the statement of D.'s residence might be tried by affidavit, on a motion to set aside the plea (*Maybury v. Mudie*, 11 Jur. 80; 17 Law J., N. S., C. P. 895.) The affidavit must state where the parties were at the time of the plea pleaded (*White v. Gascoyne*, M. T., 24 Nov. 1848, Ex.)

The most advantageous course, where the affidavit is defective in this respect, is to apply to set aside the plea. Where the jurat is defective the plt. may sign judgment, but if, instead of doing so he pleads, he waives the objection and cannot afterwards sign judgment (*Graham v. Judly*, 10 Law J., 307, Ex.)

Where a *feme covert* pleads in abatement the nonjoinder of the husband, this affidavit is not necessary (*Jones v. Smith*, 3 M. & W. 526.)

Forms in Nonjoinder.

Pleas in assumpsit of nonjoinder of a co-contractor.

In the Q. B. (or C. P., or Ex. of P.) On the day of A. D. 1850.
John Styles } And the deft. in his own proper person, (or, if by attorney, say, and the
 ats. } deft. by ———, his attorney,) prays judgment of the said writ and de-
John Nokes. } claration; because he says that the said [several] promise[s], in the said
 declaration mentioned, if any such were made, were, and each of them was, made by
 Joseph Brown and John Bell jointly with the deft., and which said Joseph and John are
 each of them still alive, and at the commencement of this suit were and still are resident
 within the jurisdiction of this court, to wit at ———. Wherefore, because they are
 not, nor is either of them, named in the said writ and declaration, the *deft.
 [*14] prays judgment of the said writ and declaration, and that the same may be
 quashed, &c. (*Add affidavit. See a form in covenant*, Lil. Ent. 7.)

Plea that another person signed the bond with deft.

In the Q. B. (or C. P., or Ex. of P.) On the day of A. D. 1850.
John Styles } And the deft., by ———, his attorney, prays oyer of the said writing
 ats. } obligatory, and it is read to him in these words (*here set out the bond, but,*
John Nokes. } *not the condition*), which being read and heard, the deft. says that the said
 George Thompson, in the said writing named, duly sealed and executed the said writing,
 and thereby became jointly bound with the deft. to the plt., to wit, on the same day and
 year aforesaid; and that the said George Thompson is still alive, and at the commence-
 ment of this suit was and still is resident, &c.; and this he is ready to verify. Where-
 fore, inasmuch as the said George Thompson is not named in the said writ and declara-
 tion, the deft. prays judgment of the said writ and declaration, and that the same may be
 quashed. (*Add affidavit, ante*, p. 12. *See an instance of a defective plea of nonjoinder by*
the acceptor of a bill, *Bleakley v. Jay*, 13 M. & W. 464.)

Replication denying the joint contract.

In the Q. B. (or C. P., or Ex. of P.) On the day of A. D. 1850
John Nokes } And the plt. saith that the said writ and declaration, by reason of any-
 ats. } thing above by the said deft. in his said plea alleged, ought not to be quashed,
John Styles. } because he saith that the said [several] promise[s] were not made by the
 deft. jointly and together with the said Joseph Brown and John Bell, in manner and form
 as the deft. hath above, in his said plea in that behalf, alleged; and this the plt. prays may
 be inquired of by the country, &c.

Notes on Form of Pleas, &c.

The preceding notes as to the form of pleas in abatement in general (*ante*, p. 2,) will be here applicable. This plea may be pleaded by attorney (*Lut.*

696.) Deft. may plead in abatement to part of a count, and in bar to the residue (2 Saun. 210; see Hill v. White, 6 Bing. N. C. 23; 8 Dowl. P. C. 63.)

The deft. in his plea must name *all* the joint contractors, for the purpose of giving a better writ, or he will fail, and must show that all are within the jurisdiction (Joll v. Lord Curzon, 11 Jur. 737.) It is sufficient, if it state where such persons are resident at the time of the plea pleaded, without saying that they were within the jurisdiction of the court at the time of bringing the action (Bannister v. Bachelor, 5 Law T. 73.) In an action by drawer against acceptor of a bill, and on an account stated, the deft. pleaded in abatement, that the bill was accepted, and the *promise* in the declaration mentioned was made, by the deft., jointly with B., who is still living and resident within the jurisdiction. Held bad on demurrer (Bleakley v. Jay, 13 M. & W. 464.) In slander the declaration stated that plt. carried on, together and in copartnership with J. W. S., and G. C., the trade, &c. of a banker, and that deft. spoke and published of and concerning plt., and of and concerning him in the way of his aforesaid trade and business, certain defamatory words. Plea in abatement, that plt. carried on the said trade and business of a banker jointly with the said J. W. S., and G. C., and not otherwise; and that all the damage in the declaration mentioned resulted and accrued to the said J. W. S. and G. C., jointly with plt., and not to plt. alone. Held, no answer to the action (Robinson v. Marchant, 10 Jur. 156.) To assumpsit against six defts. a plea was pleaded in abatement by four, that the promises were made by them jointly with one A. B. *(not a deft.) and not with the other two defts. is bad (Bull v. Taylor, 7 Law T. 257) So, an action for goods sold and delivered, and [*15] on an account stated, plea: "And for a further plea as to the first and second counts of the said declaration, the deft. saith that," &c. alleging that before action brought, disputes had arisen between plt. and deft., whether deft. was indebted to plt. in any and what sum, for the causes of action declared upon, which disputes they submitted themselves to refer, and did refer, to arbitration, and mutually promised to fulfil the award; the arbitrators, before action brought, took upon them the reference; that the matters in dispute are still under their consideration, and that a reasonable time has not elapsed for making the award: conclusion, "and this the deft. is ready to verify, &c." On demurrer: Held, 1. That the plea could not be considered as a plea in abatement informally pleaded; 2. That as a plea in bar it was bad, the pendency of an arbitration being no answer to an action for recovery of a debt (Harris v. Reynolds, 7 Q. B. 71). The plea must expressly state that the party omitted is living. (1 Saun. 291 a.) Also, in debt on a bond, &c. that the party sealed and delivered it. (Ib.) In the case of executors or administrators suing, deft. should craveoyer of probate, or letters of administration, to plead a nonjoinder in abatement (see form, 1 Went. 13, 58). It is not, in such a plea, necessary to state that the will is proved (2 H. V. 8 b, 9; Co. 37 b). But it should state that the executor, not named, administered the goods of testator (Bro. Exors. 20, 28; 1 Lev. 161; 1 Saun. 291 g).

If a plea of nonjoinder of plt. is pleaded to several counts, and is bad as to any of them, it is bad altogether, and there must be a general judgment of *respondeat ouster* (Phillips v. Cloggett, 10 M. & W. 102; 2 Dowl. N. S. 258). To a declaration in case against a bailee of goods containing some counts charging a breach of contract by misuser of the goods, whereby they were lost to the plt. and other counts in trover, a plea in abatement to the whole declaration, that the goods were the goods of the plt. and others, was held bad, as being no answer to the counts on the contract. (Ib.) So, if a plea for nonjoinder of defts. is pleaded to the whole declaration, and is bad, even

only, as to part of one count, it is bad altogether; as, where on such a plea to a declaration in assumpsit it appeared that part of the work in one of the counts was done for the defts. only, though the rest was done for them jointly with others, as stated in the plea, it was held, that the plt. was entitled to judgment on the whole declaration for the amount so proved (*Hill v. White*, 6 Bing. N. C. 26; 8 Dowl. P. C. 13); but if no part of the work had been done for them only, the plea would have been an answer to the action; as, where to assumpsit against A., B., and C., for work done for them, it was pleaded, that it was done for them jointly with D., and the evidence was that part was done for A., another part for A. and B., another for A., B., and D., and another for A., B., and C., and D., but there was not evidence of any having been done for A., B., and C. only (*Hill v. White*, 6 Bing. N. C. 23; 8 Dowl. P. C. 63).

Quære—Whether a plea is correct in including the names of all the co-contractors, both those within and those without the jurisdiction (*Newton v. Stewart*, 15 Law J. 384, Q. B.). The 3 & 4 Will. VI. c. 42, s. 2, has not altered the rules of pleading in abatement, but only restricted the occasions on which such a plea may be had recourse to. If, therefore, a plea in abatement for the nonjoinder of joint contractors be pleaded, it must still be for the nonjoinder of *all* the joint contractors, and if one be abroad, or his residence unknown, the deft. is ousted of his plea (*Joll v. Curzon*, 11 Jur. 737; 16 Law J., N. S., C. P. 172; 4 C. B. 249). Where the writ was **is* [*16] sued against two and the declaration was against a single deft. who pleaded in abatement the nonjoinder of a co-contractor, and prayed judgment of the declaration: Held, that the plea was bad; it should have prayed to quash the writ as well as the declaration (*Whitling v. Desange*, 16 Law J. 159, C. P.; *Whitling v. Des Angés*, 3 C. B. 910).

Deft. may be estopped from pleading nonjoinder in abatement in consequence of his own acts (3 Stark. 8; *Bonner v. Wilkinson*, 1 D. & R. 328).

The deft. having pleaded in abatement that four others were jointly liable, the court compelled him to deliver particulars of their residences and additions (*Taylor v. Harris*, 4 B. & A. 93; 1 Y. & J. 257); but, in another case, the court refused to compel the plt. to deliver to the deft. a copy of an agreement to enable him to plead that the agreement was jointly made by himself and others (1 D. & R. 419).

Evidence in Nonjoinder.

As to which party begins, *ante*, p. 8.

Proof for Defendant.] If the plea of nonjoinder is traversed, the burden of the evidence lies upon the deft. who will have to prove that the party omitted was partner, or joint contractor. As to proving a partnership, see *post*, "Partners." The declarations of the party not joined, if made before action brought, are evidence in support of the plea (*Clay v. Langslow*, 1 M. & M. 45). *Quære*.

Proof for Plaintiff.] This will depend, of course, on the nature of the replication and the issue raised. On a plea that the action is not brought jointly against a person who ought to have been sued, if the plt. traverses the partnership, he may prove that the deft. held himself out to the plt. as alone, constituting the firm: *e. g.* of "*Bush and Co.*" (*Bonfield v. Smith*, 12 M. & W. 405); and the person giving the order cannot be asked, With whom do you deal? the proper inquiry is, as to the acts done (*Ib.*: see, as to the amount of evidence which may be sufficient on such an issue, *Crellin*

v. Calvert, 14 M. & W. 11; 9 Jur. 810); he may also show that such alleged partner was never an ostensible, but a mere dormant partner (Lloyd v. Archbowle, 2 Taun. 324-5; Skinner v. Stokes, 4 B. & A. 437; 3 Stark. 814; R. & M. 293; Robinson v. Wilkinson, 3 Price, 538; 1 Stark. 338, 341, 272; Mitchell v. Lapage, Holt, 253; Hudson v. Robinson, 4 M. & S. 475; Stracey v. Deey, 7 T. R. 361; Lanchister v. Tricker, 1 Bing. 201); or, a mere nominal partner, having no interest, provided deft.'s interests would not be affected by the nonjoinder (3 Stark. 814; Teed v. Elworthy, 14 Ea. 210; Guidon v. Robson, 2 Camp. 302; Davenport v. Rackstowe, 1 C. & P. 89); or, an infant, or *feme covert* (3 Stark. 814; 4 Taunt. 468); or, not a partner when the contract was made, or the cause of action accrued (Shirriff v. Wilks, 1 Esp. 180); or, that he did not seal, and refused to seal the deed (Vernon v. Jefferys, 2 Str. 1146; 1 Saun. 291 f, 154, n. 1; Withers v. Bircham, 3 B. & C. 254, 353; Metcalf v. Rycroft, 6 M. & S. 75); or, in the case of an executor or administrator, that he formally renounced before the ordinary (Munt v. Stokes, 4 T. R. 565), but not, that he has not proved the will, or, has even refused before the ordinary, or, is an infant under seventeen (Brookes v. Stroud, 1 Salk. 3; 3 B. & A. 863; 1 Saun. 291 g, n. 2; 1b. 209, 212); or, that the person not joined was dead when the action was brought (Jell v. Douglass, 4 B. & A. 374; Scott v. Godwin, 1 B. & P. 74; 2 Saun. 121, n.; Kemp v. Andrews, Carth. 170-1; S. C. 3 Lev. 290; Smith v. Barrow, *2 T. R. 479); *semble*, if this were [*17] proved by affidavit the plea would be set aside (see Wheatley v. Golney, 9 Dowl. 1019); or, that the contract was several as well as joint.

Upon a replication traversing a plea of nonjoinder of a co-deft., plt. may, besides giving evidence to disprove the joint liability of all or any of the parties named in the plea, prove that another, or others not named, are also liable (Goodson v. Good, 6 Taun. 587; Crellin v. Calvert, 14 M. & W. 11); or that the claim, as against the parties named in the plea, is barred by the Statute of Limitations (9 Geo. IV. c. 14, s. 2), or that the deft. in making the contract represented, or, otherwise, induced plt. to believe that he was dealing with him alone (Bonfield v. Smith, 12 M. & W. 405).

Whatever the replication may be, when the action is in assumpsit, or covenant, the plt. should be prepared to prove the amount, and should also, it seems, give some evidence to connect the deft. with the contract, so as to identify the demand proved with that admitted by the pleading (see Crellin v. Calvert, 14 M. & W. 11). In *debt*, it seems that no evidence of amount need be given, inasmuch as, when the plea is disproved, the deft. is in the same position as if he had suffered judgment by default (*Ib.* and see *ante*, p. 16).

PRIVILEGE.

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Want of Certificate, p. 21.

When it may be Pleaded.] This plea, claiming a privilege of being sued in a particular court, is, as before stated, strictly a plea to the jurisdiction of the court, except, when pleaded by an officer of a court, in which case it is simply a plea of privilege (*Hunter v. Neck*, 3 Scott, N. R. 448; 3 Man. & G. 281; *Groom v. Wortham*, 5 Scott, N. R. 799). There are various privileges which may be thus pleaded: such as that deft. is a baron of the Cinque Ports (Com. Dig. Abt. D, 5), a minister (*Ib.* D, 8), a tinner (*Ib.* D, 7), or scholar of the universities (1 Ch. Pl. Privilege); but the only one of any extent in practice is that of being an officer of a court, as an attorney.

By Attorney.] If an attorney be improperly sued in a court of which he is not an attorney, he must plead his privilege (*Turton v. Prior*, 11 Mo. 168; *Benson v. Cartwright*, 2 Buls. 207; *Baker v. Duncalf*, Lut. 195, 639; see *Percival v. Cook*, 5 M. & W. 293); otherwise, he loses the benefit of it (*Crossley v. Shaw*, 2 W. Bla. 1088; *Horn v. Howard*, 1 ib. 231; *Unwyn v. Robinson*, Barn. 53); and he cannot take advantage of it upon motion only (*Snee v. Humphrys*, 1 Wils. 306; *Lane v. Saltmarsh*, 2 Sal. 544, 2 Arch. Pr. 817, *sed vide* *Tidd, 76), unless, indeed, he be sued in [*18] an inferior court, in which case a writ of privilege may be issued to relieve him (Tidd, 76), or, in the new county courts, a prohibition. Suing a person, who is not an attorney, as an attorney, does not appear to be ground for plea in abatement, but is irregular (5 M. & S. 324; *Paul v. Garry*, 6 B. & C. 77, n.; *Nabb v. —*, 2 Ch. R. 396).

In some cases, an attorney cannot plead his privilege; as, where both he and plt. are attorneys of different courts, and the plt. sues him in the court of which plt. is an attorney, for plt.'s privilege prevails (*Shorter v. Backhouse*, 1 Bla. 19; *Danser v. Berryman*, 2 ib. 1325; 4 D. & R. 73). And as his privilege extends only to actions in *his own right*, he cannot plead it when sued *in autre droit*, as executor, &c. (*Newton v. Rowland*, 1 Sal. 2; *Lawrence v. Martin*, 1 Lord Raym. 533), or, when sued jointly with unprivileged persons, even his wife, and though the nature of the action be not absolutely joint (*Roberts v. Mason*, 1 Taun. 254; 1 Ven. 298; *Brathwaite v. Blackerby*, 2 Sal. 544; 1 Rol. 580; 4 Bac. Abr. 223), or, with an attorney of the court (*Rastrick v. Beckwith*, 8 Jur. 1030, C. P.), or when he is in prison for debt (*Byles v. Winton*, 4 B. & A. 88), or has left off practice (*Maynard's case*, cited by the court, *Goldsmith v. Baynard*, 2 Wils. 232; *Brooke v. Bryant*, 7 T. R. 25); but, the omitting to take out his certificate, unless, for a year, does not deprive him of his privilege (*Skirrow v. Tagg*, 5 M. & S. 281; *Norwich (Mayor) v. Berry*, Burr. 2109). If he be arrested and bailed in one suit, he may plead his privilege to another action brought against him in the same court (*Bands v. Roddinner*, Carth. 377). An attorney in an action at suit of the Queen loses his privilege (2 Rol. Abr. 274); but not, in an action *qui tam* (*Kirkham v. Wheelley*, 2 Sal. 543), nor, in an action jointly against him and a privileged person (*Ramsbottom v. Harcourt*, 4 M. & S. 585), nor, in an action on a bill of exchange (*Atkins v. —*, 2 Ch. R. 63; *Comerford v. Price*, 1 Doug. 312).

Other Officers.] These rules also apply to other officers of the courts. Thus, if the filicer (*Browne's case*, 2 Sal. 544), or prothonotary, or any of his clerks (*Payne v. Fry*, Str. 546; *Onslow v. Booth*, 705); or warden of the Fleet (*Duncombe v. Church*, 1 Sal. 1), or the like, be impleaded out of their own court, they may plead their privilege. So a clerk in the Exchequer, if sued in the K. B. or, C. P., may plead his privilege (*Wentworth v. Squibb*, Lut. 44; *Phipps v. Jackson*, 6 Mo. 305). So one of the six clerks, or, of the sixty clerks in Chancery, if sued out of his court, may plead his privi-

lege (20 H. VI. 32 *b*; Fawkener v. Annis, 1 Ven. 264; Bro. 498; see form, Wilkes v. Williams, 8 T. R. 631). So, if a serjeant-at-law be sued in any other than the courts at Westr., he may plead his privilege (Deakins v. Scroggs, 2 Lev. 129; Humbleton v. Scroggs, 2 Mo. 297; Com. Dig. Abt. D. 6). But *quere* since the opening of the C. P. to the profession.

Form of Plea of Privilege.

Plea of privilege, by an attorney of the C. P., to an action brought against him in the Q. B. as a common person.

In the Q. B. on the day of , in the year of our Lord 1850.
John Hall, gent.,
one of the attorneys, &c. } And the deft., in his own proper person, (or "by C. D., his
 ats. } attorney," saith, that he, the deft., long before, and at the time
Joseph Styles. } of the commencement of this suit, was, and from thence
 hitherto hath been, and still is, one of the attorneys of the
 court of our lady *the queen, of the bench, at Westr., in the county of Midx.
 aforesaid, and that he, during all the time aforesaid, hath prosecuted and de- [*19]
 fended, and still doth prosecute and defend, divers pleas and suits in the said
 court of the bench at Westr. aforesaid, for many true and faithful subjects of our said
 lady the queen, as their attorney; and the deft. further saith, that he, and all other the
 attorneys of the said court of the bench prosecuting and defending suits and pleas therein
 for their clients, have been, and ought, according to the custom of the said court, and the
 privilege of such attorneys, to be exempt from being compelled to answer any plea or
 plaint, in any action personal (pleas of freehold, felony, and appeals only excepted), before
 any justices or ministers of our lady the queen, or other judge whomsoever, in any court
 whatsoever, except before the justices of our lady the queen, of the court of the bench at
 Westr. aforesaid; and the deft. further saith that he is not, nor hath he ever been an at-
 torney, officer, or minister of the said court of our lady the queen, before the queen her-
 self at Westr., and this he is ready to verify. Wherefore he prays judgment, if he ought
 to be compelled to answer to the plt. in the said plea in the said court of our lady the
 queen before the queen herself now here.

Notes on Form of Plea, &c.

Plea.] The general notes, as to pleas to the jurisdiction and in abatement, will here apply (*ante*, p. 5). A plea of privilege in Q. B. will be received after appearance and bail (Upton v. Coward, Bun. 113); but it cannot be pleaded after deft. has been fore-judged (Farrill v. Head, Barn. 41). Formerly it was held that the plea should be pleaded in person, and not by attorney (1 Lut. 7; Sparks v. Wood, 6 Mo. 146); but now it may be pleaded by attorney (Hunter v. Neck, 3 Scott, N. R. 448; 3 Man. & G. 181); and, *semble*, ought (Groom v. Wortham, 2 D. P. C., N. S. 657; 5 Sc. N. R. 799). Not more than half defence must be made (Co. Litt. 127 *b*). It is not unusual to commence the plea with a prayer, "*that the court ought not to take cognizance,*" &c.; but this seems unnecessary (Hixon v. Binns, 3 T. R. 186; Gilb. C. P. 209; Wilkes v. Williams, 8 T. R. 631). It must be stated deft. was an attorney of the court at the time of exhibiting bill, or, issuing writ (Duncombe v. Church, 1 Salk. 1; Basingstoke (Mayor) v. Bonner, 2 Str. 864; S. C. 2 Raym. 1567). The allegation as to the custom of the court is usual; but it is sufficient for the deft. to plead that he is an attorney of this court, and as such to claim his privilege, for the court will take notice of it (*per* Ld. Ellenb., Stokes v. Mason, 9 Ea. 426). Therefore, a mistake in the statement of the custom does not seem material (9 ib. 339; 2 Lut. 1606). No venue need be stated (Scawen v. Garratt, 2 Raym. 1172-3; S. C. 2 Sal. 545). It is not necessary, though it is usual, to negative deft.'s being an attorney of the court in which he is sued (Percival v. Cooke, 5 M.

& W. 293; 7 Dowl. P.C. 500); nor, *semble*, his having practised there since the passing of the 6 & 7 Vict. c. 73 (this being a re-enactment of 1 Vict. c. 56, and 1 & 2 Vict. c. 45) (Prior v. Smith, 6 Dowl. 299; Hunter v. Neck, 3 Scott, N.R. 449, n. 14). It is said to be unnecessary to aver that he has clients there (3 Chit. Plead. 12, n. m, citing Lutw. 1666; Com. Dig. Abt. D, 6), but, it seems to be on principle safer to do so (see Stiles v. Serjeant Mead, 2 Str. 738; Goldsmith v. Baynard, 2 Wils. 228; Dyson v. Birch, 1 B. & P. 4; Brooke v. Bryant, 7 T. R. 26; Anon. 1 Dowl. P.C. 208; Chippendale's case, 1 Tidd's Pr. 77; Chreshop v. Coulthard, ib.; Sand v. Heysham, ib.; Ex parte Sheppard, 2 Cox, 398). The deft. may plead with a *profert* of his writ of privilege, and the plt. cannot deny the privilege, but must plead *nul tiel record* (Thomee v. Lloyd, 1 Raym. 336; Com. Dig.

Abt. D, 6.) If he do not plead it *with a *profert*, the plt. may [*20] reply that he is not an attorney, and then a *certiorari* issues to certify whether he be an attorney, or, not (Dillon v. Harper, 2 Salk. 545; Stephens v. Squire, Skin. 582.) As under the 37 Geo. III. c. 90, neglecting to take out the annual stamped certificate rendered the admission null and void, and declared him incapable of practising till re-admitted, it was formerly sufficient to state in the plea that the deft. was an attorney, &c. for if he did not take out the certificate, this allegation could not be sustained; but as, by the 6 & 7 Vict. c. 73, this provision of the above statute is repealed, and an attorney is now an attorney and on the roll, notwithstanding his having neglected to take out his certificate, it seems advisable to add to the allegation of his being an attorney that he was also duly qualified to practise. The clause in the late act bearing on this point is the 26th, and is in these words: "Be it enacted, that no person who as an attorney or solicitor shall sue, prosecute, defend, or carry on any action or suit, or any proceedings in any of the courts aforesaid, without having previously obtained a stamped certificate, which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement, for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid, whilst he shall have been without such certificate as last aforesaid." If this clause be construed as a prohibition to practise without a certificate, the plea, it would seem, ought to aver a due qualification; but if it be construed to imply that an attorney may practise without a certificate but shall not recover his fees, and this is the only penalty imposed on him, then he will retain all his other rights and privileges as an attorney, except that of recovering his fees, and the want of a certificate cannot even be replied to this plea.

If the deft. plead that he is on the record and qualified, this being matter of record and not matter *in pais*, the plea should conclude with a *paratus verificare per recordum* (King v. Hour, 8 Jur. 1127.) The conclusion of the plea of privilege by an attorney is, in some of the precedents, thus: "Wherefore he prays judgment if the said court of our said lady the queen, before the queen herself, now here, will or, ought to take cognizance of the said plea" (3 Ch. Pl. 896;) but it seems to be good both ways (1 Sal. 298; Bowyer v. Cook, 5 Mo. 145; S. C. Carth. 363; Challand v. Thornley, 12 Ea. 544-5.)

Affidavit.] It is now held necessary to add the usual affidavit (Davidson v. Chilman, 1 Bing. N. C. 297; 5 M. & S. 117.)

Replication.] Plt. may reply to the plea by traversing, or confessing and avoiding it. The plt. cannot traverse the custom, it being matter of law (Kirkman v. Wheeler, 2 Sal. 513; Com. Dig. Abt. D, 6.) A replication to

a plea of privilege as an attorney of C.P., that, for five years before, the deft. had not prosecuted or defended any suit, is bad (2 Lut. 1664,) or that he had not practised within a year (*per* Patteson, J., *Spike v. Adams*, 3 Ch. Pl. 12, n. m.) As to replication of want of certificate, see *ante*, "Plca," and *Skirrow v. Tagg*, 5 M. & S. 281. Plt. may reply that deft. is in custody for debt (*Byles v. Winton*, 4 B. & A. 88,) (under the 6 & 7 Vict. c. 73, s. 31, an attorney or solicitor in person cannot "sue out any writ or process, or commence, prosecute, or defend any action or suit,") or has left off practising (*Goldsmith v. Baynard*, 2 Wils. 232,) or has resumed practice, or become an attorney since the commencement of the action (*Brook v. Bryant*, 7 T. R. 25; *Smith v. Bower*, 3 ib. 632;) or matter of estoppel.

**Evidence.*

[*21]

As to which Party is to begin, see *ante*, p. 8.

Proof for Defendant.] Deft. may prove himself to be an attorney either by producing the original roll, signed by him on his admission, together with the proof of his signature, or by means of an examined copy; or he may prove it by the entry in the book of the chief clerk, kept in the Master's office, into which the names of all attorneys are copied, by the chief clerk, from the original roll (see 1 Tidd, 61; *R. v. Crossley*, 2 Esp. 526; *Lewis v. Walter*, 3 B. & C. 138, n. b.; S. C. 4 D. & R. 810; *Jones v. Stevens*, 11 Price, 251;) or by the entry in the alphabetical roll kept by the registrar of attorneys and solicitors under 6 & 7 Vict. c. 70, s. 21.

Proof for Plaintiff.] This will depend very much on the nature of the replication.

Want of Certificate.] This must be proved strictly (*Pearce v. Whale*, 5 B. & C. 38.)

Plt. should be prepared to prove his damages, in case the plea should be found for him (*ante*, p. 9.)

PENDENCY OF ANOTHER ACTION.

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When it may be pleaded.] The pendency of another action against the same parties, for the same cause, may be pleaded in abatement (Com. Dig. Abt. H. 24,) but not in bar (*Hurley v. Greenwood*, 5 B. & A. 101, per Bayley, J.,) except at the suit of an informer (*Baines v. Blackbourne*, Say. 216; Tidd, 989;) and it is said, if two suits are brought on the same day for the same cause, their pendency may be pleaded reciprocally the one to the other (*Pie v. Coke*, Hob. 128; Mo. 864-5; Com. Dig. Abt. H. 24.) It may be pleaded, whether the suit be depending in the same or a different court (*Sparry's case*, 5 Co. R. 62 a.;) but not so to an action brought in the

superior courts at Westr., where the other action is in an inferior court (Ib.; Moyle v. West, Dyer, 92 b.; Fitzg. 313; Laughter v. Taylor, 8 Dowl. P. C. 776.) It may be pleaded, though the actions be of a different nature (Bac. Ab. Abt. M., *sed quære*.) It is said that this plea is improper where the former suit was a real or personal one; where no certainty of description is required in the suit, and the plt. did not make a plaint or declaration, as it does not appear that it is the same suit; the reasons, however, seem unsatisfactory (see Com. Dig. Abt. H, 24; Bac. Ab. Abt. M; Sparry's case, 5 Co. R. 61 b.; *sed vide* 3 Ch. Pl. 9, n.; 6 T. R. 307; 1 Saun. 92, n. 2.) It is no plea that another action is depending for the same cause, at the suit of another person (Pechell v. Layton, 2 T. R. 512; Com. Dig. Abt. H, 24;) as *to an action at the suit of assignees of a bankrupt, that a former [*22] action by bankrupt is pending (Biggs v. Cox, 4 B. & C. 920;) or against another person (Bedford (Earl) v. Exeter (Bishop), Hob. 137;) though a joint contractor (Henry v. Goldney, 32 Law Obs. 204; 10 Jur. 439;) or, against deft. jointly with others (Com. Dig. Abt. H, 24; Isam v. Hitchcock, Cro. E. 202; Rawlinson v. Oriett, Carth. 96, *sed quære*; Bedford (Earl) v. Exeter (Bishop), Hob. 137;) or, to an action at suit of the king (Th. Dig. l. 11, c. 39, s. 19;) but, it is to an action at the suit of a common informer (Baines v. Blackbourne, Say. 216; Coombe v. Pitt, 3 Bur. 1423, supra.) In an action against one of several joint contractors, the deft. cannot plead in abatement the pending of another action for the same cause against another co-contractor; but, he should plead in abatement the nonjoinder of the joint-contractor; and if a second action be brought against all, the pendency of the former action against the other joint contractor may be pleaded (Henry v. Goldney, 4 D. & L. 6; 15 M. & W. 494.) And it has been held at *nisi prius*, that where separate actions have been brought against several defts. for the same single act of trespass, the party against whom the last action was commenced may plead the pendency of the first in abatement (Boyce v. Douglas, 1 Camp. 601; 1 Ch. Pl. 76.)

The plt. cannot, after the plea, avoid the effect of it by discontinuing the first action (1 Salk. 329; Knight's case, 2 Raym. 1014.)

Form of Pendency of another Action.

Plea of pendency of another action previously brought for the same cause.

In the Q. B. (or C. P., or Ex. of Pl.) On the day of , in the year of our Lord 1850.

Joseph Styles } And the deft. by ———, his attorney, (or "in person,") prays judgment of the said writ and declaration, because he says that, before the
 John Hill. } issuing of the said writ, or the plt. declaring thereupon, to wit, on the
 day of , in the year of our Lord 1850, the plt. issued a certain writ of summons out of the court of our lady the queen, before the queen herself, at Westr., and declared thereon against him, in a plea of debt on demand, of and upon the same identical writing obligatory (or, in a certain plea of promises upon the very same identical promises and undertakings, or, in a certain plea of trespass for and in respect of the very same identical trespasses and causes of action,) in the said declaration, in this present suit mentioned, as by the record and proceedings thereof remaining in the said court of our said lady the queen, before the queen herself, more fully appears. And the deft. further saith, that the parties in this and the said former suit are the same, and not other, or different persons, and that the supposed causes of action in this, and the said former suit are, and each and every of them is and are, the same, and not other, or, different causes of action; and that the said former suit, so brought and prosecuted against him the deft., by the plt. as aforesaid, is still depending in the said court of our said lady the queen, before the queen herself. And this the deft. is ready to verify. Wherefore he prays judgment of the said writ and declaration in the suit, and that the same may be quashed, &c. (*Add usual affidavit.*)

Notes on Forms of Plea, &c.

Plea, &c.] The notes as to pleas in abatement in general will be here applicable. The plea must show that the cause of action in both suits is the same (Doc. Pl. 10,) whether they are of the same, or, different forms of action, as detinue and trover (London (Mayor) v. D. Freem. 401.) If it appear from the pleadings that it could not *be the same, the plea will be bad (Biggs v. Cox, 7 D. & R. 409; 4 B. & C. 920.) In [*23] some cases the plea must state on what particular day the former action was brought; as, in an action at the suit of an informer, the deft. must show a prior right attached in somebody else, and, if the prior action be brought in the same term, it must be shown on what particular day such prior action was brought, that its priority may be ascertained (Combe v. Pitt, 3 Bur. 1423; S. C. Bla. 437,) and so, in other cases, where the plea is of another action pending of the same term (Hutchinson v. Thomas, 2 Lev. 141; Jackson v. Gisling, 2 Str. 1169.) It does not seem essentially necessary to state the declaration in the prior action, (3 Ch. Pl. 19, n.,) nor to aver that such action is still pending, as it is sufficient to abate the second writ to show that it was pending at the time that the second action was commenced (Ferrer's case, 6 Co. R. 7.) A plea setting forth the pendency of several actions against several joint contractors is bad for multiplicity (Esdaile v. Lund, 12 M. & W. 607; 2 D. & L. 565; 8 Jur. 109.) It should seem, it is not necessary to plead a *prout patet per recordum*, or, to plead the record of another court *sub pede sigilli*, because, the plea involves a matter of fact whether both actions are for the same cause (3 Ch. Pl. 19, n.;) see a plea so concluding, and law thereon (Kirby v. Seagers, 2 D. P. C. 639.)

Replication.] The plt. may reply *nul tiel record* of the former action. If an action pending in the same court be pleaded, plt. may pray oyer, that the record may be inspected by the court, or, demand oyer of it, which, if not given in convenient time, he may sign judgment (Com. Dig. Abt. H. 24.) Where, to debt on a statute, the deft. has pleaded a prior action depending, or, a compromise by rule of court, &c., plt. may traverse the fact, or, reply *per fraudem* (1 Ch. Pl. 507.)

Evidence in.

For Defendant.] The burden of the evidence lies upon the deft., who must prove the commencement of the former suit, and that it is for the same cause. If the former suit be on record, as, according to some authorities, t ought to be, the record should be produced, or proved, in the usual way *post*, "RECORD.") If a writ only has been issued, the same should be proved in the usual way (*post* "PROCESS;") and it is sufficient to satisfy the plea (Kirby v. Siggers, 2 Dowl. P. C. 659.) If there have been any affidavit of debt, or, particulars of demand, or, any other legal document, or, writing, in any way showing the former suit is for the same cause of action, the same should be proved (*post*, "AFFIDAVIT—PARTICULARS OF DEMAND.")

For Plaintiff.] Plt. should be prepared with evidence in answer; also, to prove his damages, in case the plea should be found for him (*ante*, p. 9.)

*ACCORD AND SATISFACTION.(a)

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What it is.] Accord is a satisfaction agreed upon between the party injuring and the party injured; which when performed is a bar of all actions upon this account. As, if a man contract to build a house, or, deliver a horse and fail in it, this is an injury, for which the sufferer may have his remedy by action. But if the party injured accept a sum of money, or other thing, as a satisfaction, this is a redress of that injury and entirely takes away the action (3 Bla. Com. 16; Bac. Abr. Accord, A; Com. Dig. *ib.* B, 4; Lynn v. Bruce, 2 H. Bl. 317; Collingburn v. Mantell, 5 M. & W. 289; Bayley v. Homan, 3 B. N. C. 915.)

This defence must now in all cases be specially pleaded (R. G. H. T. 4 Will. IV.)

In what Actions pleadable.] Accord and satisfaction is a good plea in all actions where damages are recoverable for the wrong done, or, the contract broken. It may therefore be pleaded in ejectment, detinue (9 Co. R. 79 a;) debt, as well as in covenant (6 Co. R. 44 b;) trespass, case, and assumpsit, although, in the former, a specific thing or sum is also to be recovered. So to an action of debt on bond for the payment of money, the deft. might, at common law, plead the delivery and acceptance, on or before (5 Co. R. 117 a) the day, of a horse, or other thing, in satisfaction; and such accord saved the forfeiture of the condition (9 Co. R. 79 a.) But it is otherwise of a bond conditioned to do a collateral act, as, to make a feoffment, to

(A) Vide for American cases, 1 U. S. Dig. Tit. "Accord and Satisfaction," p. 41. 1 Supp. U. S. Dig. p. 21. 1 Ann. Dig. 12. 2 Id. p. 6. 3 Id. p. 9.

yield a true account, &c.; for, in these cases, accord is no satisfaction to *save the forfeiture. Hence, as such bonds are not within the stat.

4 & 5 Anne, *infra*, it seems that a plea of accord and satisfaction to [*25] save the forfeiture, must aver it to be in satisfaction of the penalty, and consequently that payment of any sum short of that would be a bad plea (*Ib.*; see, however, such a plea, 3 N. & P. 226.)

Before the stat. 4 & 5 Anne, c. 16, payment of the sum mentioned in the condition, or any other matter in satisfaction of that sum, *after the day*, was not a good plea; because the forfeiture having attached, nothing less than the penal sum, or its equivalent, could in contemplation of law be deemed a satisfaction. But by the 12th sect. of that act the obligor is enabled to plead payment of principal and interest *after the day*; and such payment is to be as effectual a bar as if the money had been paid on the day mentioned in the condition. Since which *accord and satisfaction*, generally, after the day may be pleaded to the sum mentioned in the condition, and need not as formerly be pleaded to the penalty (see *post*, “Bond,” “Payment.”)

Accord and satisfaction cannot be pleaded to an action on a record (4 Moo. 165;) nor, it is said, will the court on an accord *unexecuted* permit it to be pleaded as a sham plea, for the purpose of delay (see *Rickley v. Proone*, 1 B. & C. 286; 2 D. & R. 661; *Blewit v. Marsden*, 10 Ea. 237; 3 Ch. Pl. 92; see, also, *Phillips v. Bruce*, 6 M. & S. 134; *Draycote v. Pilkington*, 5 M. & S. 518.)

Requisites of Plea.] *Accord* without performance of *satisfaction*, or in other words, an accord *unexecuted*, that is, a mere agreement between the plt. on the one hand and the deft. on the other, to do, or give, and accept something as an equivalent for, on, or in substitution of the claim, cannot be pleaded, for it is no answer to a vested right of action (*Crisp v. Griffith*, 2 C. M. & R. 649; *Allies v. Probyn*, *ib.* 408; *Bayley v. Homan*, 3 B. N. C. 915; *Phillips v. Afflalo*, 4 M. & G. 856; *Smart v. Chell*, 7 D. P. C. 781.) But an accord *executed*, if it be reasonable in intendment of law, and such as amounts to a valid and binding contract, is a good defence, though it have not produced actual satisfaction. On the other hand, the payment or delivery and acceptance of money or other thing in satisfaction, if reasonable in contemplation of law, is a good bar, though no *accord* be stated. And where a chattel is taken in satisfaction, it need not be averred that it was of equal value with the debt, for, the party receiving it, is the best judge of matters of uncertain value (*Andrew v. Doughey*, *Dyer*, 72, a; *Thompson v. Percival*, 5 B. & Ad. 932, *per Denman*, C. J.)

It seems, therefore, convenient to consider this defence in a two-fold aspect. 1st, where actual *satisfaction* is given; and, 2ndly, where it lies in *accord* only.

1st. *Pleas of Satisfaction.*] The following rules will show what is necessary to constitute this plea a defence.

How Defendant may avail himself of it.

The Satisfaction must be a reasonable and complete Satisfaction of the thing demanded, and operate as an extinguishment of the original cause of action. Therefore, acceptance of a less cannot be a satisfaction, in law, of a greater sum, unless, there be a release or some consideration for the relinquishment of the residue (*Down v. Hatcher*, *infra*; *Wright v. Acres*, 6 Ad. & E. 726; see *Denton v. Richmond*, 1 C. & M. 734; *Fitch v. Sutton*, 5 Ea.

231 ; Walker v. Seaborn, 1 Taun. 526;) and this, though an additional security be given, *(1 Str. 426.) "An agreement between a debtor [*26] and creditor, that part of a larger sum due should be paid by the debtor, and accepted by the creditor as a satisfaction for the whole, might, under special circumstances, operate as a discharge of the whole debt. But then the legal effect of such an agreement must be considered to be the same as if the whole debt had been paid, and part had been returned as a gift to the party paying" (*per* Holroyd, J., Thomas v. Heathorn, 2 B. & C. 481, 482 ; S. C. 3 D. & R. 647. See *infra*.) Therefore, a plea of payment of a smaller sum is bad on demurrer (*Ib.*); and even after verdict (*Down v. Hatcher*, 10 A. & El. 121 ; 2 P. & D. 292.) But where a party sued on two bills of exchange, and in his particulars of demand, by mistake, claimed 301*l.* 9*s.* 2*d.* instead of 323*l.* 7*s.* 5*d.*, the sum really due, and an order was made by a judge, with the consent of *plt.* and *def.*, that upon payment of the debt for which the action was brought, and costs, all further proceedings should be stayed, &c., and the *plt.* accepted the order, and the *def.* paid the money,—a plea setting forth the action, the order, the acceptance of it in accord and satisfaction, and the payment of the money, was held a good answer in accord and satisfaction to a subsequent action for the sum really due on those bills, though the *plt.* replied that the *def.* had known the amount really due, and fraudulently permitted him to consent to the order; that he, before the order had been fully performed by the *def.*, by payment of the entire sum agreed upon, discovered the mistake, and before the commencement of this suit applied to the *def.* to allow the particulars in the action and order to be amended, which the *def.* refused, and that he received the balance of the 301*l.* 9*s.* 2*d.* under protest,—the court deeming that the replication did not show fraud, or misrepresentation in the *def.* which should avoid the accord and satisfaction (*Atherton v. Ibeard*, 8 Jur. 752, Q. B. ;) and although payment of a part of a liquidated and ascertained sum cannot be satisfaction of the whole, yet, upon a mere simple contract, a negotiable security may be a satisfaction of a claim for the larger amount (*Sibree v. Tripp*, 15 M. & W. 28.) In an action for taking cattle, it is no plea, that it was agreed that *plt.* should have his cattle again, and that they were returned, 'being no satisfaction of the injury sustained for the detention (*Peytoe's case*, 9 Co. R. 78 ;) nor an agreement, not under seal, that the parties should be quit of actions against each other (*James v. David*, 5 T. R. 141 ; *Davis v. Oakham*, Sty. 245 ; *Dighton v. Whiting*, Lut. 57 ; 1 Rol. Ab. Accord. 128, J. 40 ; Com. Dig. Accord, B. 1.)

But payment and acceptance of a part of a debt, before the time it becomes due, or, at a place where it was not payable, in satisfaction of the whole, may be a sufficient satisfaction (Co. Litt. 212 b.) So, if a third person guaranty the payment of the less sum (*Steinman v. Magnus*, 11 Ea. 390 ;) so, if the debtor assign all his effects (*Heathcote v. Crookshanks*, 2 T. R. 24.) So, where the damages are not liquidated, it may, under certain circumstances, be a good plea (see instances in 1 Smith, L. C. 147.) See further, as to composition, *post*, title "COMPOSITION."

And so, if the debtor give a chose in possession for a chose in action, as a horse, or, other property in specie (*Heathcote v. Crookshanks*, 2 T. R. 24 ; Co. Litt. 212 b.) Destroying certain documents upon *plt.*'s undertaking, in consideration thereof, not to bring an action for slander, is a sufficient consideration (*Lane v. Applegate*, 1 Star. 97.) Conferring a benefit to a third person, at the debtor's request, is sufficient (9 Skin. 391.) So, where A. owes B. 100*l.*, and B. owes C. 100*l.*, and the three meet, and it is agreed between them A. shall pay C. 100*l.*, the payment of B.'s debt would be

sufficient (*Tatlock v. Harris*, 3 T. R. 180; *Wilson v. Copeland*, 5 B. & A. 228: **Wharton v. Walker*, 4 B. & C. 163.) But, where J. C., being indebted to S., and R. C. being indebted to S. and also to J. [*27] C., it was verbally agreed between the three, that S. should transfer the debt due to him from J. C. to R. C.; and S., in pursuance of such agreement, delivered to R. C. an account, in which he, R. C., was charged with the debt due from J. C. to S., it was held that such rendering of account amounted, at most, to an accord, but not, a satisfaction (*Cuxon v. Chadley*, 3 B. & C. 591.) And where it was agreed, in an action on a bill, that deft. should renew the bill, and give a warrant of attorney as security, which he did, omitting to pay the costs, it was held not to be a satisfaction, and that plt. might render the bill available (*Norris v. Aylett*, 2 Camp. 329.) And, so, an acceptance of a smaller sum from one contractor who had been sued alone, as a compromise of the action against him, is not a satisfaction in favour of a joint contractor, though, stated in a receipt to be for debt and costs in that action (*Waller v. Smith*, 2 B. & Ad. 889;) and, as to co-obligors on a bond of indemnity (*Field v. Robins*, 3 N. & P. 226,) unless, it is received expressly, in full satisfaction of the entire cause of action (*lb.* 228.)

To trover for not returning notes, a plea, that after breach the deft. gave the plt., at his request, "*for and on account* of the notes, and of the promise, and damages in respect thereof, an order on B., who had them to deliver them to the plt.; that the plt. accordingly took it, but, neglected to present it, and get the notes till they were feloniously stolen from B.," was held bad on special demurrer, as not showing any sufficient legal satisfaction for the conversion (*Griffiths v. Owen*, 13 M. & W. 58; 2 D. & L. 190). So, in trespass for taking goods, an agreement to restore them, and their restoration accordingly, is not a satisfaction for the tort in taking them (*Bac. Ab. Trespass*, I, 2; and see *Com. Dig. Accord*, B, 1). So, it is no satisfaction of the right of action for distraining for more than was due, that the distress taken was insufficient to pay the rent really due (*Taylor v. Henniker*, 4 P. & D. 242; 12 A. & E. 488). So, to an action of assault and false imprisonment against magistrates, for having committed a man for an offence deposed to before them, an agreement between the prosecutor of the charge and the plt., with the consent of the defendants, that the prosecutor should drop the prosecution, and that the plt. should be discharged at the sessions for want of prosecution, and his discharge accordingly, in full satisfaction and discharge of the assault and false imprisonment, is not a satisfaction of the wrong done in committing him (*Edgecombe v. Rodd*, 5 Ea. 294).

It is said that a release of an equity of redemption is not a sufficient satisfaction (*Preston v. Christmas*, 2 Wils. 86; see *Elliott v. Martin*, 2 M. & W. 19; *per Parke*, B; *Skinner's Co. v. Jones*, 2 B. N. C. 490). In an action of debt upon two indentures, whereby the deft.'s testator covenanted to pay the plt. the respective sums of 1300*l.* and 700*l.* with interest, the deft. pleaded, in substance, that the plt. was a mortgagee, by two mortgages of an estate which was insufficient, upon an estimate of its value, to pay the mortgage money due from the testator; that three other mortgagees were in the same situation, the estate realized to each being less in estimated value than the charge upon it; that the defts. were devisees of the real estate, and executors of the deceased mortgagor; that they had received assets, which, after deducting the costs and the expenses payable by them, in the first instance, and in preference to the debts from the testator, and also, excepting some furniture, amounted to the deficiency on each mortgage, and thereupon, it was agreed, between the plt. and deft., and each of the mortgagees, as the common *consent of all, and at the request of each, that no suit should be instituted for the [*28] administration of assets, and that the said balance of the assets, after

deducting the furniture, which should be given to the widow, should be divided rateably between the mortgagees, and paid to them in satisfaction of the sums due to them over and above the estimated value of the estates; and that all the respective rights and equities of redemption, or, other rights of the debts., as executors and trustees to the mortgaged property, should thenceforth, be wholly barred, extinguished, satisfied, and discharged, and the mortgagees should thenceforth become absolute owners, both at law, and in equity, of the mortgaged estates, and that the covenant in the declaration should be satisfied and discharged in consideration of the premises. The plea then averred payment to each of his share of the assets, and that the several rights and equities of redemption were barred and extinguished. Replication denying the agreement and the payment in the plea mentioned, and issue thereon. The judge at the trial having ruled that the plea could not be proved, except by an agreement in writing; on motion for a new trial, and assuming, for the disposal of that question, that the plea, if proved, would be a good bar: Held, that, though, on agreement to convey an equity of redemption is not binding, unless, in writing, yet this plea would have been held good on demurrer, even, if, it had expressly stated that the contract was by parol; for the agreement by the plaintiff to forego the balance of his mortgage above the value of the estate, on receiving his share of the assets, was obligatory on him, and the receipt of that share a satisfaction for the estate, though, there was no binding agreement on the defendant to convey the equity of redemption, for, the agreement of the other mortgagees to take their shares also, was a good consideration for giving up the claim for the residue of the debt against the debts. Whether the plea, if proved, would be a good bar, *quære* (*Massey v. Johnson*, 1 Exch. 241).

An agreement that the parties should give each other a quart of wine in satisfaction of action is a sufficient satisfaction (1 Rol. Ab.); and so if, either party has done any act which would deprive him of his right of action, it would operate as a satisfaction (*Lane v. Applegate*, 1 Star. 97). It is no plea in debt on bond given to a firm that the claim was assigned, or, transferred to the account of a new firm on the obligors dissolving partnership, and some of them quitting the firm (*Parker v. Wise*, 6 M. & Sel. 239). "Payment after the day is good, by way of discharge, but not of satisfaction" (*per Holroyd, J.*, *Francis v. Crywell*, 5 B. & A. 888, citing 4 Mo. 250). The mere fulfilment of an act which a party is bound to, is no satisfaction (*Edgcombe v. Rodd*, 5 East, 302). A deed before breach cannot be discharged by accord and satisfaction without a deed (*Kaye v. Waghorn*, 1 Taun. 428; *Com. Dig. Ple. 2. v. 8*); but it may after breach (*Com. Dig. A. 1, &c.*; *Scholey v. Mearns*, 7 Ast. E. 150; 1 Moore, 358, 460). The accord and satisfaction must be before action brought, or, if it be afterwards, it must be in satisfaction of the costs and damages (*Francis v. Crywell*, 5 B. & A. 886; *S. C.* 1 D. & R. 546; *Corbett v. Swinburne*, 3 N. & P. 551; 8 A. & El. 673; *Henry v. Earl*, 8 M. & W. 228).

A *Specialty Security*, when co-extensive, operates as a satisfaction, of a simple-contract debt, or security; and is a satisfaction, as the simple-contract is merged in the specialty (*Cro. C.* 415; *Bac. Ab. Debt, G*; *Winton v. Foster*, 2 B. N. C. 692); but not, if the specialty be void, or, be taken merely as a collateral, or, additional security, and reciting a pre-existing [*29], security (*Twopenny v. Young*, 3 B. & C. 210-1; **Solly v. Forbes*, 2 B. & B. 38). An assignment by deed, of property to secure debts due, or, to be due, with power of sale, on giving six months' notice, is only to be viewed as collateral security, and does not suspend the remedy by action against the debtor, although, no such notice has been given, there being no express stipulation in the deed that the remedy by action should not be

adopted (*Emes v. Widdowson*, 4 C. & P. 151). Judgment recovered is, in itself, no satisfaction, *until payment be obtained* upon it: and *Le Blanc*, J., said, "The giving of another security, which, in itself, would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless, it produce the fruit of a judgment" (*Drake v. Mitchell*, 3 East, 259; see *post*, "JUDGMENT;" as to composition deeds, see *post*, "COMPOSITION").

A *Bill of Exchange*, or, *Promissory Note*, &c., will sometimes operate as an accord and satisfaction. A person, by taking a bill, or, note accepted, made, or indorsed by the debtor, in satisfaction of a former simple-contract debt, or a simple contract debt created *at the time*, is precluded from afterwards waiving it, and suing the person who gave it him for the original debt before the bill is due: for, the taking a bill, or note, is *prima facie* evidence of satisfaction, and amounts to an agreement to give the person delivering it credit for the time it has to run (*Stedman v. Gooch*, 1 Esp. 3; Ch. B. 95; *Kerslake v. Morgan*, 5 T. R. 513; *R. v. Dawson*, Wight. 32.) But, *pl.* may reply, the bill was not taken in satisfaction (*Ib.*); and, if the bill be dishonoured, he may sue for the original debt, or, on the bill (*Puckford v. Maxwell*, 6 T. R. 53; *Bishop v. Rowe*, 3 M. & S. 362; *Owenson v. Morse*, 7 T. R. 64.) If a renewed bill be taken for the amount of a former bill, no action can be maintained upon the latter, even, for the recovery of expenses of noting, and postages, whilst, the first bill is current (*Kendrick v. Lomax*, 2 C. & J. 405.) Or, if the bill be waste paper, as being of no kind of value (*Stedman v. Gooch*, 1 Esp. 5; *Camidge v. Allenby*, 6 B. & C. 381; *per Bayley, J.*, *Hawse v. Crowe*, Ry. & M. 414; Ch. B. 96.) or, drawn on a person who has no effects of drawer's in hand, and refuses to accept (*Ib.*; 12 Mo. 517,) or be a forgery (*Camidge v. Allenby*, *supra.*) The taking a bill, or, note does not prejudice a prior specialty security (2 V. & B. 416.) But, this would not be a good plea to an avowry for a distress for rent (*Davis v. Gyde*, 2 Ad. & E. 625.) *Quere*, whether, if, the bill of a third person were given for rent, or, a bill were given on the terms that the landlord was to wait, it would be otherwise (*Ib.*) Nor, to an action on a specialty debt (*Worthington v. Wigley*, 3 B. N. C. 454, and see *infra.*)

An express agreement by a creditor to take a bill, or, note as payment and incur the risk of its being honoured, will amount to a payment, or satisfaction of the debt, whether the bill, or, note be afterwards paid, or not (*Owenson v. Morse*, 7 T. R. 66; *Brown v. Kewley*, 2 B. & P. 518; see *Ex parte Blackburn*, 10 Ves. 206; *Camidge v. Allenby*, 6 B. & C. 381; *Sard v. Rhodes*, *infra*; *Lewis v. Lyster*, *infra*; and see *Simon v. Lloyd*, 2 C. M. & R. 187.) So, the acceptance of a promissory note, in satisfaction and discharge of a bill of exchange, is a good defence, though it is not paid (*Sard v. Rhodes*, 1 M. & W. 153; 4 D. P. C. 743; and see *Lewis v. Lyster*, *ib.* 377.) And a bill, or, note will, in favour of any party to it, who would be entitled to bring an action on paying it, operate as a satisfaction of any debt, or, demand for which it was given, if the receiver, or, holder make it his own by laches (*Smith v. Wilson*, Andr. 187; *Hebden v. Hartsink*, 4 Esp. 46; Ch. B. 804; Bay. 171; *Bridges v. Berry*, 3 Taun. 130;) as, if he do not present it in proper time for acceptance, or, *payment (*Bishop v. Rowe*, 3 M. & S. 362; *Soward v. Palmer*, 8 Taun. 279;) or, bind [*30] himself by agreement to allow an extra time for payment (*Tindal v. Browne*, 1 T. R. 167; *Sproat v. Mathews*, *ib.* 186;) or, neglect to give due notice of a failure in the attempt to procure a proper acceptance, or, payment: unless, indeed, in any of these cases the bill, or, note, were on an improper stamp (*Bay. 172*; see also 3 & 4 Anne, c. 9, s. 7.) If a cre-

ditor take from his debtor a bill drawn by the latter upon a third person, and after the bill has been accepted, the creditor alter the bill in regard to the time of payment, he makes the bill his own, and it operates as a satisfaction of the original debt, although, it be dishonoured (*Anderson v. Langdale*, 3 B. & A. 660.) But, it is otherwise, where the debtor is acceptor of the bill, since, he cannot be prejudiced by the alteration (*Atkinson v. Hawdon*, 2 Ad. & E. 628.) And, if the holder, or, receiver lose the bill, it will, in some cases, be deemed a satisfaction of the debt (*Pierson v. Hutchinson*, 2 Camp. 211; *Dangerfield v. Wilby*, 4 Esp. 159; Ch. B. 9th ed. 254; *Hansard v. Robinson*, 7 B. & C. 90; *Rolt v. Watson*, 4 Bing. 273; *Ramsay v. Crowe*, 1 Exch. 167.) But, the remedy is not extinguished, it is only suspended until the bill, or, note be owned (*Dent v. Dunn*, 3 Campb. 296.) But, it is no answer to an action on a bill, &c., not payable to bearer or order, that the debt. has always been ready to pay the note on its being produced and delivered up to him (*Wain v. Bayley*, 2 P. & Dav. 507; *post*, "*BILLS OF EXCHANGE*.") Where an action is brought upon a bill, or, note, and also for goods sold, and the plt. proves the bill, or, note (without showing the consideration for it,) and also the goods sold, and it appears that the price became due before the bill, or, note was given, a presumption arises, that the instrument was given for the goods (*Mutrie v. Harris*, Moo. & Mal. 322.) And in an action on a note, and on a count for an attorney's bill for 300*l.*, it appeared that the note, which was for 87*l.* 4*s.*, was given at a time when business to the extent of 17*l.* only, was done; yet as the plt. gave no evidence as to the consideration for the note, Lord Tenterden, C. J., left it to the jury to say, whether the note was given in satisfaction of the bill for business done up to the time of its date, or, whether it was an entirely distinct transaction (*King v. Martin*, 3 C. & P. 347.)

When a renewed bill is taken and paid, the party cannot sue on the former bill which was left in his hands, although costs incurred on taking a warrant of attorney, as an additional security, were left unpaid contrary to agreement (*Dillon v. Remmer*, 1 Bing. 100; but see *Norris v. Aylett*, 2 Camp. 329.) unless the old bill be left as a collateral security; in which case, the plt. was allowed to recover interest due on it, at the time of giving the new bill, though, the latter had been paid (*Lumley v. Musgrave*, 4 Bing. N. C. 9; *Lumley v. Hudson*, *ib.* 15.)

A creditor does not lose his remedy against his original debtor for a precedent debt, by taking for it the bill, or, note (afterwards dishonoured) of an agent of the debtor without his consent, unless, by so doing, and giving the agent a receipt, the principal, the debtor, is induced to treat the demand as satisfied, and is thereby injured by dealing differently with his agent (*Robinson v. Reid*, 9 B. & C. 449; Ch. Contr. 772;) and where the seller of goods received from the purchaser an order upon his banker for the price, and the latter, with whom money was deposited for the purpose, offered to pay in cash, deducting discount for the period of credit, or, by a bill upon a third person, which the seller elected to take: held, that, although, the bill was afterwards dishonoured he could not sue the purchaser for the price of the goods (*Smith v. Ferrand*, 7 B. & C. 19; *Strong v. Hart*, 6 *ib.* 160.)

The taking the bill, or, note of one of several members of a firm for a *partnership debt, will not necessarily discharge the original claim [*31] against all the partners in the event of the instrument being dishonoured (3 Ch. C. L. 132; but, see *David v. Ellice*, 5 B. & C. 196; but see, also, *Thompson v. Percival*, 5 B. & Ad. 925; *Kirwan v. Kirwan*, 2 C. M. & R. 617; and *ante*, "*PARTNERS*.")

There is a distinction between satisfaction and extinguishment, sometimes essential to be remembered: "as, the holder's claim upon a bill, or, note may

be extinguished as to some parties, and remain entire as to others; but, if his claim is satisfied as to any, it is satisfied as to all" (Bay. 267). But a bill, or, note, to be a satisfaction for a debt, must be equivalent to, or, larger than the sum due. Therefore, where in an action for 1000*l.*, the deft. pleaded that, upon an account stated, he was found indebted in 400*l.*, and that he accepted a bill drawn upon him for that sum by the creditor, on account of the several promises, &c., it was held, that the giving a bill for 400*l.* was not, in point of law, a satisfaction for a debt of 1000*l.*, and that plt. might recover the difference (Thomas v. Heathorn, 2 B. & C. 477; Str. 426; Rolt v. Watson, 4 Bing. 273), unless, there be an additional security given, as, an undertaking by a third party (Steinman v. Magnus, 11 Ea. 390).

The *debt* between the intermediate parties to a bill, or, note which formed the consideration for the instrument may be inquired into, either wholly, or, in part, and the holder shall recover no more than the real amount of the debt due to him from the deft. (Ch. B. 9th ed. 76 to 79; Ch. Contr. 773). But even, between such parties, if the bill, &c. were given upon a special contract, which has not been entirely rescinded, and is not wholly void on account of fraud, the partial failure of consideration will afford no defence whatever, and the full amount of the bill shall be recovered, where the reduction claimed by the deft. from the amount, in respect of the plt.'s partial non-performance of the contract, involves a question of unliquidated damages, which are only recoverable by a cross action (Ch. B. 78; Ch. Contr. 773, 774; Lewis v. Cosgrave, 2 Taunt. 2; Archer v. Bamford, 3 Stark. R. 175). Thus, if a bill be given for the price of a horse delivered, and warranted sound, but, which is not so, and has not been received back by the plt., or, for the price of goods of less value than the price charged (Solomons v. Turner, 1 Stark. R. 51; Morgan v. Richardson, 1 Camp. 40; Tye v. Gwynne, 2 ib. 346; Obbard v. Betham, M. & Mal. 483; Wills v. Hopkins, 5 M. & W. 7; see Mann v. Lent, 10 B. & C. 877; Moggridge v. Jones, 14 East, 486; Spiller v. Westlake, 2 B. & Ad. 155; Day v. Nix, 9 Moore, 159).

Where it is part of the original terms of the contract for the sale of goods, that the price shall be paid by a bill or note, to be due at a future period, and the person who was to give the bill refuse, on request, the remedy during the period thus agreed upon for credit is a special action of assumpsit for not accepting, or, giving the bill, or, note, and the common count for goods sold will not be sustainable (Mussen v. Price, 4 East, 147; Brooke v. White, 1 N. R. 330; Taylor v. Briggs, M. & M. 30, n.). But if the action be brought, after the expiration of such credit, the common count is sufficient, and under it interest on the price of the goods from the time when the bill would have become due may be recovered as part of the estimated value of the goods (Farr v. Ward, 3 M. & W. 25). To a declaration in debt with three counts in 40*l.* each, for goods, work, and on an account stated, the deft. pleaded to the first and last counts, except as to 10*l.* and 9*l.* 15*s.* 6*d.*, parcel, &c., that the said debts except so far as they related to 9*l.* 15*s.* 6*d.* accrued to the plt. for the delivery of clothes, and that it was afterwards agreed, that in consideration that the deft. would deliver to the plt. an acceptance of the Earl of M. for 25*l.*, with a blank space for the signature of the drawer, the plt. would discharge the deft. from all claim for clothes, if the acceptance should be paid in six months; and if it should not be paid in that time the deft. should be liable to pay to the plt. the sum of 10*l.* only on account of the clothes, and that the acceptance should be a full discharge of so much of the claim as should exceed 10*l.*; that the deft. delivered the acceptance, and that the same was not paid: held good (Curlewis v. Clark, 18 Law J. 144, Exch.).

2ndly. Pleas of Accord.

The Accord must be certain.] An accord that the deft. shall employ workmen in two, or, three days is bad (4 Mo. 88). An accord to pay a less sum on the same, or, at a subsequent day is bad (Fitch v. *Sutton, 5 [*32] Ea. 230); and performance of an uncertain accord will not aid the defect for deft. (3 Lev. 189; Yelv. 184).

When deft. pleaded that B. was indebted to him in a larger sum, and that, B. being in prison in Scotland as a debtor, defendant authorised plaintiff to receive from B. the said sum so due to him from defendant, and that plaintiff, instead of receiving the said sum from B., received from B. a bill of exchange "for and on account of the said sum," and that he appropriated and retained the said bill for and in liquidation and discharge of the said debt, and that he discharged B. from the debt, according to the law of Scotland:—Held, that the plea did not import either satisfaction, or, payment (Baillie v. Moore, 10 Jur. 592, Q. B.; 8 Q. B. 489.)

A plea in trespass that the plt. and deft. had agreed to settle all matters in dispute, and to bind themselves in a penalty not to sue each other, is bad (James v. David, 5 T. R. 141.) When certain stock of the plt.'s was transferred under a forged power of attorney, the Bank of England offered to replace the stock if the plt. would first prove the amount under a commission of bankruptcy, issued against the firm in which the forger of the power had been a partner. After this offer the plts. received a dividend, and engaged to tender proof of their demands under a commission of bankruptcy: held, that they could not sue the bank in respect of the stock, till, they had fulfilled their engagement to tender the proof under the commission (Stracey v. Bank of England, 6 Bing. 754;) observed on, in *Allies v. Probyn*, supra. In case for wrongfully causing a *ca. sa.* to be indorsed to levy more than was due, it appeared the deft. was discharged out of custody, by virtue of a judge's order, upon terms, constituting a new and mutual agreement embodied in the order. Parke, J. said, in considering the terms of this order, "I am inclined to think that there is evidence of a mutual agreement between the parties, upon good consideration to forego the action, for charging plt. in execution for too much, and an agreement, giving the plt. a remedy for the breach of it, or, an accord executed, where there was no remedy by action upon the accord itself, is a bar to an action for unliquidated damages" (*Wentworth v. Bullen*, 9 B. & C. 840.)

An action by indorsee against maker of a note, plea, that the note was made by deft. and one A. B., his partner, and that, whilst the plt. held the note, the deft. and A. B. delivered to the plt. nineteen signed bills of costs, &c., which were referred to taxation; that it was agreed that the balance found to be due from the plt. to the deft. and A. B. should be applied in part payment of the note; and the balance of the note, with interest, should be secured by a judgment, payable at certain periods, which had elapsed before the commencement of the suit; that the taxation had not been completed, and that the balance was not ascertained; that the deft. and A. B. had always been ready and willing to apply the balance due to the deft. towards the payment of the note, and to secure the balance due on the note by a judgment, in accordance with the agreement. Held, that the plea was bad on general demurrer (*Carter v. Wormald*, 1 Exch. 81; 5 D. & L. 131, Ex.)

The Accord must be executed.] An accord must be completely executed before it can produce any legal obligation, or, effect to extinguish the first debt, or, to create a new one (*Reeves v. Hearne*, 1 M. & W. 323; *Lynn v.*

Bruce, 2 H. Bl. 317;) and part execution of an accord and tender of the residue is insufficient (5 Co. R. 79 b; 2 H. Bl. 319; Walker v. Seaborne, 1 Taun. 526; Fitch v. Sutton, 5 Ea. 230.) An accord to do a thing at a future day is good, but it must be executed before action brought (1 Rol. Ab. 129, l. 14; Com. *Dig. Acc. B. 4.) But, if the accord be not founded on a new consideration, and be not so far binding on the debtor as [*33] to afford a fresh right of action to the creditor for its non-performance, an action lies on the original demand, even, before the time prescribed for rendering satisfaction (see Case v. Barber, T. Raym. 450; Wickham v. Taylor, Jones, 168; Peytoe's case, 9 Co. R. 79; Brown v. Wade, 2 Keb. 851.) An agreement subsequent to, and inconsistent with that declared on, is a good defence, if made before breach of the latter, and on a new consideration (Rippengale v. Lloyd, 5 B. & Ad. 742; Taylor v. Hilary, 16 M. & W. 741; Pearson v. Pearson, 5 B. & Ad. 864; Collingburne v. Mantell, 5 M. & W. 289.) And an agreement for a compensation with creditors is an answer to an action by a creditor who is party to it, for, it operates as a new agreement substituted by consent, and on good consideration for the original one, and not as accord and satisfaction (Good v. Chaseman, 2 B. & Ad. 335; Alchin v. Hopkins, 1 B. N. C. 102.) And, where there is an agreement to pay money, or, deliver goods in satisfaction, it is not sufficient to plead that he has always been ready to pay the money, or deliver the goods, or, even, a tender and refusal; but, there must be an actual acceptance thereof by plt. (Peytoe's case, 9 Co. R. 79; Allan v. Harris, Raym. 122; 2 N. R. 148; Drake v. Mitchell, 3 East, 251. If a party agree that the debtor shall pay a sum of money, or, perform some act at a future day as a satisfaction, this agreement is not available as a satisfaction before that period; so, where the agreement is to execute a mortgage (Allies v. Probyn, 5 Tyr. 1079,) or, to repair (Batley v. Homan, 3 Bing. N. C. 915; 5 Scott, 94; 3 Hodges, 184,) an averment of constant readiness to perform his part, &c., is not sufficient (Brown v. Wade, 2 Keb. 851; Com. Dig. Acc. B. 4.) The performance of one of two things stipulated for by an accord is insufficient; and, where it was agreed that plt. and deft. should deliver up respectively their parts of an indenture to be cancelled, it was held no satisfaction, though, deft. had delivered up his part (Russell v. Russell, 3 Lev. 189.) A plea to an *indebitatus* count, which stated that plt. was to pay himself out of some of deft.'s moneys which he was to receive, and that, through his own default he received nothing; was held bad, as being neither in accord, nor, satisfaction (Gifford v. Whittaker, 13 L. J. 325, Q. B.; 6 Q. B. 249; Griffith v. Owen, 13 M. & W. 58.)

By and to whom.] Satisfaction should proceed from the deft. (Edgecombe v. Rodd, 5 East, 294;) for, if it be executed by a total stranger, the deft. cannot avail himself of it (Ib.; *per* two Js., Cro. E. 541; 1 Str. 24.) Accord and satisfaction by a co-partner is a bar to an action against the others (Peytoe's case, 9 Co. R. 79 b; 12 East, 317;) and though, part of the satisfaction is the setting off of a debt due to that co-partner from the plaintiff (Wallace v. Kelsal, 7 M. & W. 264;) and acceptance of satisfaction from one joint tort-feasor discharges the rest (Dufresne v. Hutchinson, 3 Taunt. 117; Thurman v. Wild, 11 A. & El. 453; 3 P. & Dav. 289.) As to satisfaction by an agent, see Hills v. Mesnard, 11 Jur. 795; 16 L. J. 306, Q. B.

The satisfaction must be to the party having the legal interest in the debt, and must be so pleaded (Scholey v. Mearns, 7 East, 148.) Accord and satisfaction to one of several co-plts. will be so to all (5 Co. R. 117 b.; 13 East, 4, 6,) and may be pleaded as made to him *puis darrein continuance* (Wallace v. Kelsal, 7 M. & W. 264, 8 Dowl. P. C. 841; 4 Jur. 1064.)

See further, as to accord and satisfaction generally, Bac. Ab. and Com. Dig.

[*34]

* *Evidence for Defendant.*

This will depend much on the state of the pleadings. If the deft. take issue directly on the plea, the affirmative of the issue lies on the deft. Where the replication denies the payment, or, delivery and acceptance, or, the acceptance only (*Ridley v. Tindal, ante,*) in satisfaction, the deft. must prove both, and that the article, &c., was so paid and received as a satisfaction, and prove expressly the actual acceptance by the plt. Where on an issue as to the acceptance of a bill of exchange in satisfaction, the judge directed the jury, that if, the bill were such an one as, by the course of dealing between the parties, the plts. were bound to take, that was an acceptance in full satisfaction: it was held a misdirection, for acceptance in satisfaction must be an act of the will in the party receiving (*Hardman v. Bellhouse, 9 M. & W. 596.*) So, where, to a declaration on an agreement signed more than 20 years back, the deft. pleads a new contract and performance in satisfaction, he must prove the plea, and it will not be left to the jury to presume satisfaction of the original contract from lapse of time (*Siboni v. Kirkman, 1 M. & W. 418.*) A plea that the plt. drew and the deft. accepted a bill for 60*l.* in satisfaction, &c., is not supported by proof that the deft. remitted to the plt. a blank acceptance, with the words "nine months after date," written in the body, and 60*l.* in the margin, and that it was subsequently filled up by the plt. for 46*l.* only (*Baker v. Jubber, 8 Dowl. P. C. 538; 1 M. & G. 212; 1 Scott, N. R. 26.*) So, a plea, by acceptor of a bill for 100*l.* 6*s.*, of payment by the drawer to the plts. (the indorsees) is not supported by proof that the plts., who were bankers, on the bill being returned unpaid, entered it on the debit side of the drawer's (a customer of theirs) account thus: "B.'s (deft.'s) return, 100*l.* 6*s.*;" that the state of the account was then, and up to the commencement of the action against the drawer, to the amount of 400*l.*, and that the bankers had, on former occasions, allowed him to overdraw to the extent of 500*l.* or, 600*l.*, but, there was no agreement that they should do so (*Ryder v. Willett, 7 C. & P. 609; see Belcher v. Lloyd, 3 M. & Scott, 822; 10 Bing. 310.*) It seems, that on taking from a debtor the bill of a third person the omission to require the debtor's indorsement is not *per se* sufficient proof that he was not to be liable for the precedent debt, if, the bill were dishonoured (*Gross v. Blackburn, 10 Ves. 206.*) It is a question for a jury whether a bill has been taken on account, or, in satisfaction of a debt claimed; if the latter, the deft. cannot be sued, in any event, for the original debt; if the former, he may in general be sued when the bill has become due and is unpaid (*Goldshede v. Cottrel, 2 M. & W. 20.*) Though, whatever amounts to accord and satisfaction must be pleaded, and cannot be given in evidence under the general issue (*Alexander v. Strong, 9 M. & W. 733; 2 Dowl. N. S. 256; Weston v. Foster, 3 Scott, 155; 2 Bing. N. C. 693; 2 Hodges, 59;*) yet where an agreement to accept a certain sum in full discharge was received without objection, under the plea of *nunquam indebitatus*, and the plt. recovered only nominal damages, the court would not disturb the verdict (*Wright v. Skinner, 4 Dowl. P. C. 741.*) Assumpsit; plea, that plts. in E. T. 1827, impleaded defts. for same cause of action, and in T. T. pleaded thereto the general issue, and paid 5*l.* 15*s.* into court; that plts.'s costs were taxed at 8*l.* 5*s.* 6*d.*, and that they agreed with him to take the sum of 5*l.* 15*s.* out of court; that defts. paid the costs to the plts., and that they accepted, &c. the 5*l.* 15*s.* together with those costs in satisfaction and discharge,

&c. Replication, that plts. did not agree with defts, to take and receive the 5*l.* 15*s.* out of court, and did not accept, &c. the same together with *the costs in satisfaction and discharge, &c. It appeared [*35] the plts. received their taxed costs, but gave notice to the defts.'s that they would not receive the 5*l.* 15*s.* out of court, and that they should take out a rule to discharge the action on payment of costs; the 5*l.* 15*s.* remained in court; the latter costs were taxed and paid. Held, that the plts. in having received the amount of their costs could not be considered as having accepted the 5*l.* 15*s.*, together with those costs in satisfaction, &c., and that if in point of law it could have been so considered, the defts. ought to have pleaded that matter specially, and that the deft. having received his costs had assented to the discontinuance of the action upon the terms of the rule to discontinue (*Power v. Barham*, W. B. & C. 399.)

In trespass *q. c. f.* defts. pleaded that they acted as servants of B., who was no party to the suit, that they delivered up possession of the close to him; that afterwards, with the consent of the defts., they made satisfaction to the plt., which was accepted: it was held, that whether, or, not satisfaction by a stranger could be pleaded, it appeared, by the plea in this case, that B. was a co-trespasser, so as to be able to make a satisfaction which should enure to the benefit of all the defts. (*Thurman v. Wilde*, 3 P. & D. 289; *Edgecombe v. Rodd*, 5 East, 294; *Grymes v. Blofield*, Cro. E. 541; Com. Dig. Acc. A, 2, 5).

Evidence for the Plaintiff.

This also will depend entirely on the state of the pleadings. The nature of the evidence, generally, with which the plt. should be prepared, may be collected from the foregoing observations on the "*Evidence for the Defendant.*"

The taking a bill, &c., for a debt is *prima facie*, or, presumptive discharge, or, payment of the demand, and it becomes necessary for the creditor to rebut the inference (1 Ch. Contr. 770). To constitute an acceptance, there must be an act of the will. Every receipt is not an acceptance; but if the party accepts the bill, though, but, for a moment, for that, for which the other pays it, he cannot afterwards by his subsequent dissatisfaction get rid of the effect of it (*Hardman v. Bellhouse*, 9 M. & W. 680). The acceptance must be clearly proved; the jury cannot infer it from the course of dealing between the parties (Ib.). Where a creditor has taken a bill, or, note of a third party for the former debt, and upon its dishonour, brings an action for *such original debt*, and the debtor shows, at the trial, that a bill, or, note was taken on account thereof, it is incumbent on the creditor to prove those circumstances which obviate the effect of taking the bill and revive the original demand; as, that reasonable diligence was used to obtain payment from the acceptor, or, maker (3 & 4 Anne, c. 9, s. 7; *Bridges v. Berry*, 3 Taunt. 130); unless, indeed, the debtor is not a party to the bill, or, note, in which case, he cannot, it seems, require strict proof of presentment for payment, or, that he had formal notice of dishonour; indeed, he cannot defend even, where no presentment has been made, or notice given, if it appear he was not thereby prejudiced (*Holbrow v. Wilkins*, 1 B. & C. 10; *Van Wert v. Woolley*, 3 B. & C. 439; *Murray v. King*, 5 B. & Ad. 165; *Swinyard v. Bowes*, 5 M. & Sel. 52; see *Goodwin v. Coates*, 1 M. & R. 21); and where a note, not negotiable, is indorsed by a debtor to his creditor on account of a debt, which is dishonoured by the maker, the right to sue for the original debt revives, though, no notice of dishonour has been given to the debtor (*Plimley v. Westley*, 2 B. N. C. 249). If the debtor were the acceptor, or,

maker of the bill, or, note, although, he is not entitled to presentment, &c., yet, if, the creditor sue him for the original demand, and it appear [*36] that the bill was given *on account thereof, the plt. must produce it to show its dishonour, and that it is not held by a third person, or, that it was upon a wrong stamp (see *Cundy v. Marriot*, 1 B. & Ad. 696; *Wilson v. Vysart*, 4 Taunt. 288); or, must show that it was dishonoured, and has been destroyed, or that it is within his control, as, that it lies protested for dishonour in the hands of his foreign agents (see *Hadwell v. Mendizabell*, 10 Moore, 477; *Barden v. Halton*, 4 Bigh. 454). In this case the action was for the price of the goods, for which the bills had been given by deft.; plt. produced the bills overdue and dishonoured at the trial, but, it appeared, that when the action was brought the bills were in the hands of third parties who sent them before the trial to the plt., without any money passing, but, there was no evidence that those parties held the bills for value. Held, that the action was maintainable. *Semble*, that if it had appeared that the third parties held the bills for value, when the action was brought, it could not have been maintained (Ib.).

Form of Pleadings.

Plea.] The plea must be specially pleaded (R. G. H. T. 1834). Where the bond is taken in satisfaction it must be specially pleaded, if, given after the original debt has been contracted (see *Weston v. Forster*, 2 B. N. C. 693). *Aliter*, when the bond is given at the time such debt accrues, in the latter instance the specialty excludes the implied promise, and the general issue suffices (Ib.; see *Yates v. Aston*, 4 Q. B. 182; 3 M. & G. 213), and an averment in the plea of payment of the bond, or, bill would render it bad for duplicity (*Wright v. Watts*, 3 Q. B. 89). The plea must be framed so as to afford a complete answer to the whole of the demand it professes to answer (*Thomas v. Heathorn*, 2 B. & C. 477; 2 Chit. R. 303). The safest way is to plead it as a satisfaction, and not to state the accord and agreement (Com. Dig. Acc. C); the plea must allege the *delivery* (Step. Pl. 331), and set out what the deft. gave in satisfaction. It seems unnecessary to allege the satisfaction to be reasonable, according to the *dictum* in 1 Stra. 426, which was overruled, *Heathcote v. Crookshank*, 2 T. R. 26, a; nor does it seem generally necessary or advisable to allege the whole of the satisfaction (Step. Pl. *supra*; 3 Ch. Pl. 925, n. a). It must be expressly averred that the goods were *accepted* in satisfaction and discharge; and an averment that they were given in payment and satisfaction is insufficient (*Drake v. Mitchel*, 3 Ea. 256-8; 1 Str. 573). So, where a tenant had covenanted to pay 25*l.* rent and 5*l.* additional rent for every acre newly brought into tillage, a plea of acceptance of 25*l.* "as and for all rent due without demanding or requiring payment of such penalty or additional rent," was held bad on demurrer (*Denton v. Richmond*, 1 C. & M. 734). If the plea profess to answer the whole demand, but apply to part only, it will be fatal on demurrer (1 Saun. 28, n. 3); therefore if, in assumpsit on *several promises*, defendant allege satisfaction "of the cause of action," it is bad, "being only an answer to one of the causes of action" (*Hopkinson v. Tahourdin*, 2 Chit. R. 303; *Willes*, 55; *Thomas v. Heathorn*, 2 B. & C. 477; S. C. 3 D. & R. 647). It is necessary to mention the kind of goods (*Morley v. Culverwell*, 7 M. & W. 180; see *Siboni v. Kirkman*, 1 M. & W. 418). It is not required that the chattels should be of equal value with the debt (*Andrew v. Boughey*, Dyer 72, a; *Thompson v. Percival*, 5 B. & Ad. 932, *per* Lord Denman, C. J.; and see *Mitchell v. Craig*, 10 M. & W. 367). A plea of composition with creditors is bad, even after verdict, for not stating that the payments were made at the times provided for by the accord; or, at least, a tender made of them (*Evans v. Powis*, 11 Jur. 1043, Ex.).

*Action by the drawer against the acceptor of two bills of exchange for 30*l.*, and 41*l.* 16*s.* 4*d.* respectively; plea as to 13*l.* 3*s.* 2*d.*, parcel of the first count, and to all the second count, that deft. being indebted to the plt. in respect to the causes of action in the first and second counts mentioned, and to one E. B. in certain other large sums of money, and unable to pay them their debts in full, agreed with them to pay to the plt. 11*l.* 16*s.* 10*d.*, in part of the debts in the first and second counts mentioned, and to pay to them 10*s.* in the pound as a composition, in full satisfaction and discharge of the residue of the plts.' debt and of the debt of E. B., by certain payments at certain times mentioned in the plea, concluding with an averment of readiness and willingness to pay, with a tender of the amount of the composition, and a subsequent payment of it into court, *held bad*. *Semble, per curiam*, that if, the plea had been, that a new mutual agreement between the plt., the deft., and E. B., binding on each at the time when it was made, was given as a substitution for, or, in satisfaction of the debt due from the deft. to the plt., it would have been good; and in that case, it would be a question for a jury to decide whether the plt. agreed to accept the agreement itself, not the performance of it, as a satisfaction for his debt (*Evans v. Powis*, 11 Jur. 1043, Ex.)

A plea of accord and satisfaction after action brought should allege a payment in discharge, not only, of the promises and undertakings in the declaration, but, of all costs and damages accrued by reason of the non-performance of those promises and undertakings (*per Abbott*, C. J., 5 B. & A. 886; 1 D. & R. 546.) Therefore, a plea in satisfaction "of the promises and undertakings in the declaration mentioned" is bad on demurrer, as, not answering the costs (*Francis v. Crywell*, *ib.*; but a plea "in full satisfaction and discharge of all damages sustained" is good on general demurrer (*Corbell v. Swinburne*, 3 N. & P. 551; 8 Ad. & E. 673. *Semble*, as "damages" include costs, *per Ellenborough*, C. J., *Phillips v. Bacon*, 9 Ea. 304; and *per Abinger*, C. B., in *Henry v. Earl*, 8 M. & W. 233.) In the latter case it was held that a plea "in full satisfaction and discharge of all the causes of action in the declaration mentioned" was good as to so much as it covered, and that the plt. might sign judgment for the part unanswered and for costs as part of the damages (*Ib.* and 5 Jur. 528; 8 Dowl. P. C. 725.)

A plea of satisfaction to one of three plts. need not aver authority from the other plts. to make the settlement, nor need it be proved (*Wallace v. Kelsall*, 7 M. & W. 264.)

If the plea be of a bill, a note, or security, it may be pleaded as 'given in satisfaction, or, on account or "in discharge" (see *Emblin v. Dartnell*, 1 D. & L. 591;) but it should be pleaded only, to the amount of the sum contained in such bill, note, or security, or allege that deft. was found indebted in that sum and "no more" (*Thomas v. Heathorn*, 2 B. & C. 481.) The correct way of pleading is to say, "as to all the sums of money except £—, *non assumpsit*;" and then, as to that sum, that the bill was accepted, &c. The plea should show that the bill was accepted as well as given on account, or, in satisfaction (*Crisp v. Griffiths*, 2 C. M. & R. 124; *Senior v. Lloyd*, 3 D. P. C. 752.) A plea to an action on a simple-contract debt, that the deft., who was the payee of a note, &c., indorsed it to the plt. for, and on account of, the debt, should negative that the note is *overdue* and unpaid, but, it is otherwise where the bill, &c. is pleaded as having been given in *satisfaction* (*Sard v. Rhodes*, 1 M. & W. 153; *Senior v. Lloyd*, 3 D. P. C. 814.) A plea averring the acceptance of one bill of exchange in satisfaction and discharge of another, which appeared from the declaration to be negotiable, and payment of the amount *to the holder (a third [*38]

party) at maturity is good on special demurrer, without averring that the second or substituted bill was negotiable (*Lewis v. Lyster*, 4 Dowl. P. C. 377.) Accord and satisfaction by one deft. is in general a bar for all (Com. Dig. Acc.; *Hillman v. Ancles*, Skin. 391; *Thompson v. Percival*, 5 B. & Ad. 932;) but, in an action against one of two obligors severally and jointly liable, an acceptance of a smaller sum in compromise of the action is no bar to a future action, against the other obligor (*Field v. Robins*, 8 Ad. & E. 91.) Action against acceptors of a bill for 419*l.* 2*s.*: damages 500*l.*; plea, first, as to 4*l.* 18*s.* parcel, &c., payment of 5*l.* into court; and, secondly, "as to the residue of the sum mentioned in the declaration," that the plts. were the brokers of C. I. H., and sold certain property for him for 415*l.* 12*s.* 6*d.*, payable on a day which would arrive before the bill would become due, and that he applied to the plts. to advance him the amount, which they agreed to do, if C. I. H. would procure the defts. to accept a bill for 419*l.* 2*s.*, and that the plts. agreed to appropriate the purchase-money, when received by them, towards the payment of the bill; and that, thereupon, the defts. for the accommodation of C. I. H., and without consideration, accepted the bill, and the plts. advanced C. I. H. 415*l.* 12*s.* 6*d.*, and afterwards, and before the bill became due, they received the purchase-money, viz., the 415*l.* 12*s.* 6*d.*, which was sufficient to satisfy the residue of the sum in the declaration mentioned, and all damages, &c. Held, that these facts being proved, were a good answer to the action; secondly, that they were evidence of a payment to the plts. by the defts., through the agency of C. I. H., of 415*l.* 12*s.* 6*d.*; thirdly, that the defts. were, as between the plts. and themselves, entitled to credit for the full sum of 415*l.* 12*s.* 6*d.*, without reference to a claim which the plts. had on C. I. H. for a sum of 3*l.* 15*s.*, which was admitted to be due by him to them, by virtue of an agreement respecting the mode of paying the brokerage; lastly, that the pleas, though informally pleaded to the sum mentioned in the declaration, yet, must be taken after verdict to apply to the sum mentioned in the bill (*Hills v. Mesnard*, 16 Law J. 306, Q. B.; 11 Jur. 795.)

A plea of accord without satisfaction is bad on general demurrer (*Cannan v. Read*, 10 Law J. 242, C. P.) To assumpsit for money lent, &c., a plea that deft. at plt.'s request entrusted and authorized the plt. to collect several sums of money then due to the deft. exceeding the sum due to the plt. and out of those moneys to pay himself, and that plt. afterwards neglected to collect those moneys, and that they thereby became lost to the deft. is a bad plea in accord and satisfaction (*Gifford v. Whittaker*, 8 Jur. 1134, Q. B.; *Bailey v. Moore*, 10 Jur. 592.) A plea of delivery of goods to a third party at plt.'s request and an agreement, "then, to wit on the day and year aforesaid," (the day of delivery,) by the plt. to accept such delivery in satisfaction and discharge is bad on a special demurrer, as not showing with sufficient certainty that the agreement was contemporaneous with the delivery (*Stead v. Poyer*, 9 Jur. 856; 1 C. B. 782.)

Replication.] Formerly the mode of replying was to deny the delivery or payment in satisfaction, and protest against the acceptance, or *vice versa* (*Steph. Pl.*; *per Patteson, J.*, 7 Ad. & El. 135; *Hob.* 178; *Young v. Rudd*, 5 Mod. 86;) but protestations are no longer allowed (*R. G. H. T.* 4 Will. IV. r. 2, pl. 12.) Where the receipt is confessed the acceptance should not be traversed (1 T. Ray. 60.) The replication may take issue on either allegation (*Pinnel's case*, 5 Rep. 117, a; *per Tindal, C. J.*, 1 Scott, 479; or on both, *Webb v. Weatherby*, ib. 477;) and a replication alleging that the plt. did not

*accept in full satisfaction, puts in issue the payment as well as the [*39] acceptance (*Ridley v. Tindal*, 7 Ad. & E. 134.) Where to an

action for use and occupation, the deft. pleaded, first, that the plt. seized goods of the deft. sufficient to pay the rent and costs, and detained them for two years, and it was then agreed between them that the plt. should retain the goods in satisfaction of the debt, and that he did so accordingly: secondly, that after a wrongful seizure of goods of sufficient value, &c. the plt. and the deft. agreed that the plt. should retain the goods, and that they should relinquish their claims on each other: thirdly, that they agreed that the plt. should retain the goods so seized, and that they should relinquish their claims, and the deft. should give up possession. Replications, traversing the seizure of goods of sufficient value, &c. Demurrer: Held, that the pleas were good, and that the replications were bad for putting in issue matter which was only inducement to the acceptance in satisfaction, such acceptance being the material part of the pleas (*Jones v. Sawkins*, 17 Law J. 92, C. P.) If the deft. plead that he delivered a bill or note in payment, plt. may traverse the plea; or, admitting it, show that the bill or note has been dishonoured (*Kearslake v. Morgan*, 5 T. R. 513.) The plt. replied, that when the bill became payable the party who had endorsed it to the deft. did not pay, of which the deft. afterwards, &c., to wit, on the 3d of December, &c., "had notice." Held, good on demurrer, it not being necessary to say "due notice" (*Cook v. Gell*, 10 Law T. 205, Q. B.) So, in debt for money had and received, &c., the deft. pleaded, that, after the accruing of the debts and causes of action, the deft. executed a deed, securing to the plt. a certain annuity, which he accepted and received in full satisfaction and discharge of all the said several debts, and causes of action. Replication, that no memorial of the annuity deed was inrolled pursuant to the statute; that the annuity being in arrear, the plt. brought an action to recover the amount of the arrears; that the deft. pleaded in bar of that action the non-inrolment of the memorial; and that thereupon, the plt. elected and agreed that the indenture should be null and void, as pleaded by the deft. and, discontinued the action. Held, a good answer to the plea, inasmuch, as, it showed that the accord and satisfaction, thereby set up, had been rendered nugatory and unavailing by the act of the deft. himself (*Turner v. Browne*, 3 C. B. 157; 4 D. & L. 201.) Where the plea states an acceptance of the bill or note "for and on account of," as in the common form, or "in discharge of" the debt, if the replication traverse that the acceptance was "*in satisfaction and discharge*," it is bad on special demurrer, as traversing what is not alleged (*Emblin v. Dartnell*, 1 Dowl. & L. 591.) Where the plea alleged an agreement to re-deliver brandy in satisfaction of a bill and a re-delivery, and acceptance of the brandy in pursuance of the agreement, a replication traversing the agreement and its performance by the re-delivery of the brandy was held bad for duplicity (*De Wolf v. Beavan*, 2 D. & L. 345; 13 M. & W. 160.) When a plea averred a set-off on account of a debt due from plt. to deft. and then alleged, that an account and settlement of that debt, and of the debts in declaration, was accepted by plt. in accord and satisfaction; held, sufficient in the replication to allege merely, that plt. was not indebted in manner and form, &c. (*Scarmoretti v. Grandine*, 5 M. & W. 658.)

If the deft. plead a payment or delivery, C., after action brought in satisfaction "of the causes of action in the declaration," the plt. may sign judgment for costs and damages (*Henry v. Earl*, *ante*, p. 37.) So, if he plead in satisfaction of the "*damages*," and the payment did not include costs, the plt. may take issue (*Ib.*, and **Corbett v. Swinburne*, [*40] *supra*.) In replying to a plea of accord and satisfaction in trespass, plt. may deny the accord, or state it to be for another trespass, and traverse the acceptance in satisfaction; or he may reply, that deft. was guilty after the accord (*Com. Dig. M, 13*;) or, if necessary, new assign. As

to when it is unnecessary to new assign in assumpsit, see *James v. Lingham*, 5 Bing. N. C. 553; in debt, *Freeman v. Crofts*, 4 M. & W. 4; *Monkman v. Shepherdson*, 11 Ad. & El. 411; in trover, *Branker v. Molyneux*, 1 M. & G. 710.

A replication denying the delivery, or, receipt, &c., in satisfaction must conclude to the country (1 Saund. 103 c, n.)

Precedents.

Plea of accord and satisfaction, in assumpsit, by delivery of goods.

The deft. by A. B., his attorney [or if a second plea, "and for a further plea the deft.] says that, after the making of the said several promises [or if in debt, after the accruing of the several causes of action] in the declaration mentioned, and before the commencement of this suit, to wit, on, &c., *the deft. delivered to the plt. one ton of Riga hemp, and one hundredweight of Russian tallow, in full satisfaction and discharge of the several promises [or causes of action] in the declaration mentioned, and of each and every of them: and which said ton of Riga hemp, and said hundredweight of Russian tallow, he, the said plt., then accepted and received, of and from the deft., in full satisfaction and discharge of the said several promises [or causes of action] in the declaration mentioned, and of each and every of them. And this, &c. (*Usual verification.*)

Same, and delivery of bill of exchange, which is in the hands of a third party.

[*Copy to the Asterisk*]* An account was had and stated, by and between the plt. and deft., of and concerning the said several sums of money in the declaration mentioned, and upon that occasion the deft. was found in arrear and indebted to the plaintiff in the sum of £—, for which said sum of £—, the plt. made his bill of exchange, in writing, and directed the same to the deft., and thereby required the deft. to pay to the plt.'s order the said sum of £—, for value received, two months after the date thereof, and the defendant at the request of the plt., then accepted the said bill, and delivered the same to the plt., who then accepted and received the same in discharge of the said sum of £—, and then indorsed and delivered the same to a certain person, to the deft. unknown, who from thence hitherto has been, and still is the holder thereof, and entitled to sue the defendant upon the same. And this, &c.

The like in covenant or debt.

[*Commencement as usual*] says that he, the deft., before the commencement of this suit, to wit, on, &c., paid to the plt. the sum of £—, in full satisfaction and discharge of the said sum of £—, in the said breach of covenant mentioned, and of all the damages by the plt. sustained, by reason of the nonpayment thereof, which said sum of £— the plt. then accepted and received of and from the said deft., in full satisfaction and discharge of the said sum of £—, in the said breach of covenant mentioned, and of the damages of the plt. by him sustained, by reason thereof. And this, &c.

Plea of accord and satisfaction in trespass.

[*If necessary, actio non, as usual, see "Trespass."*] Because he says, that, after the committing of the said trespasses, as aforesaid, and before the commencement of this suit, to wit, on, &c., he, the deft., paid to the plt. the sum of £— for, and in full satisfaction and discharge of the said trespasses in the said declaration mentioned; and which said sum of £—, he, the plt., then accepted and received of and from the deft., in full satisfaction and discharge of the said trespasses, and each and every of them, &c. (*Usual conclusion: see "Trespass;" for the general issue, see ib.*)

Plea of payment after action brought.

And for a further plea in this behalf, the deft. says that the plt. ought not further to maintain his aforesaid action thereof against him, because he saith, that [*41] after the making of the said promises in the said declaration mentioned, *and after the issuing of the writ in this cause against the deft. to wit, on, &c., [*day of payment or about*] he the deft. paid to the plt. a large sum of money, to wit, the sum of £—, in full satisfaction and discharge of the said several promises, in the said declaration mentioned, and also of all damages sustained by the plt. by reason of the non-per-

formance of such promises, and also of all the costs then incurred and sustained by the plt. in this suit, and which said sum of £—, he the plt. then accepted and received of and from the deft. in full satisfaction of the said promises, damages and costs. And this the deft. is ready to verify, wherefore he prays judgment if the plt. ought further to maintain his aforesaid action against him.

Replication to a plea of satisfaction in assumpsit.

And the plt. "as to the plea of the deft. by him above pleaded," [or if the replication is in maintenance of part only of the count, "as to the plea of the deft. by him above pleaded, as to the said sum of £—, parcel," &c.] [or if the plea commence with actionem non, the plt. says that, by reason of any thing in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the deft., because he says] that he, the plt., did not accept [or, if there has been no delivery whatever, that he, the deft., did not deliver] the said one ton of Rigi hemp and the said one hundredweight of Russia talow, in full satisfaction and discharge of the said promises and undertakings and causes of action, and of all the sums of money in the said declaration mentioned, in manner and form as the deft. hath above alleged. And this the plt. prays may be inquired of by the country, &c.

Replication to plea of delivery of promissory note, denying the delivery.

And the plt. [*precludi non*, if necessary.] Because he says, that the deft. did not make and deliver to him, the plt., the said promissory note in the said plea mentioned, for and on account of the said sum of £—, parcel of the said several sums of money in the said declaration mentioned, and the said several promises and undertakings relating thereto; nor did the plt. take or receive of and from the deft. the said promissory note, for and on account of the same sum of £—, and the said promise and undertakings relating thereto, in manner and form as the plt. hath above, in his said plea in that behalf, alleged. And this the plt. prays may be inquired of by the country, &c. (*If a good note or bill has in fact been given, plt. should then reply the non-payment as follows:*)—

Replication to a plea of delivery of a bill of exchange accepted on account, that the bill was dishonoured.

Says, that the said bill of exchange in the said plea mentioned bore date on a certain day and year therein, in that behalf mentioned, to wit, &c., and that the same became due and payable long before the commencement of this suit. And the plt. further says that after the said bill became due and payable according to the tenor and effect thereof, and before the commencement of the suit, to wit, &c., the said bill was shown and presented to the defendant for payment thereof, but that he the defendant did not, nor would when he was so requested as aforesaid, or at any other time before the commencement of this suit, pay the said sum of money in the said bill specified, or any part thereof, but wholly neglected and refused so to do, and the said sum of money in this bill mentioned at the time of the commencement of this suit was, and still is wholly due and unpaid, and the plt. at the time of the commencement of this suit was, and still is the holder of the said bill. And this the plt. is ready to verify, &c.

See a form of plea bad on special demurrer as being a plea of accord without satisfaction as to part of the declaration, and as to the other amounting to the general issue, *Collingbourne v. Mantell*, 5 M. & W. 289; 7 Dowl. 518; 3 Jur. 847; and also a form which was held to be a plea of a substituted agreement, and not of accord and satisfaction, *Taylor v. Hilary*, 1 C. M. & R. 741. See other forms of pleas and replications, 3 Ch. Pl.; 3 Wentw. Prec. 135, and index to vol. 6. A form of plea of delivery of one bill of exchange in satisfaction of another, 4 Dowl. P. C. 377.

*ACCOUNT—ACTION OF.

[*42]

This form of action is now seldom used. See, as to it, *Bac. Ab. Accompt*; *Vin. Ab. Account*; *Baxter v. Hosier*, 7 Scott, 233; 5 Bing. N. C. 288;

Sturton v. Richardson, 2 D. & L. 182; 13 M. & W. 17; Eason v. Henderson, Q. B., 18 Dec. 1848. See a form of declaration, 3 Ch. Pl. 565.

Action of Account.] A. being the clerk and manager of B., the sheriff of Montreal, received and paid in that capacity various sums of money on B.'s account, in the course of the business of the office. B. brought an action against the representatives of A. for an account of the receipts and application of the moneys which passed through A.'s hands while in B.'s office: held, in such circumstances, by the Judicial Committee, reversing the judgment of the Court of Appeal of Lower Canada, that such action would not lie against A.'s representatives (*Ermantinger v. Gugsy*, 5 E. F. Moo. 1).

A tenant in common who occupies and takes the whole produce derived from the culture of the common property, the whole expense of which is sustained by himself, but receives no rent or any other profit in respect of the property, is liable to account to his co-tenant under 4 Anne, c. 16, s. 27 (*Eason v. Henderson*, 13 Jur. 150; 18 Law J., Q. B. 69).

The receipt by one co-tenant of the whole profits is *prima facie* a receipt of more than his just share, and will render him liable to render an account to his co-tenant as bailiff, though on taking such account it may turn out that he is a creditor, not a debtor (*Ib.*).

Therefore in an action of account by a tenant in common against the executor of his co-tenant, the declaration stated that testator had the care and management of the whole to receive and take the rents and profits, to the use and profit of plt. and testator, and as bailiff of plt. of what he should receive more than his just share and proportion to render a reasonable account to plt. The testator was in the sole occupation, and received the whole profits, but no part was underlet; he received no rents, issues, or profits, other than the produce and profits derived from the culture of the lands to the expense of which plt. in no way contributed: held, that deft.'s testator was properly charged under sect. 27 of stat. 4 Anne, c. 16, as bailiff (*Ib.*).

Amount Stated.] In an action on an attorney's bill, if plt. fail on the count for work and labour, because no bill has been delivered, he cannot recover under a count upon an account stated, though he prove that the charges were assented to by the client (*Brooks v. Bockett*, 9 Q. B. 847); and to the latter count it is a good plea that the account was stated solely of and concerning charges for work done as an attorney, and that no bill was delivered (*Scadding v. Eyles*, 9 Q. B. 858).

ACCOUNT STATED.

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Form of Remedy.] The form of Remedy to recover money due upon an account stated is by an action of debt or assumpsit (Cro. E. 654). The difficulty and intricacy of the account makes no difference (5 Taunt. 431).

Form of Pleadings, &c.

Declaration.] It is advisable in declarations in assumpsit, and in debt (except in actions against infants) to insert an account on an account stated, and by the R. G. H. T. 4 Will. IV. this count may be joined with any other count for a money demand, although, it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts; but then his failure to establish it will subject the plt. to the costs of the issue (R. G. H. T. 2 Will. IV.). The acknowledgment by the deft. that a certain sum is due creates an implied promise to pay the amount, and it is not necessary to set forth the subject-matter of the original debt (Milward v. Ingram, 2 Mod. 44; Foster v. Allanson, 2 T. R. 480); the sum in the count alleged to be due is not material (Rolls v. Barnes, 1 Bl. R. 65; Roades v. Barnes, 1 Burr. 9); it suffices to state that the deft. was found indebted in any sum large enough to cover the demand (2 Saund. 122, n. 3). In an action against A., B., and C. the wife of B., in order to give in evidence a promise by A. before the marriage of B. & C. to take the case out of the Statute of Limitations, a count on such promise before marriage must be added (Pittam v. Forster, 1 B. & C. 248).

Care must be taken that it meets the evidence. Therefore in actions by or against executors, &c., if it be material for the plt. to avail himself of a promise or acknowledgment since the death of the testator, &c., a count should be added, on an account stated to or by the executor, &c., in that character; otherwise *such promise or acknowledgment [*43] cannot be given in evidence (Sarell v. Wine, 3 Ea. 409; Willes 29; 1 Ch. Pl. 186, 308). An account stated by the deft. as executor or administrator of moneys due from the testator, &c., may be supported and joined with counts upon promises by the testator or intestate (2 Saun. 117 e); and a count on an account stated by an executor, as such, of moneys due and owing from *him* in that character, may be joined with counts on promises by the testator (Powell v. Graham, 7 Taun. 580; S. C. 1 Moore, 305).

Plea.] There is nothing peculiar relating to the plea, which is usually *non assumpsit*, or, *nunquam indebitatus*. See "ASSUMPSIT," "DEBT." If the account be stated and agreed of what is due for growing crops not previously severed, it is a valid plea that there was no contract in writing signed within the Statute of Frauds (29 Car. II. c. 3, s. 4), but, if, this account has been stated after the severance that fact might be replied (Falmouth (Earl) v. Thomas, 3 Tyrw. 26.) *Nil debet* is not pleadable (1 Ch. Pl.)

A plea that the plt. and deft. were partners, and that their accounts were not adjusted, is bad, as amounting to the general issue (Worrall v. Grayson, 1 M. & W. 166; see "PARTNERS.") Nor can the deft. plead the general issue by statute (Calvert v. Moggs, 10 Ad. & E. 632; but see Hankey v. Cobb, 1 Q. B. 494.) If the account is stated of a debt due of a third person to the plt., and which deft. promised to pay without any consideration, this is a defence on the general issue (French v. French, 2 M. & Gr. 644.)

Where the plt.'s particulars do not show that he intends to proceed on a distinct cause of action on the account stated, it is usual, and it seems, sufficient to plead *non assumpsit* to that count, and the special plea to the count on the original debt (see Eike v. Nokes, 4 M. & Sc. 585.) But, if the par-

particulars are so framed as to enable the plt. to recover for them, independently of the other claim, then the defence should be specially pleaded to those items which form the consideration for the account stated to that count specially (see *Arthur v. Dutch*, 2 Jur. 118, Ex.; Ch. Pl. by Pearson, 241.) Where a plea pleaded to a count for work, and also, to another count on an account stated, averred matter of defence applicable only to the work: held bad, for want of an averment that the account was stated concerning the work mentioned in the first count (*Rayner v. Wright*, 3 Q. B. 922.) A plea pleaded to 20*l.* parcel of the first count, and also to 20*l.* parcel of the count on the account stated, averring that they were the same debt, and then answering 20*l.* only, is good (*Mee v. Tomlinson*, 4 Ad. & E. 262.) But a plea as to 4*l.* parcel of the sums in the first count mentioned, averring that, that was the same debt as a sum of 4*l.* parcel of the count on the account stated, and then answering 4*l.*, was held bad, as answering in the body of it two sums, while professing in its commencement to answer only one (*Shand v. Rawlinson*, 5 M. & W. 468; but see *Foot v. Baker*, 5 M. & G. 335, n. b.) It is observed that as the plt. claims *two* sums in the two counts, the account stated must be understood as alleged by the plt. to have been stated of sums *other* than that separately demanded in the first count, whether it be so expressed in the count or not, and so the plea would be bad for duplicity, for the plea, besides the special answer, operates as a plea of *nunquam indebitatus* to the last count, and to an undivided moiety of both counts, but *quare*. See *Hopkins v. Logan*, where deft. pleaded that the account was stated of and concerning a specialty debt not then due (7 Dowl. 361;) but this would seem to amount to *non assumpsit*. See a plea that the debts stated in the indebitatus count, and on the account stated, are one and the

[*44] same *sum and payment, or other defence to that sum (*Guttie v. Field*, H. T. 1846, Q. B.; *Hammond v. Dayson*, April 1846, Ex.).

Precedents.

This count is now usually joined with other counts, and generally runs thus: "And for money found to be due from the deft. to the plt. on an account stated between them." If however there be no other count, the usual commencement must be inserted, and the conclusion will be as in the ordinary cases of assumpsit or debt. The word "then" is unnecessary (*Bingham v. Stanley*, 8 Ad. & El. 778; *Leaf v. Lees*, 4 M. & W. 579; *Lane v. Thelwall*, 1 Tyrw. & G. 334; *Bayley v. Durham*, 1 P. & D. 58.) The count need not run "by and between them" (*Debenham v. Chambers*, 3 M. & W. 128; *Robinson v. May*, 6 D. P. C. 306.)

As to particulars of demand, see Ch. Pl. by Pearson, 50, n.; *Roberts v. Elworth*, 2 D., N. S. 456. Where there is evidence of an admission amounting to an actual account stated between the parties, it may be given in evidence under particulars asserting that the same was due on the considerations to which the admission related (*Simmons v. Wood*, 5 Q. B. 170.)

Evidence for Plaintiff.

Mode of Accounting.] An admission of a balance or acknowledgment made by one party to another, that a sum of money is due to the latter, is sufficient *prima facie* evidence to entitle the plt. to recover that sum on an account stated (2 Mod. 44; *Truman v. Hurst*, 1 T. R. 42; *Knox v. Whalley*, 1 Esp. 159; *Dawson v. Remnant*, 6 Esp. 24.) But an acknowledgment by a deft. after action brought, of money being due to the plt. when there is no debt or account between them, proved to have existed before action brought, is not evidence of an account stated (*Allen v. Cook*, 2 D. P. C. 546), nor is

a compulsive admission (*Tucker v. Burrow*, 7 B. & C. 623). The admission should be clear and unqualified (*Evans v. Verity*, 1 R. & M. 239; *Calvert v. Baker*, 4 M. & W. 417). It is evidence, although it refer to the subject of a written agreement (*Newell v. Hall*, 6 M. & W. 662). But not if made for the purchase of peace (*Wayman v. Hilliard*, 7 Bingh. 101). An entry in a bankrupt's examination of a certain sum being due to A. is evidence of an account stated (*Eicke v. Nokes*, 1 M. & Rob. 359). There must be an acknowledgment of a subsisting debt; therefore where a party examined before commissioners of bankrupts admitted that he had received a sum of money on account of the bankrupt after an act of bankruptcy, but not that it was a subsisting debt, held, that this would not support a count on an account stated with the assignees (*Tucker v. Barron*, 7 B. & C. 623). An agreement by a member of a company to pay the plt.'s bill is evidence of an account stated, though the debt. become a member after the debt was incurred (*Barker v. Birt*, 10 M. & W. 61). *Semble*, that a compulsory admission made before commissioners of bankrupts is not evidence of an account stated (*Ib.*).

Proof that debt. stated that he would call and settle the amount of the debt sent in, is sufficient (*Clarke v. Glennie*, 3 Star. 10). So, is proof of his sending 5*l.* on account, and stating that he would pay the remainder next week (*Peacock v. Harris*, 10 Ea. 104). But proof of a mere qualified acknowledgment is not sufficient (*Evans v. Verity*, 1 R. & M. 239; *Green v. Davis*, 4 B. & C. 235; 6 D. & R. 306; see *Calvert v. Baker*, *supra.*) The following memorandum, signed by the debt.:—"Mr. C.; I beg you will not proceed against *me, for A.B., for the 100*l.* which I owe [*45] her, and I will pay her as soon as I am able," though it might be *prima facie* evidence on an account stated, was held not sufficient to render the debt. liable on such a count, when it appeared that the debt in respect of which the memorandum was written was due from the deceased husband of the debt. to the former husband of the plt. (*Petch v. Lyon*, 15 Law J. 398, Q. B.).

An acceptance of the bill is evidence of an account stated by the acceptor with the holder (1 H. Bl. 239; *sed vide* *Taylor v. Higgins*, 3 Ea. 169; *Whitwell v. Bennett*, 3 B. & P. 559; *Johnson v. Collings*, 1 Ea. 98;) at all events, it is so, in an action at the suit of the drawer (*Highmore v. Primrose*, 5 M. & S. 65,) or at the suit of a payee, who is also drawer (*Rhodes v. Gent*, 5 B. & A. 245.) A promissory note is evidence as an account stated, in an action by the payee against the maker (*Story v. Atkins*, 2 Str. 719; ante, "BILLS," &c.), especially if it be expressed to be for value received (*Clayton v. Gosling*, 5 B. & C. 360;) *Highmore v. Primrose*, 5 M. & S. 65;) but not if payable on a contingency (*Morgan v. Jones*, 1 C. & J. 162;) nor, if, improperly stamped (*Green v. Davis*, 4 B. & C. 235.) But, if admitted, it will be evidence of an account stated at the time of the date, and in answer to a plea of the Statute of Limitations will show that the cause of action did not accrue until the time at which it is payable (*Wheatley v. Williams*, 1 M. & W. 533.) A promise by the drawer to pay the indorsee and holder of bills overdue is evidence of an account stated in an action by the indorsee against the maker (*Oliver v. Dovatt*, 2 M. & Rob. 230.) In an action by indorsee against indorser the bill, or, note will not be evidence unless, there be an admission of the money being due (*Bird v. Legge*, 5 M. & W. 418.) A promissory note dated August 8th, 1844, from the debt. to the plt. for 23*l.* 2*s.* 6*d.* "being the amount of interest due on a promissory note from the undersigned to the late W. N. (the plt.'s testator) for 117*l.* 4*s.*, dated 6th July, 1838, up to the 6th July, 1844." Held, an admission that 117*l.* 4*s.* was due to the plt. as executor on the 8th August, and evidence of an account

stated with him as executor to that amount (*Penny v. Slade*, 10 Jur. 31; 1 D. P. C., N. S. 322; *nom. Perry v. Slade*, 8 Q. B. 115.)

A company having contracted a debt with the plt. and the debt not being paid, he laid an attachment on money of theirs in the hands of bankers; while the attachment was in force, the deft. representing himself to be a director of the company, called on the plt.'s attorney for the purpose of making an arrangement about the debt, when it was agreed that the following letter should be written by the deft. to the plt., which was accordingly done: "As director of the B. W. company I have to request that you will accept the sum of 50*l.* on account of your claim of 116*l.* 19*s.* 7*d.* against the company and in consideration of your withdrawing the attachment against the funds of the company, I agree, on behalf of myself and the other directors, to pay you the balance of 66*l.* 19*s.* 7*d.* on 27th August next." Held, that this letter, coupled with the above facts, was evidence of an account stated, and that it was no answer to show that the deft. was not a member of the company when the original debt was contracted (*Baker v. Birt*, 10 M. & W. 61.)

An I O U is evidence of an account stated (*Highmore v. Primrose*, 5 M. & S. 65; *Fesenmeyer v. Adcock*, 2 N. Pr. C. 128:) even where it was not addressed, and there was no explanation how it came into plt.'s hands, it is *prima facie* evidence, (*Curtis v. Rickard*, 1 M. & G. 46; *Douglas v. Holme*, 12 Ad. & E. 641.) Where accounts are submitted to an arbitrator, not by bond, his award may be given in evidence under an account stated (*Kean v.*

Batshore, 1 Esp. 194.) *Where an incoming tenant agrees to take [*46] fixtures at a valuation to be made by two brokers, which is done, and the tenant enters, the value of the fixtures may be recovered on this count (*Salmon v. Watson*, 4 Moore, 73.)

The declaration stated that the deft. accounted with the plt., and was found indebted in £—, and in consideration thereof promised to pay by instalments according to an agreement, which was as follows: "I agree to pay the plt. or order, the sum of 695*l.*, at four instalments, viz., the 1st on, &c., being 200*l.*; the 2nd on, &c., being 150*l.*; the 3rd on, &c., being 150*l.*; the 4th on, &c., being 100*l.*; the remainder 95*l.* to go as a set-off for an order of R. to J., and the remainder of his debt from C. D. to him." The plt. proved at the trial that he had lent money to the deft. Held, that the agreement was evidence of the accounting (*Davies v. Wilkinson*, 10 Ad. & E. 98.) A letter offering to pay a certain sum of money in discharge of a disputed account followed by a tender of the sum, which is refused, is not evidence of an account stated (*Frude v. Powell*, 1 D. P. C., N. S. 278.)

In an action of debt, containing counts for goods sold and delivered, interest, and on an account stated, the plt. proved that he was a shopkeeper, and that the deft., on being served with the writ, indorsed with the amount sought to be recovered, said that, "he would call and pay the bill." The following paper, without date, and in the handwriting of the deft., was also given in evidence:—"I send you 4*l.* and will pay the balance in the book in a week." The jury having found for the plaintiff:—Held, first, that the paper was rightly received in evidence; secondly, that there was no evidence to support the count for interest, or, the account stated; thirdly, that, although the judge at *nisi prius* had done wrong in telling the jury that the conversation with the sheriff's officer was evidence of an account stated, a new trial ought not to be granted, as the first count was proved, and the deft.'s counsel had not required the several counts to be put separately to the jury (*Moseley v. Reade*, 10 Jur. 18.)

If the account was stated verbally, a witness present should be subpœnaed; if in writing, then the same should be produced, and deft.'s signature

proved. If the writing be in the opposite party's possession, a notice should be served on him to produce it, and the service of such notice proved; after which, parol evidence of the contents of the writing would be admissible (*post* "NOTICES.") An acknowledgment of the correctness of an account need not be stamped (*Wellard v. Moss*, 1 Bing. 134; *S. C.* 7 Moore, 583; *Jacob v. Lindsay*, 1 Ea. 460.)

The account must be stated before the commencement of the action. Therefore an acknowledgment after action of money being due is no evidence of an account stated (*Allen v. Cook*, 2 Dowl. 546,) unless, a debtor account be proved to have existed before action brought (*Ib.*) and the offer of a cognovit after that time is not evidence of an account stated (*Spencer v. Parry*, 3 Ad. & E. 331.)

Evidence of an account stated whereby deft. admitted a certain balance due to the plt. is not done away, but confirmed in support of an assumpsit by evidence of a foreign judgment recovered by the plt. for the same sum, with a stay of execution for six months to enable the deft. to prove a counter demand if he had any: and the plt. not having declared till after that period, it was held no objection, that the writ was sued out and the deft. arrested before (*Hall v. Odder*, 11 East, 118.)

The averment of an account stated can only refer to a single occasion. Thus, when in an action for use and occupation 4*l.* were paid into court *on the account stated, the plts. proved that the deft. was indebted to them as surviving executors of T., and having no other account with [*47] them, was called upon for payment, and refused, saying that he had a cross demand on the funds of the testator. The plts. gave evidence of a debt exceeding 4*l.*, and contended that this with the admission implied by payment into court entitled them to recover the larger sum on the account stated, the other counts being inapplicable. Held, that they could not recover, for the averment of an account stated could only refer to a single occasion, and the above-mentioned answer of the deft., with the subsequent payment into court, merely showed that upon that accounting, which alone was in question, the deft. was found indebted 4*l.* (*Kennedy v. Withers*, 3 B. & Ad. 467.) An award is not evidence to support a count on an account stated (*Bates v. Townley*, 4 Law T. 376, Ex.).

With whom stated.] Proof of an account stated with plt.'s agent is sufficient (*Hughes v. Thorp*, 5 M. & W. 667;) proving the party to be such agent. So, plt. may recover on an account stated by the deft. with plt.'s wife, or, on an account stated by the deft.'s wife (*B. N. P.* 129;) if, indeed, she be proved to be the party's agent. An admission by the deft. in a conversation with a third person that he was indebted to the plt. in a named sum, is not evidence of an account stated, unless, the third person was the plt.'s agent (*Breckon v. Smith*, 1 Ad. & E. 488; see *Rigley v. Jeffereys*, 4 M. & W. 417.)

Whether a conversation between the deft. and a witness is sufficient to entitle deft. to recover on an account stated is a question of law, and not of fact (*Bishop v. Chambre*, 3 C. & P. 55.)

Where there were accounts between A. and B., and C. became a partner with B., and dealings continued between B. and C. as partners, and A., who afterwards settled an account with B. and C., wherein was included the money due from A. to B. alone, it was held the whole might be proved on an account stated in an action by B. and C. (*Pea. Ev.* 273; *Gough v. Davies*, 4 Price, 214; *David v. Ellice*, 5 B. & C. 196.)

To connect A. with B. as a co-promiser, it was shown that they were the trustees of an insolvent estate, in respect of which the debt arose; that A. and B. were at the counting house of the plts. on several occasions together,

and at a meeting of the creditors of the insolvent estate, the amount of the plt.'s debt was stated by one of the defts. in the presence of the other, and and that B. had admitted in a letter that there was a debt due to the Held, that the jury were justified in coming to the conclusion that A., in stating the account with the plts., had the authority of B. (*Chisman v. Count*, 2 M. & G. 317.)

If a partnership have been dissolved, and an account stated between the partners, and one partner expressly promise to pay the balance struck, he may be sued at law, even by his partners (*Smith v. Barrow*, 2 T. R. 476-8; *Foster v. Allanson*, ib. 482; *Brierley v. Cripps*, 7 C. & P. 709;) and it is maintainable even without any express promise (*Wray v. Milestone*, 5 M. & W. 21.) Where one of two partners who have duly accounted between themselves, on being applied to for a debt due from the partnership, stated, that in the account with his partner, he, the deft., had taken that debt upon himself, and would pay it: held, sufficient to support a count upon account stated with one partner alone (*Harrison v. Marsh*, Exch. Jan. 16, 1849.)

But this only holds where there is a final balance of all the partnership concerns, and an express promise to pay such balance, and not during the continuance of the partnership (*Fromont v. Coupland*, *2 Bing. [*48] 170; *Goddard v. Hodges*, 1 C. & M. 37; *Wilson v. Cutting*, 10 Bigh. 436;) and evidence of this must be adduced accordingly.

An infant cannot state an account, even though the items consist of necessities (*Bartlett v. Emery*, 1 T. R. 42, n.; *Ingledon v. Douglas*, 2 Stark. N. P. 36; *Hedgely v. Holt*, 4 C. & P. 104; *Harrison v. Fane*, 1 M. & Gr. 551, n.;) though, he may ratify one after full age (*Williams v. Moor*, 11 M. & W. 256.) If the deft. account with the plt. in a particular character, he will be taken to have admitted that character (*Peacock v. Harris*, 10 East. 104.)

Subject-matter of Account.] With respect to the subject-matter of the account, it must be proved to have been of *money* and a *debt* (see 5 Moore, 114, 116.) It is sufficient, however, to prove an account stated, without giving evidence of the several items constituting the account (*Trueman v. Hurst*, 1 T. R. 42; *Bartlett v. Emery*, ib. n.; *Prouting v. Hammond*, 8 Taun. 688;) proof of one item is sufficient to maintain the count (*Highmore v. Primrose*, 5 M. & S. 65.) It is not necessary that there should be cross demands between the parties, or that the deft.'s admission should relate to more than one item, or, transaction (*Knowles v. Mitchell*, 13 East, 249; *Highmore v. Primrose*, 5 M. & S. 65; *Pinchen v. Chilcot*, 3 C. & P. 336; *Perry v. Slade*, 8 Q. B. 115.) The rule is, that if a fixed and certain sum is admitted to be due to the plt., for which an action would lie, that will be evidence to support a count upon an account stated (*Porter v. Cooper*, 4 Tyrw. 264, 265, per Parke and Alderson, Barons.) An admission by the deft. that so much was agreed to be paid to plt. for the sale of standing trees, made after the trees had been felled and taken away by the deft. will support it (*Knowles v. Mitchell*, 13 East, 249.) It is most usual to prove some existing antecedent debt or demand between the parties, respecting which an account was stated, and a balance struck (5 Moore, 105; *Green v. Davis*, 4 B. & C. 235, 242; *S. C.* 6 D. & R. 306; *Trueman v. Hurst*, 1 T. R. 42, n.; *Teal v. Atty*, 4 Moore, 542; 2 B. & B. 101; *Knowles v. Mitchell*, 13 Ea. 249.) But it seems without such evidence, he would be entitled to nominal damages; if he seek more, it will be necessary for him to prove the amount by other means (*Dixon v. Deveridge*, 2 C. & P. 109; *Teeson v. Smith*, 4 N. & M. 304; *Whitehead v. Howard*, *infra*; see however *Barnasconi v. Anderson*, Moo. & Mal. 183, where it was held that an acknowledgment of a

debt without specifying any amount is not sufficient to entitle the creditor to nominal damages upon this count :) if deft. had admitted a sum certain to be due, the plt. would be entitled to recover; still, however, there must have been an existing debt between the parties to render the account available (*Whitehead v. Howard*, 5 Moore, 114, per Burrough, J.) The precise sum must be proved (*Kirton v. Wood*, 1 M. & Rob. 253.)

Where the deft., on being applied to for payment of interest, stated he would bring plt., who was an executrix, some money on the following Sunday; it was held, that though, this was an admission that something was due; still, as it did not appear what the nature of the debt was, or, that it was due to plt. as executrix, or in her own right, nor that it was one for which assumpsit would lie, plt. was not entitled to recover even nominal damages (*Green v. Davies*, 4 B. & C. 235.)

Where a debt is actually in existence and a prior transaction, it may be shown by other evidence than the plt.'s admission that the sum to which he referred was of a precise and stipulated amount.

But it lies only where an account has been stated with reference to former transactions. It does not lie therefore to recover a single sum under an express contract (*Clarke v. Webb*, 1 C. M. & R. 29; see *Allan v. Cross*, 2 Dowl. 546; *Eike v. Nokes*, 3 C. & P. 170.) *Thus, when the assignees of an insolvent tenant, in consideration of being allowed [*49] to remove certain fixtures, agreed to pay to the landlord 7½. for the last quarter's rent; held, that this sum could not be recovered on this count (*Clarke v. Webb*, 3 C. & P. 170.)

An attorney's bill cannot be recovered under this count without due proof of delivery of a signed bill (*Eicke v. Nokes*, 1 M. & Rob. 359,) and a plea of no signed bill, &c. is an answer to the count (*Brooks v. Bocket*, 2 N. P. C. 60; 11 Jur. 284.) Where there is a moral obligation to pay, the law will convert it into a legal one, and enable plt. to recover on this count;—thus, when A. agreed with B., by parol, that if B. would take of him a lease for twenty-one years of certain premises, he would give 20½. towards putting them into repair; B. accepted the lease, and A. refused to pay the money: held, that an admission by A. that the money was due entitled B. to recover on an account stated (*Seageo v. Dean*, 3 C. & P. 170). A promise to pay plt. the expenses he had been put to by deft.'s not performing an agreement, is evidence under the count on the account stated when plt. failed on the special count, the agreement being void under the Statute of Frauds (*Remington v. Baker*, 1 Jur. 56).

When A., one of the defts., was shown an account by the clerk of the plt. at their counting-house, and he objected to one of the items, but, made no remark with respect to the rest; held, evidence of an account stated by A. of those items to which he made no objection (*Chisman v. Count*, 2 M. & G. 317).

In support of this count plt. offered an account signed by the deft. showing a balance of 321½. 5s. to be due, the first item in which was "To principal and interest of old account which Dr. J. F. transferred as per letter, 146½. 3s. 6d." The letter was as follows:—"I hereby acknowledge to have received from J. M. F., esq., the sum of 321½. 5s., and should I die during my absence from England, or, at any time before the said debt is liquidated, it is my desire that it should be paid out of whatever property I possess at the time of my death with legal interest on the same." Held, not entitled to recover the 146½. 3s. 6d., the evidence showing a mere promise without consideration to pay the debt of a third person (*French v. French*, 2 M. & G. 644).

The plt. was the commercial agent of the East India Company at Am-
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boyna. It was his duty to send his account to Jones, the company's agent at Banda, to examine and transmit to the governor of Madras. On the plt.'s accounts there appeared a balance of 1325 dollars against him, but on reference to the account kept by Jones of the same transactions, instead of a deficiency, 4771 dollars appeared due to the plt. The company then allowed the 1325 only. Held, that this was not a sufficient admission and recognition of the correctness of Jones's account as to entitle the plaintiff, without further evidence, to the 4771 dollars (*Farquhar v. The East India Company*, 8 Beav. 260).

An account stated in some cases will amount to an admission of the title of the party to receive the money (4 Moore, 73; *post*, 49). Accounting with plt. in a particular character admits that character (*Peacock v. Harris*, 10 East, 104; *post*, 46). An account stated does not alter the nature of the original debt (*Aleyn*, 72-3).

Evidence for Defendant.

Non assumpsit denies, that the parties came to an account, and that the deft. was indebted to the plt. thereon (*Jacobs v. Fisher*, 1 C. B. [*50] 178); the deft. may, under the general issue, show a gross *error, or mistake in the accounts, or, that he made the account under a misapprehension of facts, for the account stated is not conclusive evidence against him (*Thomas v. Hawkes*, 8 M. & W. 140; *S. C.* 9 Dowl. 802). Yet the stating an account in many cases amounts to a conclusive admission of the plt.'s title (see *Peacock v. Harris*, 10 Ea. 104; *Salmon v. Watson*, 4 Moo. 73); and where the parties, having cross demands, settled and balanced their accounts, the deft. was precluded from showing at the trial that many items in the plt.'s account were for spirituous liquors, and irrecoverable (*Dawson v. Remnant*, 6 Esp. 24; see also *Barker v. Burt*, 6 Jur. 736; *ante*, p. 44). The deft. may show that the items were such that he was not primarily liable upon them, but collaterally only (*Gould v. Coombs*, 14 L. J. 175, C. P.). But he cannot show fraud, or, illegality of consideration, or, that a subsequent account was in his favour (*Bridget v. Penny*, 16 M. & R. 108). There an account was stated on the 5th of February in plt.'s favour; another was stated on the 20th of March in deft.'s favour in consequence of including fresh items. The plt. afterwards sued upon the first account and deft. pleaded the general issue. Held, that he could not give evidence in this action of the second account stated. In law the second account must be taken to be either a payment (see *Sinclair v. Baggeley*, 4 M. & W. 314), or, a set-off, neither of which are available under the general issue (*Alderson, B.*) If, however, the second accounting were the correction of a mistake it would be otherwise (*supra*). Nor can deft. on the general issue give in evidence an admission by the plt. before action brought that the balance of accounts was in deft.'s favour (*Evans v. Downes*, 2 Jur. 1066, C. P.).

To support an account stated, a statement of accounts was put in, containing a number of bills of exchange, and showing a balance in favour of the plaintiff. Held, that this document was capable of explanation, and that the defendant, having shown that some of the bills to a larger amount than the balance were outstanding and unpaid, was entitled to a verdict (*Barker v. Alexandre*, 9 Law T. 53, C. P.).

ACKNOWLEDGMENT.

See "ADMISSIONS."

*ACT OF PARLIAMENT.

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Public Acts.

Public Acts are those which relate to all the subjects of the realm (Holland's case, 4 Co. R. 76), as, those which concern the king, or all lords of manors, or all officers in general, or all spiritual persons, or all trades (B. N. P. 223; 1 T. R. 115; Samuel v. Evans, 2 ib. 569), and are presumed to be known to all men as the general law of the land. Some acts are made public acts by an express provision in their enactment. A recital in a public act is evidence of the fact recited (R. v. Sutton, 4 M. & S. 532). Neither the Metropolitan Buildings Act, nor, the Metropolitan Police Acts are local and personal acts within the 5 & 6 Vict. c. 97 (Richard v. Easto, 15 M. & W. 244; Barnett v. Cox, 16 Law J. 27, Mag. Cas.).

When and how pleaded.] As the courts take notice of all public acts, it is never necessary to set them out in pleading. It is only necessary for the party availing himself of them to state those facts which bring his case within them (Spieries v. Parker, 1 T. R. 145; Allen v. Kimpton (Inhabitants), 3 Wils. 318; Clarke v. Harvey, 1 Star. 92); and, in general, referring to the act. It is not advisable to recite any part of a public statute, for a misrecital will sometimes be fatal (Platt v. Hill, 1 Ld. Raym. 382; Boyce v. Whitaker, Doug. 97; King v. Marsack, 6 T. R. 776). If a statute be recited, the whole of its title must be stated, though it comprise several other subject-matters besides that to which the pleading relates (Beck v. Beverley, 11 M. & W. 845). Where facts have occurred recently after the passing of the act, it is usual to allege them to have taken place subsequently to its enactment (1 Saun. 309, n. 5). But it is unnecessary to allege the time of holding every parliament, and its prorogations and sessions, or where any parliament, sat, as they will be taken notice of judicially (Birt v. Rothwell, 1 Ld. Raym. 343; Plowd. 77; King v. Wilde, 1 Lev. 296); and therefore they should not be stated in pleading, as a misrecital may be a ground of demurrer, nonsuit, or arrest of judgment (Rann v. Green, Cowp. 474; King v. Wilde, 1 Lev. 296; Rex v. Biers, 1 Ad. & El. 327), as describing a statute to be made on a certain day in the 1st and 2d year, &c., as the same day could not be in two different years (Langley v. Haynes, Moo. 302), or to be made in the 4th year of Ph. & Ma., when the record of it appeared to be in the 4th and 5th Ph. & Ma. (Rann v. Green, Cowp. 474), or describing it as passed in both years (Gibbs v. Parke, 8 M. & W. 223; 9 Dowl. P. C. 731; Rex v. Biers, 1 Ad. & El. 327; 3 Nev. & M. 475; Ex parte Williams, 4 Jur. 171), even though recited in a later statute as passed "in the 2d and 3d years," &c. (Rex v. Biers, *supra*). It should be described as passed in a session holden in both years (Gibbs v. Pike, *supra*). It is not a ground of objection to describe it as passed in the 25th year, when, in fact, the [*52] parliament in which it was passed was *prorogued* from the 24th to the 25th year (R. v. Windsor, 2 Chit. R. 513); for every meeting of parlia-

ment after a prorogation is a new session, and a statute can never relate further back than to the first day of the session in which it was made (*Partridge v. Strange*, *Plowd.* 79). But where the parliament was only *adjourned* from one year to the other, the statute must be described as of the first year, for it relates back to the first day of the parliament (*Bryant v. Withers*, 2 M. & S. 123; *Rumsey v. Turfnell*, 2 Bing. 257; 9 Moo. 425; *Savage v. Smith*, 2 W. Bl. 1102; *Anon.* 12 Mod. 602; *Spring v. Eve*, 2 Mod. 242; *Bart (q. t.) v. Rotheram, Ltd.* *Raym.* 343; and see 4 Inst. 25; *Patten v. Holmes*, 4 T. R. 660; 6 Bro. P. C. 486; and 33 Geo. III. c. 13). It is said that a misrecital which would be fatal in a declaration is not so, in a plea in bar (*Woolsey v. Sheppard*, 1 Brownl. 196). And see further, as to the pleadings on a penal statute, *post*, "PENAL STATUTE."

Proof of Public Acts.] As the courts take judicial notice of public acts, and as they are presumed to be known to all men, they require no proof; and the printed books are used as hints of that which is supposed to be in every man's mind (*Gilb. Ev.* 10); however, if the books differ, the mistake may be shown by one examined with the original roll (*Rex v. Jeffries*, 1 Str. 446).

By 41 Geo. III. c. 90, s. 9, copies of the statutes of Great Britain and Ireland, prior to the Union, printed by the printer duly authorized, shall be received as evidence of the several statutes in the respective courts of either kingdom.

Private Acts.

Private acts are such as relate to a particular class of men: as to particular officers (*Holland's case*, 4 Co. R. 76; 2 Saun. 155, n.; *Samuel v. Evans*, 2 T. R. 569); or to particular persons; or particular counties, parishes, or places; or particular trades, as dyers, butchers, grocers (*B. N. P.* 223). Public acts bind all the queen's subjects, but, private acts do not bind strangers, unless, by express words, or, necessary implication the intention of the legislature to affect the rights of strangers is apparent in the act; and whether an act is public, or, private does not depend upon any technical considerations (such as having a clause, or, declaration that the act shall be deemed a public act), but upon the nature and substance of the case (*Dawson v. Paver*, 11 Jur. 766, Ch.; 16 Law J. 274, Ch.; 5 Hare, 415.) A canal act is not rendered a public act by empowering the company to take tolls from all persons using the canal (*Brett v. Beales, M. & M.* 421).

How construed.] Private acts are construed in analogy to private deeds (*Eton College v. Bishop of Winchester*, *Lofft.* 401), and therefore most strongly against the company (*Parker v. Great Western Railway Company*, 7 Scott, N. R. 831), and in favour of the public (*Barrett v. Stockton and Darlington Railway Company*, 2 Scott, N. R. 337; 3 ib. 803; 2 M. & G. 134; 2 Rail. Cas. 443, 466); or of private property (*Scales v. Pickering*, 1 Bing. 448; 1 M. & P. 195; and see *Anon.* *Lofft.* 438; *R. v. Croker*, *Cowp.* 26).

When and how pleaded.] As the court will not take judicial notice of private acts, such parts of them as are essential to the party's action or defence must be specially recited in pleading (*Bac. Ab. Stat.* l. 2; 2 Mod. 57; *The King v. Larwood, Carth.* 306).

*In reciting or pleading the act, the day, year, and place of
[*53] making it must be shown; and any misstatement in this respect will be bad on the plea of *nul tiel record*, or any other plea putting

in issue the whole of the facts stated in the declaration (*Rann v. Green*, Cowp. 474; *King v. Wilde*, 1 Lev. 296; Cro. C. 202); but the mistake may be aided by verdict (*Spring v. Eve*, 2 Mod. 240). It is not necessary to recite the title (*Chance v. Adams*, 1 Raym. 77), or preamble (*Mills v. Wilkinson*, 6 Mod. 62; 8 Mod. 144), as they do not constitute a part of the statute (Bac. Ab. Stat. l. 3). Yet, if the party undertake to recite the title or preamble of an act, and if it be misrecited, it is fatal (*Mills v. Wilkinson*, 6 Mod. 62; *Mills v. Wilkins*, 2 Salk. 609, expressly over-ruling *Adams v. Chance*, Ld. Raym. 77; *Att.-Gen. v. Hutchison*, Hard. 324). As to the setting out of the act, it is sufficient to recite so much of it as relates to the subject-matter in dispute (*Plowd.* 106, &c.; *Read v. Patter*, Cro. J. 140; *Doct. Pl.* 332). And if the party recite so much of a statute as makes for him, it is sufficient, though he omit a proviso containing an exemption, provided it is not incorporated with the enacting clause by any words of reference (*Steele v. Smith*, 1 B. & A. 94; *Newis v. Lark*, *Plowd.* 410; *Jones v. Axen*, Raym. 120). But the opposite party may avail himself of such proviso in his pleadings (*Read v. Patter*, Cro. J. 140, and see *post*, "PENAL STATUTE"). In reciting a statute, a material variance will vitiate the pleading, as if the act be recited in conjunctive words, where it is disjunctive (*Knaresburgh's case*, Cro. E. 96; *Eden's case*, ib. 697; *King v. Marsack*, 6 T. R. 771; *Rann v. Green*, Cowp. 474). Not, however, if the word which precedes, and the word which follows, the disjunctive part will be of the same import (*Crosse v. Stanhope*, 2 Buls. 47; *Godb.* 246). But a trifling or immaterial variance will not prejudice (*Crosse v. Stanhope*, 2 Buls. 47, 51), as where the statute is "by the said justices, or the more part of them," and the recital is "the better part of them" (*S. C.* 2 Buls. 47); or where the statute is merely in the plural, and the recital in the singular (*Goodwin v. West*, Cro. C. 523). See further, *post*, "PENAL STATUTE."

Proof of Private Acts.] The regular proof of a private act, like that of other records, was to substantiate it upon oath, by means of an examined copy compared with the original in the Parliament Office at Westminster (*Gilb. Ev.* 12, 13; *B. N. P.* 225); or by means of an exemplification under the great seal (*Ib.*); but by the 8 & 9 Vict. c. 103, s. 4, "all copies of private and local and personal acts of parliament, not public acts, purporting to be printed by the queen's printers, shall be admitted as evidence thereof by all courts," &c., "without any proof being given that such copies were so printed." It is usual, in most acts of this nature, to insert a clause, with a view to evidence, directing that the act shall be deemed and taken to be a public act, or that a copy by the queen's printer shall be admitted in evidence; and, in such a case, it requires no proof, though it has not the effect of a public act (*Woodward v. Cotton*, 1 C. M. & R. 44). But, though an act contains no clause of this description, if it be of a general and public nature, it has been ruled at the assizes, that a printed copy may be given in evidence; thus, acts relating to public highways (*Gilb. Ev.* 10, 13); the Act of the Bedford Levels; the Act for Rebuilding Tiverton; and that concerning the College of Physicians (*Ib.*; *B. N. P.* 225; *Dupays v. Shepherd*, 12 Mod. 216). When copies of a private act are made evidence, it is not "judicially noticed," and is not before the court, except when given in evidence, and, therefore, if a plt. do not give it in evidence, the deft. cannot avail himself of an objection founded upon it without making *it [*54] part of his evidence (*Greswolde v. Kemp*, 1 C. & M. 635, *per* Erskine, J.). As to effect of acts of parliament, see "PARLIAMENT."

Where an act is not found on the Parliament Roll, see what is sufficient evidence as to its having passed (*Doe d. Bacon v. Brydges*, 7 Scott, N.R. 333).

As to the proceedings in Parliament, and the Journals of the House, see *post*, "PUBLIC DOCUMENTS." As to actions on penal statutes, see *post*, "PENAL STATUTE."

ACT OF STATE.

See "PUBLIC DOCUMENTS."

ACTION.

As to proof of notice of, see "NOTICE."—As to proof of commencement of, see "PROCESS."—As to plea in abatement of pendency of prior action, see *ante*, 21.

ADJUSTMENT.

See "AVERAGE"—"POLICY."

ADMINISTRATOR.

See "EXECUTOR AND ADMINISTRATOR."

ADMIRALTY, SENTENCES OF COURTS OF.

Effect of, in Evidence.] The final judgment, sentence, or decree of a Court of Admiralty in this country, in questions of prize, being a proceeding *in rem*, is conclusive evidence in all courts and with reference to all persons (B. N. P. 244; 11 St. Tr. 262; Kindersley v. Chase, Park, Ins. 490; Oddy v. Bovill, 2 East, 473; Geyer v. Aguilar, 7 T. R. 681). It was held evidence of condemnation without producing the libel and answer, at least, if not found, or usually filed with it (Wheeler v. South, Com. Dig. Ev. C, 1). And so, all sentences of foreign courts of admiralty of competent jurisdiction to decide questions on prize, will be received as conclusive evidence of every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they professed to decide judicially (Hughes v. Cornelius, 2 Show. 232; Bolton v. Gladstone, 5 East, 160; Baring v. Clagett, 3 B. & P. 214). Such judgments, &c., whether domestic or foreign, are also conclusive, whether they involve questions as to the right of property, as in trover, or questions arising as to warranty in actions on policies of insurance (Baring v. R. Ex. Ass. Comp., 5 East, 99; Bolton v. Gladstone, *ib.* 155; S. C. 2 Taun. 85; Lothian v. Henderson, 3 B. & P. 513; 2 Show. 232; 2 Doug. 575). And such judgments will be received in evidence, though [*55] it appear, from the judgment itself, that the *court acted on rules of evidence established by its own particular ordinances, and not arising out of general principals (*ib.*). Thus, a sentence condemning goods

as captured from the enemy, is conclusive evidence that they were so captured; and such sentence is conclusive of the facts it establishes, not only against those concerned in interest and persons claiming under them, but also against strangers (*Stirling v. Vaughan*, 2 Camp. 228). And, where property is condemned on the ground of not being neutral, the sentence is conclusive evidence of that fact (*Barzillay v. Lewis*, Park, Ins. 469; Doug. 554; *Calvert v. Bovill*, 7 T. R. 523). So, a sentence of a French court, condemning a ship during a war between England and France, is conclusive that she was not Swedish (*Baring v. R. Ex. Ass. Comp.* 5 East, 99; *Bolton v. Gladstone*, ib. 155; *S. C.* 2 Taun. 85). The condemnation of a ship at Malaga, that she was English, is conclusive that she was not neutral (*Oddy v. Bovill*, 2 East, 473). And where a ship is condemned generally as lawful prize, and no special ground assigned, it will be presumed that the sentence proceeded on the ground of the property belonging to an enemy, and the sentence will be conclusive evidence of that fact (*Saloucci v. Woodmass*, Park, Ins. 471).

But the sentence of a foreign court is evidence only of what it positively and specifically affirms in the adjudicative part of it, not, of what may be gathered from it by way of inference (*Fisher v. Ogle*, 1 Camp. 418); and is not conclusive unless the fact upon which the condemnation proceeded, appear on the face of the sentence, free from doubt and ambiguity (*Dalgleish v. Hodgson*, 5 M. & P. 407; 7 Bing. 495; see *Naylor v. Taylor*, 9 B. & C. 718); though where there is an ambiguity in the sentence, the court will look into the proceedings to ascertain the precise ground of the determination (*Lothian v. Henderson*, 3 B. & P. 525; *Bernardi v. Mottram*, 2 Doug. 574). If the facts disclosed in the sentence do not warrant the sentence, it will not be conclusive as to such facts (*Calvert v. Bovill*, 7 T. R. 523). If the condemnation do not plainly proceed upon the ground, of its being the property of enemies, or, of the ship not having complied with subsisting treaties between her own country and that of the capturing power, but on the ground of regulations arbitrarily imposed by the latter, to which neither the government of the captured ship nor the other powers of Europe have been made parties, such a condemnation will not be admitted as conclusive of a breach of warranty of neutrality (8 T. R. 444; Doug. 574; *Bolton v. Gladstone*, 5 East, 155). The sentence of a court of admiralty, sitting under a commission from a belligerent power in a neutral country, will not be recognized in our courts (*Havelock v. Rockwood*, 8 T. R. 268; *Donaldson v. Thompson*, 1 Camp. 429).

Proof of Sentences in English Courts.] The libel, answer, depositions, and sentences in the Admiralty Court must be proved by examined copies (Com. Dig. Ev. C, 1; *vide post*, "CHANCERY," "RECORD.")

Proof of, in Foreign Courts.] The decisions of a foreign court are proved by exemplification under the seal of the court, and it must be proved that the seal affixed to the exemplification is the seal of the court; it is not sufficient merely to prove the judge's signature (*Henry v. Adey*, 3 East, 221; see further, *post*, "RECORD"); nor is a copy by an officer of the court sufficient (1 Star. 297). The record must be sealed, though the seal be so worn out as not to make an impression (1 Star. Ev. 294.) If there be no seal of the court, then, indeed, an examined copy will suffice, proving the court has no *seal (6 M. & S. 36). So, if the court verify its judgments by the signature of the judge, proof of that fact and the judge's signature [*56] suffices (4 Camp. 28). Before the sentence of a foreign court of admiralty, condemning a ship as a prize, can be given in evidence, a founda-

tion for it should be laid by proving the capture of the vessel ; the sentence will then be evidence of the facts on which the condemnation proceeded (*Marshall v. Parker*, 2 Camp. 69). See "ECCLESIASTICAL COURTS."

ADMISSIONS.(a)

DIRECT AND COLLATERAL :

By Pleading.

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This important branch of evidence may be conveniently divided into, 1, *Direct Admissions*, viz. admissions on record, such as are made expressly for the purpose of being used as evidence in the particular suit, and 2ndly, *Collateral admissions*, or those consisting in the acts or expressions of the party *aliunde*, without reference to the suit. The former are in their nature *conclusive*, the latter are conclusive or not, according as they partake, or not, of the qualities of an *estoppel*.

(a) 1 Supp. U. S. Dig. Tit. "Evidence," sub-sect. 15, p. 704; 1 Ann. Dig. p. 236; 2 Id. 168; 3 Id. 209; 1 Greenl. on Ev. § 180, &c.

*By Pleading.—1. Direct Admissions.

It is a fundamental rule of pleading that every *material* allegation in a declaration, plea, or other pleading, which is not traversed, or, denied by the opposite party, is admitted, so that the party is precluded at the trial from asserting, and the jury from finding the contrary (Steph. Plead. 5th ed. 248; Com. Dig. Pl. 17; *Wimbish v. Tuilbois*, Plow. 48, *Tomkins v. Croker*, 2 Lutw. 1215.) Thus, if, in trespass with cattle, &c., where the deft. pleads a right of common, which right the plt. traverses, the jury cannot inquire whether the deft. put his cattle there, that being a fact admitted, and such finding would be void (2 Roll. 692, 6, 5). So, if the deft. in replevin avow the taking of cattle, damage feasant in the *locus in quo* as parcel of the manor of K. which is his freehold, and the plt. make title to the manor of K. and traverse that the manor is the freehold of the deft. he cannot afterwards prove that K. is no manor, and therefore the *locus in quo* no parcel; for that is admitted by the traverse (B. N. P. 298). If plt. traverse a customary right of common in respect of an ancient messuage pleaded by deft. he will be allowed to disprove the antiquity of the messuage, it being involved in the custom (*Dunstan v. Tresider*, 5 T. R. 2). In trover deft. pleaded that dock warrants for the goods were entrusted by plt. to his factor, to whom deft., not knowing the real owner, advanced money on the security of the warrants. The replication traversed this latter allegation. Held, that the warrants had been so entrusted was thereby admitted and that deft. was estopped from showing their non-existence for the purpose of disproving the advance of money upon them (*Bonzi v. Steward*, 4 M. & Gr. 295).

In an action for negligence in not properly securing a cow of the deft. in a slaughter-house, the declaration stated that by means thereof the cow ran at, butted at, gored, killed, &c., a cow of the plt. Plea, payment of 30s. into court, and that plt. had sustained no greater damages. Replication that plt. had sustained greater damages. Held, that deft. could not go into evidence to show that his cow had not killed deft.'s, as the contrary was admitted by deft.'s plea (*Lloyd v. Walkey*, 9 C. & P. 77). So, in libel imputing that plt.'s house was opened as a gaming-house, under the leadership of a woman of notorious character, deft. pleaded several pleas; but none of them at all referring to plt.'s wife. Held, that plt. could not go into evidence to show that his wife was a respectable person, as the pleadings admitted her to be so (*Gray v. Gregory*, 9 C. & P. 584). Where in covenant on a charter party, a plea took issue on an immaterial part of a breach, held, that by so doing the deft. admitted the material part as stated in the declaration (*Diffield v. Brocklebank* (in error), 3 Bligh, 56).

Where in trespass the deft. pleads an entry to abate a nuisance and the plt. new assigns unnecessary violence, the nuisance is admitted and plt. cannot go into evidence to negative it (*Pickering v. Rudd*, 1 Stark. 56). But it seems a new assignment amounts sometimes only to an assertion that the deft. has mistaken the grievance complained of (*Bruncker v. Molyneux*, 1 M. & Gr. 710.)

The R. G. H. T. 4 Will. IV. require a special denial of the plt.'s character in an action by an executor, or, administrator in a cause of action arising in the lifetime of the testator, or, intestate. But even before these rules the general issue admitted such character (*Marsfield v. Marsh*, 2 Ld. Raym. 824; *Thynne v. Protheroe*, 2 M. & Sel. 553; see *Hunt v. Stevens*, 3 Taunt. 113; *Watson v. King*, 4 Campb. 272; *Adams v. Savage*, 6 Mod. 134). A plea of set-off stated that the *plt. made his promissory note payable to A. C., that A. C.'s administrator indorsed it to the deft. Replica- [*58]

tion, the Statute of Limitations. Held, that the replication admitted the making of the note and the indorsement, and that the deft. might avail himself of a memorandum of the payment of interest written on the note by A. C. (before Lord Tenterden's Act) to bar the statute (*Gale v. Capern*, 1 Ad. & E. 182). In an action by husband and wife the general issue admits the marriage (*B. N. P. 20*).

The title, or character to sue, or, be sued is frequently admitted by the opposite party, and though, not strictly an estoppel, is, in some cases, conclusive. Thus, in an action for slandering an attorney importing that the deft. would have the plt. struck off the rolls, held, that this admitted the plt.'s character of attorney (*Berryman v. Wise*, 4 T. R. 366; *Pearce v. Whale*, 5 B. & C. 39).

Where a replication avers several facts in answer to a plea, and the rejoinder traverses an immaterial one which is found for the deft., yet, the others are not so admitted as to entitle the plt. to judgment *non obstante veredicto* (*Gwynne v. Burnell*, 6 B. N. C. 453). So, in covenant the plea of release admits the execution of the indenture (*Steph. Pl. supra*). So, the traversing the want of repair is an admission of the indenture of demise (*Ib.*). For the effect of the general issue in certain actions, and of a payment into court, see the various titles. See also "TENDER."

But matters not *material*, though alleged, are not admitted by thus passing them over. Hence, where, in an action against ship-owners for damage done to guns, the declaration stated that the defts. were the owners of the ship, that the plt. caused the guns to be put on board, and that in consideration thereof and of certain freight they promised to take due and proper care of them; to which the defts. pleaded—1st, *non assumpsit*; and 2ndly, that they did take due and proper care: it was held incumbent on the plt. to prove, in the absence of an express contract with the defts., their ownership of the vessel, and for want of so doing he was nonsuited. The court held that the declaration would have been good without any allegation of ownership, and consequently that such allegation was not admitted (*Bennion v. Davison*, 3 M. & W. 179).

If a plea to an indebitatus count be pleaded as to a precise sum, that, though laid under a *videlicet*, is admitted to be due, so that such sum must be covered by either the plea by which it is admitted to be due, or, some other plea (*Cousins v. Padden*, 2 C. M. & R. 547), and for this purpose the plea is divisible and may be found in part for the plt. and in part for the deft. (*Ib.*; see *post*, "PLEAS"). And where in debt for sums amounting together to 37*l.* 16*s.*, the deft. pleaded a set-off as to 10*l.* 3*s.*, goods returned as to 8*l.* 3*s.* 6*d.*, and as to the residue 4*l.* 8*s.* 6*d.* payment into court, making in all 22*l.* 15*s.* the deft. proved the plea except as to the set-off, which he failed to prove by 2*l.* short of the sum alleged in the plea. Held, that the plt. was entitled to judgment for 2*l.* at all events, although, his particulars claimed but 20*l.* 15*s.* (*Green v. Marsh*, 5 D. P. C. 669; see *Roche v. Champion*, 1 Ex. 11.)

In an action on a written instrument the deft., by not denying it, admits so much as is set out in the declaration, but no more, and if the plt. wish to avail himself of any other part he must, it is said, prove it in the common way (*per* *Ld. Ellenb.* in *Williams v. Sills*, 2 Camp. 519.) Where plt. sued on a bond to which deft. pleaded an usurious agreement, and that the bond was given in pursuance of it: replication that it was not given in pursuance of the bond: held, that the agreement was not in issue, and that plt. could not disprove *the alleged usury (*Carter v. James*, 13 M. & W. 145, n.

[*59] a). But this incidental admission will not estop the plt. in a subsequent action from denying the usury (*Ib.* 137). A notice by deft. to

produce a bill accepted by deft. is evidence of acceptance as against him (Holt v. Squire, R. & M. 282).

Effect of Admission by Pleading.] Whether such an admission amounts merely to a waiver of proof of the allegation so admitted, or, whether it is equivalent to a confession of the fact before the jury, is a question of great importance, and one upon which a difference of opinion seems to exist. In *Edmunds v. Groves*, 2 M. & W. 642, an action by the indorsee against the maker of a promissory note, the deft. pleaded that the consideration for the note was money lost by gaming, and that it was indorsed to the plt. with notice and without value, to which the plt. replied that it was indorsed without notice and for value. No evidence was given on either side, and it was contended that as the replication admitted the illegality of the consideration, the plt. was bound to show that he was the holder for value. But the court held that the admission merely dispensed with proof, that the issues only were before the jury, and that if any inferences were to be drawn by them they must have the facts proved. This doctrine, however, has been repudiated by the Court of Queen's Bench, and it has been there laid down that "an admission made in the course of pleading, whether in express terms or by omitting to traverse what has been before alleged, must be taken as an admission for all the purposes of the cause, whether the facts relate to the parties, or, to third persons, provided the allegation so made be material" (*Bingham v. Stanley*, 1 Gale & Dav. 237), and consequently that the plt. in a similar case was bound to prove consideration by reason of his having admitted by pleading the original infirmity of title. In a subsequent case the court of Exchequer upheld their decision in *Edmunds v. Groves* (*Smith v. Martin*, 9 M. & W. 304; see *Fearn v. Filica*, 7 M. & Gr. 513), and in a still later case the Court of Queen's Bench explained their decision in *Bingham v. Stanley*, and there laid down the rule that admissions made in pleading of material allegations are to be taken as made for all purposes in the cause, regarding the issue arising from that pleading (*Robins v. Maidstone*, 4 Q. B. 815).—In trespass by A. and B. his wife against C. for a false imprisonment of B., C. justified under an execution against the plts. for costs in a former action brought by them against C., alleging the recovery of the judgment, the issuing of the *ca. sa.*, its delivery to the sheriff, and the arrest of B. thereunder. The plts. replied, confessing the recovery of the judgment and the issuing of the *ca. sa.*, *de injuriâ suâ propriâ absque residuo causâ*: held, that, as the judgment and writ were admitted on the record, upon the warrant and the arrest of B. under it, being proved by the plts., the justification was made out without any evidence on the part of the deft. (*Newton v. Boodle*, 3 C. B. 795; 13 Jur. 253; 18 Law J. 53, Q. B.). Debt on a joint and several bond for 500*l.* The condition, set out on oyer by the deft., recited, that one S. had been appointed collector of taxes, and that the plt. had become surety for the payment of such sums as S. should receive; that the plt. consented to become surety on the condition that the deft. and S. would indemnify him from all charges, &c., which he should incur as surety. Plea, that the plt. had not at any time since been in anywise damnified by reason of anything in the condition specified. Replication, that S. received, as collector, divers sums of money, amounting in the whole to a large sum, exceeding 500*l.*, to wit, 2000*l.*; that S. did not duly pay the said sums so received, nor any of them, but made default, by reason of which plt. afterwards was forced to pay to the receiver-general a large sum, to wit, the sum of 500*l.*, and thereby sustained damage to a large amount, to wit, 500*l.* Rejoinder, that the plt. was not forced to pay the said sum in the replication mentioned, or any part thereof. At the trial no proof

was given of the receipt of any money by S. as collector, but it was proved that S. had not paid any over to the receiver-general, and that the plt. had been called on as a surety to pay the 500*l.*, and, having been sued, had submitted to a judgment: held, that the receipt of the 500*l.* by S. was not admitted on the pleadings, and that the plt., in default of proof of the receipt, was only entitled to nominal damages (*King v. Norman*, 4 C. B. 884; 17 Law J. 23, C. P.): held, also, that the deft. having been no party to the judgment obtained against the plt., the judgment was only evidence to show that the plt. had been sued, or had been subjected to a *bona fide* pressure, but not evidence that he was legally liable to the extent for which the judgment was signed (*Ib.*).

Where several Pleas.] It is quite settled, however, that where there are several pleas or counts, one count or plea cannot be used by the opposite party as an admission of a fact denied by another, but each issue must be tried as though it were the only issue on the record. Thus, where to an action of trespass the deft. pleads not guilty, and a justification, the plt. cannot call in aid the second, to prove that the deft. committed the trespass, whether issue be joined on that plea, or whether there be a demurrer and judgment thereon against the deft. (*Montgomery v. Richardson*, 5 C. & P. 247; *Stracey v. Blake*, 1 M. & W. 168; *Firmin v. Crucifix*, 5 C. & P. 98). But where it appears from the whole conduct of a cause that a particular fact is admitted between the parties, the jury have a right to draw the same conclusion as to that fact, as if it had been proved in evidence, and to draw such conclusion as to all the issues on the record (*Stracey v. Blake*, *supra*): 1st plea in bar to an avowry for rent arrear, tender of the rent claimed in the avowry; 2nd plea *non tenuit*; held, that proof of tender as pleaded did not support the issue on *non tenuit* without calling in aid the allegation of the 1st plea, which cannot be done, (*Knight v. McDowall*, 12 Ad. & E. 438). And as a plea of set-off cannot be used by the [*60] plt. to prove his claim *under the general issue, neither can a particular of set-off delivered under a judge's order be so used, though it contain a distinct admission of the plt.'s claim (*Harrington v. Macmorris*, 5 Taun. 328). In *Gould v. Oliver*, 2 Sc. N. R. 241, one count claimed damages for improperly loading the plt.'s guns on deck, by reason of which part had been lost; a second count claimed a sum of money as general average, and to this count the deft. paid a sum of money into court, which the plt. took out in satisfaction. At the trial the deft. offered in evidence the second count, and pleadings thereon, as a conclusive admission against the plt. that the deck cargo had been properly stowed, and thus to secure a verdict on the first count, but the court held it inadmissible. The statements in a plea held bad on demurrer are not evidence for plt. on another issue, though, the *venire* be *tam quam* (*Ingram v. Lawson*, 2 M. & R. 253; see *Montgomery v. Richardson*, *supra*).

Effect of Admission in another Action.] Before the pleading rules, when the declaration, or, other pleading alleged any matter upon which the opposite party could not take issue, it was necessary that he should commence his plea, replication, &c., with a *protestation* that such matter was not true, otherwise, he would be precluded from denying such matter in any subsequent action at the suit of the same party, though the issue joined were found for him (2 Saun. 103, n.). To prevent the necessity of this, which had become almost an idle formula, the rule of H. T. 4 Will. IV. r. 12, orders that "no protestation shall hereafter be made in any pleading, but

either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made."

^a Where the protestation was properly taken the party was not concluded in a subsequent suit whether the issue was found for, or, against him; but if it were not properly taken, that is, if it were of a matter which he might have traversed or pleaded, and the issue were found against him, he was concluded of all that was material in the record (2 Saun. 103, n. 1). It follows, therefore, that in a second action between the same parties, or their privies (see *post*, "ESTOPPEL"), allegations in the former pleadings, which were not traversable, cannot be used against the opposite party as an admission; but that where the issue in the former action was found against him, and judgment given thereon (see Allen v. Hartley, 4 Doug. 20; Holt v. Miers, 9 C. & P. 196), he is concluded not only as to the fact in issue, but also, as to every traversable allegation in the pleading upon which such issue was taken, provided the matter be pleaded by way of estoppel (see Outram v. Morewood, 3 Ea. 346; Steph. Plead. 5th ed. 227, and *post*, "ESTOPPEL"); *contra* as to a demurrer to a bill in Chancery (Tomkins v. Ashley, M. & M. 32). Where a party in his pleading makes an admission, the admission so made is not only for that purpose, but for every purpose, and he will be estopped afterwards, although in another action between the same parties, from pleading the same matter (Rutt v. Morell, Ex., 27 Jan. 1849). A declaration in case against a witness for disobedience to a *subpœna* alleged a good cause of action, and that the plt. could not proceed to trial, and was obliged to withdraw the record. Pleas, not guilty, and that plt. might have proceeded to trial. Issue. Held, that the goodness of the cause was admitted, and that the deft. could not show that the declaration in the former action was bad (Needham v. Fraser, 1 C. B. 815). An admission made before an arbitrator may be used as evidence on the trial of another cause (Doe v. Evans, 3 C. & P. 21; Westlake v. Collard, B. N. P. 236; Gregory v. Howard, 3 Esp. 113). An answer in Chancery filed by a solicitor for a client cannot ^a be used as evidence of any fact stated in the [*61] answer against the solicitor filing it (Wilkins v. Nokes, 7 Law T. 112).

Admissions made for the purpose of the Suit.] Where a party, or, his attorney, or town agent (Truslove v. Burton, 9 Moo. 64), agrees to admit a certain fact on the trial of the cause, he will be conclusively bound by such admission. Where in an action on a bond to which *non est factum* was pleaded, a paper was produced, signed by the deft.'s attorney, by which he agreed to admit the *signatures* of the deft. and of the attesting witness, Ld. Ellenb. ruled that this must be taken as a presumptive admission of all which the latter would have been required to prove, and therefore, that the plt. could not be called on to show the *delivery* of the bond (Milward v. Temple, 1 Camp. 374).

An admission thus made, like a notice to produce, &c., enures not only for this trial, but for any subsequent trial of the same cause, or upon an arbitration (Elton v. Larkins, 5 C. & P. 385; 1 Moo. & Rob. 196); and the party cannot retract it, without previous leave of the court, or a judge, upon summons (Ib.; Doe d. Wetherell v. Bird, 7 C. & P. 6).

If the admission be in writing, it will be advisable to be prepared with proof of the handwriting (see, however, Truslove v. Burton, *sup.*); but it is sufficient to show it to be that of the attorney on record, or, town agent without showing authority from his client to make it (see Young v. Wright, 1 Camp. 140; Gainsford v. Grammar, 2 Camp. 9.) The preferable course,

however, is to have the admissions embodied in a judge's order, which saves the necessity of any proof at the trial.

Pleadings in Equity.] *Semble*, that pleadings in equity as well as at common law are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party to be admitted or denied by the opposite side, and if denied, to be proved, and ultimately submitted for judicial decision (*Boileau v. Rutlin*, 2 Exch. 665.) The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are conclusive evidence between them; so are the material facts alleged by one party which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though for the purposes of the cause he is bound by those that are material, ought not, it should seem, to be treated as confessions of the truth of the facts stated (*Ib.*). In an action to recover goods supplied to a mine, in order to show that the deft. was a shareholder a document was produced by which A. B. certified that he had, transferred certain shares to the deft., who on his part agreed to accept them. The purser of the mine stated that those persons only were considered shareholders whose names were entered in a certain book; that the usual mode of transferring shares was by documents similar to the above; and that on receiving it from the deft. he had entered his name in the book as a shareholder: held, that this document was receivable in evidence as an admission by the deft. that he was a shareholder in the company, and did not require a stamp (*Toll v. Lee*, 13 Jur. 614; 18 Law J. 364, Exch.). In an action for use and occupation, to recover 42*l.* 8*s.* 10*d.*, the balance of an account of 64*l.* 0*s.* 10*d.*, the plt. in her bill of particulars admitted to have received 21*l.* 12*s.* It appeared that the deft. had taken the premises from the husband of the plt., and continued in possession for some time after his death: held, that the plt. was not concluded from showing that a portion of the sum for which credit was given in the bill of particulars was paid to her husband in his lifetime, and that another portion was paid so recently after his decease, that it could not possibly have been in respect of a debt due to herself (*Mercy v. Galot*, 14 Jur. 412).

By Judge's Order.] By the rules of H. T. 2 Will. IV. r. 6, 7, the expense of proving the copy of any judgment, writ, or other public document, is not to be allowed in costs, unless, the opposite party have been called on a reasonable time before the trial to admit such copy; nor, the expense of proving the handwriting to, or execution of any written instrument *stated in the pleadings*, unless, such notice and the name and abode of the intended witness have been previously given. These rules appear to have been superseded by the rule of H. T. 4 Will. IV. r. 20, which requires each party to give forty-eight hours' notice of every written, or, printed document which he intends to adduce in evidence, and to require the other party, by summons, to admit them at the peril of losing all the costs of proof (see *Lush's Pr.* 442; 1 Ch. Arch. 7th ed.). If he consent, a judge's order is thereupon to be drawn up, by which the documents specified in the notice are to be admitted on the trial.

Such admission, it will be observed on reference to the rule, is of a qualified nature; for, 1st. It relates only to such documents as are specified in the notice. Hence it is important that each should be there fully and accurately described (see *Byers v. Southwell*, 9 C. & P. 322); and that such notice should be identified by the judge's initials. Where, however, the objection was taken that the notice was not identified either by the judge's

initials, or otherwise, and the plt. was consequently nonsuited, the court granted a new rule, with costs, as against the deft., and if the attorney cannot clear himself from blame the court will make him pay the costs (Doe d. Tindal v. Roe, 5 Dowl. 420; see Clay v. Thackray, 9 C. & P. 53).

And where in an action on a promissory note payable on the 10th of Nov., the notice described it as payable on the 10th of Oct., but in other respects the description was correct, it appearing that the deft.'s attorney had inspected the notice before he made the *admission, it was ruled that the admission must be taken to refer to the note declared on, and a verdict having passed for the plt. the court refused to disturb it (Field v. Fleming, 7 C. & P. 619; see Bittlestone v. Cooper, 14 M. & W. 399.) An order to admit an acceptance "by B. for the defts. A. & Co." operates as an admission of B.'s authority to accept for A. and Co. (Wilkes v. Hopkins, 1 C. B. 737.)

2nd. The admission is, "subject to all just exceptions as to the admissibility of the document as evidence." So that the party is not precluded from objecting to the want of a stamp, or any other matter which would have been open had the document been presented for proof at the trial (Sharpe v. Lamb, 3 P. & D. 454; S. C. 11 Ad. & E. 805.) And the objection is equally open though these words were omitted in the notice delivered (Ib.). But where the notice described as a "counterpart" a document which was in fact executed by both lessor and lessee, but which bore only a "counterpart stamp," and was indorsed with the word "counterpart," it was held that by making the admission the deft. was precluded from objecting that the instrument was not a counterpart, but a lease, and therefore improperly stamped, though it appeared that he had consented to the admission without inspecting the deed (Doe d. Wright v. Smith, 8 Ad. & E. 255; S. C. 4 Jur. 557; see Paul v. Meek, 2 Y. & J. 116). An admission, under a judge's order, of a newspaper containing an advertisement is no admission of that advertisement being inserted by the direction of the company to which it refers (Sykes v. Cooper, D. N. C. 507).

An order to admit, once made, may be used on a second, or subsequent trial, or before an arbitrator if the cause be referred, and the party cannot get rid of it without another order (see *supra*, Langley v. Oxford, 1 M. & W. 508).

Under Judge's Order.] The admissibility of a document described in the usual notice to admit, is not the admission of a fact stated in the description; it may be some evidence of the fact, which may be rebutted by evidence to the contrary (Pilgrim v. Southampton and Dorchester Railway Company, 18 Law J. 330, C. P.) A deed given in evidence by plt. under a judge's order had an interlineation in a material part, which was not noticed in the attestation: held, that the deft. was precluded from objecting that the interlineation should be shown to have been made before the execution of the deed (Freeman v. Steggel, 13 Jur. 1030, Q. B.)

2. Collateral Admissions.

Of these the highest species are those which operate by way of estoppel. An *estoppel* is when a man is concluded by his own act, or, acceptance to say the truth (Co. Lit. 352 a.), and is of three kinds; 1st, by record; 2nd, by writing; 3rd, by act (Co. Lit. 352 a; Com. Dig. Estop.)

1. *Estoppel by Record.*] Whatever a person has admitted, or confessed on record, or, whatever has been found by verdict against him, whether in

the same, or, any other court of concurrent, or exclusive jurisdiction on the point (Duchess of Kingston's case, 11 St. Tr. 261,) he is afterwards precluded from denying. Whatever is admitted on the record need not be proved, and cannot be disproved (B. N. P. 298; Evans v. Ogilvie, 2 Y. & J. 79.) Thus, if deft. acknowledged a deed to be enrolled in court, he cannot afterwards plead *non est factum* (1 Roll. 862, l. 12). If in an action by one he plead in abatement the nonjoinder of another who ought to be a co-plt., he cannot afterwards in an action by both plead the title of one only (1 Roll. 8 a, l. 10). Where, in an action of trespass for taking coals, the deft. pleaded that the mine, from which the coals were taken, was parcel of a mine bargained and sold to a person from whom he derived title, which was traversed by the replication, and the jury found for the plt., it was held that the deft., was estopped from pleading the same plea in a second action (Outram v. Morewood, 3 Ea. 346). So, where a deft. failing to support his plea of set-off, upon which, therefore, a verdict was recorded against him, brought an action for the debt so attempted to be set off; he was holden concluded by the former verdict (Eastmure v. Lawes, 7 Sc. 461; *7 Dowl. 431; [*63] 5 Bing. N. C. 444, S. C.). And it is no answer to such a plea that a writ of error is pending on the former judgment (Doe v. Wright, 2 P. & Dav. 672). A person may also be estopped by not denying a matter alleged upon record. As, if A. be seised in fee, and B. brings waste against him, supposing him in of his demise: though A. pleads no waste done, and it be found for him, he shall be estopped to say that he is not in of the demise of B. (Com. Dig. Estop. A). So, if a deft. demur to the plt.'s declaration, he is afterwards concluded from denying any matter alleged in the count (Ib.), for a demurrer admits facts well pleaded, and on a writ of inquiry the amount of damages is the only question (De Guillon v. L'Aigle, 1 B. & P. 368; Stephens v. Pell, 2 D. P. C. 629). *Quære*, whether deft. by demurring to a declaration for libel stated to have been published with intent to cause certain matters to be believed admits particular words in the libel to have been published with that intent (Digby v. Thompson, 4 B. & Ad. 621). Setting out a judge's order in pleading is not upon demurrer to be taken as an admission of the facts stated in the order (McCormick v. Milton, 1 C. M. & R. 525). Demurring to a bad plea of justification of slander is no admission of the truth of all the slanders contained therein, as it confesses nothing but what is well pleaded (Jones v. Stephens, 11 Price, 278). *Non assumpsit* admits no immaterial allegation in the inducement (Bennion v. Denison, 3 M. & W. 179).

But we have seen that the estoppel in such cases goes only to allegations which are material, and which the deft. might have traversed (see *ante*, p. 59), and it does not embrace matter alleged by way of argument, inference, or recital, for an estoppel must be certain to every intent (Co. Lit. 352 b. 303 a).

Nor is a party estopped from averring anything, not inconsistent, with the record. As, if a deed, release, &c., be revoked, though he cannot plead *non est factum*, he may plead that *nothing passed by the deed*, or, *not seised at the time*, &c. (1 Rol. 862, l. 35).

Again, a party is not estopped by a record *coram non judice* (Com. Dig. Estop. E.); nor, when the truth appears by the same record. As, if a fine be levied upon an original, upon which a retraxit is entered, though the parties are estopped to say, when the fine is pleaded, that it was not upon an original, yet, if, by the same record it appears that a retraxit was entered, they are not estopped (Co. Lit. 352 b).

In order to avail himself of the benefit of an estoppel of this kind, the party must plead it as such, unless, the matter appear on record, and then, he may demur. If he does not, but joins issue on the fact, and gives the record in

evidence, the jury are at liberty to find the contrary (*Vooght v. Winch*, 2 B. & A. 662; *Outram v. Morewood*, 3 Ea. 346; *Magrath v. Hardy*, 6 Sc. 627; *Wilson v. Wilson*, 6 Sc. 540; *S. C. nom. Wilson v. Butler*, 4 Bing. N. C. 748).

Again, the suffering a judgment by default is an admission on the record of the cause of action. Therefore, the suffering judgment by default in an action against the acceptor of a bill admits the cause of action to the amount of the bill, unless, part payment be indorsed (*Greene v. Hearne*, 3 T. R. 301). But where the action is removed from an inferior court by habeas corpus, after judgment by default, such judgment is not evidence against the debt in the superior court (*Bottings v. Firby*, 9 B. & C. 762). The debt cannot, after judgment by default, insist on the fraud of the plt. (*E. I. Co. v. Glover*, 1 Stra. 612).

2. *By Deed.*] A party is also estopped from averring the contrary *to what he has expressly alleged in an instrument under [*64] his seal, whether it be an indenture, or, a deed poll (*Co. Lit.* 352 a); thus, if he have entered into a bond conditioned to perform the covenants in an indenture, he cannot plead to an action thereon, that the indenture was never executed (*Hosier v. Searle*, 2 B. & P. 299). If it be to pay all sums which T. is bound to pay, &c., he cannot say that T. is not bound to pay; or, to release all the right which he has in B., he is estopped from averring that he had no right in B. (*Com. Dig. Estop. A 2*). A party is equally estopped by the recital of a particular fact, if properly pleaded and relied upon, but not if the parties, in their pleading voluntarily submit the fact recited to a jury (*Bowman v. Taylor*, 2 Ad. & E. 278; *Same v. Reston*, ib. 298). If the condition of a bond recite that an action is pending, when sued on the bond the obligor is precluded from saying the contrary (ib.; see *Burleigh v. Stiles*, 5 T. R. 465).

A recital in a deed is evidence against the party executing it, or one claiming under him (*Com. Dig. Evid. B 5*; see *Rees v. Lloyd*, *Wightw.* 123). The recital in a lease of a release is evidence of the lease against the releasor, and those claiming under him (*Ford v. Grey*, 1 Salk. 286; *Crease v. Barrett*, 1 C. M. & R. 919), so is the recital of an ancient in a modern one (*Gervis v. Gt. West. Can. Co.* 5 M. & Sel. 78). Where a deed reciting the bankruptcy of A. conveys an estate to B., and B., being no party to that deed, conveys the estate to another by a deed, having no such recital, the former deeds are no evidence of the bankruptcy as against B. in an action relating to other lands (*Doe v. Shelton*, 3 Ad. & E. 265). The effect of admissions in a deed may be confined by its recitals (*Lampon v. Corke*, 5 B. & A. 607). But see *Ingleby v. Swift*, 10 Bing. 84, where it was held that the recital in a bond that the parties had agreed to execute a bond in 500*l.*, will not confine the bond to that sum if actually executed in the penal sum of 1000*l.* Although the deed be cancelled, the recital must be proved by an attesting witness (*Breton v. Cope*, *Pea. Ca.* 44). A recited instrument is only evidence of so much as is recited; if any other portion of the deed be required in evidence, it must be produced and proved in the usual way (*Gillett v. Abbott*, 7 A. & E. 783). In trespass against a sheriff, a bill of sale reciting the writ, the taking, and the sale of the goods is evidence against him of those facts (*Woodward v. Larking*, 3 Esp. 286).

In a recent case a lessee holding under a lease in which the rent reserved was 140*l.* per year, gave a bond which, after reciting the lease as reserving 170*l.* instead of 140*l.*, was conditioned for paying the sum of 170*l.* a year on the days mentioned in the lease. In an action on the bond the court held him estopped from showing what was the amount reserved by the lease, as

being in effect a denial that such lease, as the bond described, had been executed (*Lainson v. Tremere*, 3 N. & M. 603; *S. C.* 1 Ad. & E. 792). And where a purchase deed contains the usual unqualified (see *Lampon v. Corke*, 5 B. & A. 606; *Brottrill v. Somers*, 2 Y. & J. 407) acknowledgment that the money has been paid, the vendor cannot show the contrary (*Rowntree v. Jacob*, 2 Taun. 141), though, it seems, he may show that it was paid by a cheque, or, bill which was dishonoured, or that part of the money was returned (*Baker v. Dewey*, 1 B. & C. 704). Nor is the receipt on the back of the deed conclusive (*Straton v. Rastal*, 2 T. R. 366).

The matter, however, must be expressly alleged in order to operate as an estoppel. Thus, a bond conditioned to perform *all agreements* [*65] *made by A., to carry away all the marl in such a close; to release all his right in B., &c.,* does not estop the obligor from averring that no agreement was set down by A.; that no marl was in the close; that he had no right in B., &c., for this is not inconsistent with the deed (*Ib.*).

Again, it is only in an action founded on the deed, or arising out of it, that the matter can be set up as an estoppel. In *Carpenter v. Buller*, 8 M. & W. 209, which was an action to try the right to a piece of land, the deft. put in a deed made for a collateral purpose, between the plt. and the deft. and a third person, in which was a recital, to the effect, that the land in question belonged to the deft., and contended that the plt. was thereby estopped. But the court, after taking time to consider, held that the recital was only evidence, and that the plt. might show that it was made upon a misrepresentation, and, referring to the case of *Lainson v. Tremere*, *supra*, observed that in another suit, though between the same parties, where a question should arise whether the plt. held at a rent of 170*l.* or 140*l.* the recital in the bond could not be held conclusive evidence.

Where the covenantor and covenantee submitted the amount of damages, on a breach of covenant, to arbitration, in an action on a covenant the award was held a conclusive admission of the amount of damages (*Whitehead v. Tattersall*, 1 Ad. & E. 491).

The deft. signed an instrument, addressed to the plt., in the following terms:—"In consideration of your having, by indenture, agreed to accept payment of the debt owing to you by A. B., the following instalments (that is to say), 10*s.* in the pound on the 18th day of August next, &c., I promise to guarantee the payment of the instalments;" and delivered it to the plt. in exchange for an indenture executed by the plt.; held, that the true construction of the instrument was, that the deft. make his promise in consideration that the plt. would execute an indenture and release A. B., and, consequently, that the execution of the instrument was not an admission by the deft. that the plt. had released A. B., and furnished no evidence in support of an issue taken on an allegation in the declaration that the plt. had released A. B. (*King v. Cole*, 17 Law J. 283, Exch.). At the trial of a cause, it was admitted that a document "was signed, sealed, and executed, as it purports to be." The document which was produced by the party who was to take a benefit under it, concluded, "as witness the hands and seals of" (the parties), and the attestation was to the signing and sealing only: held, that it was to be inferred that the document was delivered, and amounted in law to a deed (*Hall v. Bainbridge*, 12 Jur. 795; 17 Law J. 317, Q. B.) In ejectment under stat. 59 Geo. III. c. 12, s. 17, for a parish house, on the demise of A. and B., stated, in the declaration to be churchwardens and overseers of a parish, the fact that they acted as churchwardens and overseers at the time of the alleged demise, is sufficient *prima facie* proof for the purposes of the action, that they held the offices at the time (*Doe d. Bowley v. Baines*, 8 Q. B. 1037).

Who bound by an Estoppel.] Not only the party himself, but every person who claims by, or, under him, is bound, whether he comes in by act of law, or, in the *post*, as the heir, tenant in dower or by curtesy, lord by escheat, vendee, &c., &c. (Co. Lit. 352 a; Com. Dig. Estop. B.; Doe d. Leeming v. Skirrow, 7 Ad. & E. 157); but no person who is in the situation of a stranger to the act which creates the estoppel is bound thereby.

On the other hand, no person who would not, if the matter were against him, be bound by the estoppel can take advantage of it. Hence, where the deft. purchased, of the assignees of G., certain lands which were described in the conveyance as freehold, it was held, that he was not estopped, as against the widow of G., in an action of dower, from averring that the lands were not freehold, but, leasehold, and, therefore, not chargeable with dower; because, if the deed had described them as leasehold, the widow would not have been estopped from saying they were freehold (Gaunt v. Wainman, 3 Sc. 413).

3. Estoppel by Matter in Pais.] This class is, by far, the most important, and comprehends every act, representation, and course of conduct, upon the faith of which one party has induced the other to act, or by means of which he has acquired an advantage to himself. As far as regards the transaction which has originated from such act, representation, or course of conduct, the party doing, making, or, purchasing it is concluded, as against the other, from averring the contrary (see *Hearne v. Rogers*, 9 B. & C. 586).

Thus, if a husband, seised in right of his wife, enfeoffs A. who afterwards demise to the husband and wife for life, though the wife be in her remitter, and A. has not any reversion, yet, in waste against the husband and wife, the husband is estopped to show such remitter against his feoffment, and acceptance of an estate from A., though it was not in writing (Litt. ss. 666, 667). So, if a wife bring dower, and recover, she shall be estopped afterwards to claim land settled upon her for her jointure (Com. Dig. Estop. A 3).

So a person between whom, and another, the relation of tenant and landlord has been created, is estopped from saying, in any action for rent, for obtaining possession of, or, otherwise, concerning the right to the premises, that the person whom he so acknowledged, as *landlord, had no title, whether such relation were created by the execution of a lease [*66] by indenture (*Wood v. Day*, Moo. 387; S. C. 7 Taunt. 646); or, by writing not under seal (*Fleming v. Gooding*, 4 M. & Sc. 455; S. C. 10 Bing. 549); or, whether by taking possession under a verbal contract (see *Cornish v. Searell*, 8 B. & C. 471); by payment of rent (*Doe d. Bristowe v. Pegge*, 1 T. R. 760, n.; *Doe d. Knight v. Smythe*, 4 M. & Sc. 347; *Hall v. Butler*, 2 P. & D. 374); by attornment, or otherwise.

And even though it appear on the plt.'s own case that he had no title, still the tenant will not be permitted to avail himself of the defect (*Fleming v. Gooding*, 4 M. & S. 455; *Cooper v. Blundy*, 1 Bing. N. C. 45; *Francis v. Doe d. Harvey*, 4 M. & W. 331).

The lessor, on his part, is equally concluded; and the assignee of either party stands in the same position as the party himself. Hence, where a person who had built a house on a piece of waste land, gave up possession of it to the tenant of the adjoining land, who held the same as parcel of his demise; the latter having let the house in question to the deft., it was held, in an ejectment by the landlord of the adjoining land, that the deft. could not dispute the title of the tenant, or, the tenant that of the lessor of the plt. (*Doe d. Wheble v. Fuller*, 1 Tyr. & G. 17). And where a person let a house which was vested in a trustee for the separate use of his wife, to the

deft. as yearly tenant, and pending his occupation executed an indenture, purporting to be made by him and his wife, and to demise the premises to A. for a term, but which indenture the wife refused to execute, and gave the deft. notice to pay his rent to A.; it was held, in an action by A. for the rent, that, as the deft. could not before have disputed the title of the husband, he could not impeach that of the plt., who claimed under him (*Rennie v. Robinson*, 7 Moo. 539; S. C. 1 Bing. 147; and see *Doe d. Martin v. Austin*, 2 M. & Sc. 107; *Barwick d. Richmond Corp. v. Thompson*, 7 T. R. 488; *Taylor v. Needham*, 2 Taun. 278; *Doe d. Bullen v. Mills*, 1 N. & M. 25; S. C. 2 Ad. & E. 17; *Hall v. Butler*, 10 Ad. & E. 204; S. C. 2 P. & D. 374; *Bringloe v. Godson*, 8 Sc. 71).

But where a person, let into possession of parish property, paid rent to the churchwardens, and during the tenancy the latter demised the premises for a term to the plt., and gave notice to the deft. to pay the rent to him, it was held competent for the defendant to object that the churchwardens alone had no title to the land, and that, consequently, the lease to the plt. was void, though, when the rent was demanded by the plt. he had made no objection to their title, and had afterwards promised to pay them (*Phillips v. Pearce*, 5 B. & C. 433; see *Doe d. Grundy v. Clarke*, 14 Ea. 488).

So, if a person borrow the keys, and thus get possession of his own house from another who claims it adversely, he will not be allowed to set up his own title in an ejectment brought by the other, but must himself bring an ejectment (*Doe d. Johnson v. Baytup*, 4 N. & M. 837; 3 Ad. & E. 189).

Where the relationship has not been perfected between the parties, this species of estoppel does not arise. Hence a party who has entered into an agreement for a lease; and who is sued for not accepting it, is not precluded from showing, in such action, that the intended lessor had no title. So where, the only evidence of such relationship is the payment of rent, or an attornment, the alleged tenant is at liberty to show, that such payment, or attornment was obtained by fraud or misrepresentation, or, made under a misapprehension of the facts, or, for a particular purpose, other than that of becoming tenant (*Cornish v. Scarell*, 8 B. & C. 471; S. C. 1 M. & R. 703;

Rogers v. Pitcher, 6 Taun. 202; S. C. 1 Marsh. 541; **Gravenor* [*67] *v. Woodhouse*, 1 Bing. 38; *Fenner v. Duplock*, 9 Moo. 38; S. C. 2 Bing. 10; *Gregory v. Dorage*, 11 Moo. 394; S. C. 3 Bing. 474).

And in all cases a tenant is at liberty to show that his landlord has, since the demise, conveyed away his interest, or that his estate has determined, or, any other matter which does not amount to *nil habuit in tenementis* (*Syllivan v. Stradling*, 2 Wils. 208; *England d. Syburn v. Slade*, 4 T. R. 682; *Doe d. Strobe v. Seaton*, 2 C. M. & R. 728; S. C. 1 Tyr. & G. 19; *Doe d. Jackson v. Ramsbottom*, 3 M. & S. 516; *Reave v. Moss*, 1 Bing. 360; S. C. 8 Moo. 389; *Pope v. Biggs*, 2 Bing. N. C. 572).

And where the estate was in mortgage at the time of the demise, and the mortgagor subsequently requires the tenant to pay him the rent, the latter may do so, and thus discharge himself on the ground of *riens in arrear* (*Taylor v. Zanuri*, 6 Taun. 524; *Pope v. Biggs*, 9 B. & C. 245; *Waddilove v. Barnett*, 2 Bing. N. C. 538); or, if a new tenancy be created between him and the mortgagee, he may, to any subsequent action by the mortgagor, set up this defence as the determination of a *defeasible* estate (see *Rogers v. Humphrey*, 4 Ad. & E. 299; S. C. 5 N. & M. 511; *Evans v. Elliott*, 1 P. & D. 256), though, not by way of *nil habuit in tenementis* (*Alchorne v. Gomme*, 2 Bing. 54).

Where, in an action of debt for tolls, the plt. proved the counterpart lease executed by the deft., and duly stamped as a counterpart, the deft. was holden

estopped from showing that the original was not properly stamped (Paul v. Meek, 2 Y. & J. 116).

The acceptor of a bill is estopped from disputing, as against a *bona fide* holder, the handwriting of the drawer, or, his authority or, legal ability to draw, or, from impeaching in any way the validity of the bill on this ground (Smith v. Chester, 1 T. R. 655; Bass v. Clive, 4 M. & S. 15; Robinson v. Yarrow, 7 Taun. 455; Porthouse v. Parker, 1 Camp. 82); though it were accepted in blank, and afterwards filled up by a different person from the one intended, and for a different amount.

But, the acceptance of a bill does not admit the indorsement, though it were on the bill at the time when the acceptance was written (Smith v. Chester, 1 T. R. 655). Hence, when a bill, drawn by A., by procuration for B., was indorsed by A. in the same way, it was held that the acceptor was not precluded from objecting that A. had no authority to indorse (Robinson v. Yarrow, *supra*).

So, if any party, to a bill, on being asked whether the name on it is in his handwriting, answer, that it is, and on the faith of such admission the bill is negotiated, he cannot afterwards say that the writing is a forgery (Leach v. Buchanan, 4 Esp. 226). So, a person who attends another in the character of a physician cannot afterwards make a charge on the ground that he is only an apothecary (Lipscombe v. Holmes, 2 Camp. 441; Chorley v. Bobcot, 4 T. R. 317).

A party who executes a deed, or, enters into a contract in a feigned name, cannot, in any action thereon, avail himself of the misnomer (Walker v. Willoughby, 6 Taun. 530; Bonner v. Wilkinson, 5 B. & A. 682; Newton v. Maxwell, 2 C. & J. 215). Where the plt., on being applied to for the purpose, stated that his name was John, and execution in consequence issued against him by that name, he was held concluded in an action of trespass from saying that his name was William (Price v. Harwood, 4 Camp. 108). So, where a deft. suffers judgment in an action in which his name is misdescribed, he cannot resist an execution against him by that name, and the sheriff is bound to execute it (Reeves v. Slater, 7 B. & C. 486; Crawford v. Satchwell, 2 Str. 1218).

*A person who holds himself out, or, suffers his name to be used, [*68] as member of a partnership, is, on this principle, liable as partner for the debts of the firm.

So, where a person permits a woman to appear, and treats her as his wife, he thereby incurs a liability for her debts to the same extent, as, if he were her husband (Watson v. Threlkeld, 2 Esp. 637; Robinson v. Nation, 1 Camp. 245; Munroe v. De Chamant, 4 Camp. 215). If the owner of goods stand by and see another person sell them as his, he is estopped from afterwards claiming them from the purchaser.

And, if a wharfinger transfer goods to the account of A., or, acknowledge to hold them on his account, he cannot afterwards dispute A.'s title thereto (Hawes v. Watson, 2 B. & C. 540). Where the captain of a vessel stated in his bill of lading that the freight had been paid, the owner was held estopped from saying that it had not as against a *bona fide* indorsee (Howard v. Tucker, 1 B. & Ad. 712). But, it is otherwise as between the original parties (Bates v. Todd, 1 M. & R. 106). A party claiming to have been the owner of lands, by virtue of a cession to him from A., since deceased, offered evidence, before any other proof of the cession, that A. actually managed the property, and while so managing, declared that he did so in the name of the now claimant. Held, admissible evidence (Baron de Bode's case, 8 Q. B. 208).

Admissions generally as Evidence.

We now come to those species of admission which are available as evidence against the party, more, or, less cogent according to circumstances, but which are not in their nature conclusive.

This inquiry naturally divides itself into two branches: 1. By whom the admission must be made; and, 2. Its nature and effect.

1. *By whom to be made.*] "The general rule is, that every material fact must be proved by testimony on oath. There is an exception to that rule, viz., that the acts and declarations of a party on the record, or, of one identified in interest with him, are, as against such party, admissible in evidence" (*per* Bayley, J., in *Spargo v. Brown*, 9 B. & C. 938). But he may show that such admissions were mistaken, or, untrue, except in cases of estoppel (*ante*, p. 62, *Herne v. Rogers*, 9 B. & C. 586, *per* Bayley, J.).

We shall presently see that the admissions of a party on record are receivable, though he sues, or, is sued as a trustee only; also, that in such cases, the admissions of the *real* plt. or deft. are receivable too. So, the admissions of a person *equally* interested as partner, co-contractor, &c., may be given in evidence (see *post*, "ADMISSION BY PARTNERS").

But, beyond these, there is another class of cases, which show that if the party making the admission had, at the time, the same amount of interest the other way, as the party against whom the admission is sought to be used, and the latter derives his title from him, then whatever the former said in derogation of his interest is evidence against the latter. Thus, upon a question whether a particular close was part of the plt.'s estate, or, part of a common, a declaration by a former owner of the estate, at the time he held it, that he had no right to inclose it, was held receivable against the plt., though such former owner was in court and might have been called (*Woolway v. Rowe*, 1 Ad. & E. 114). So, where it is shown that A. B. was formerly in receipt of the rents and profits, a statement by him, that he held under another, as

it is in derogation of his own *apparent* right to be considered the [*69] owner of the fee, is evidence in favour of *a person deriving title from that other, against the tenant in possession (*Doe d. Daniel v. Coulthard*, 7 Ad. & E. 235). So, as actual possession is also *prima facie* evidence of seisin, the declarations of the tenant in possession, as to, who was his landlord, are admissible in favour of a person claiming under the latter (*Carne v. Nicoll*, 1 Sc. 466; S. C. 1 B. N. C. 430; *Hollaway v. Raikes*, 2 T. R. 55; *Peaceable v. Watson*, 4 Taun. 16; *Doe d. Stansbury v. Arkwright*, 5 C. & P. 575).

Whether the admission of a tenant for life upon questions in which his interest must be considered commensurate with that of the reversioner, such as boundary, rights of way, &c., &c., are receivable against the latter, seems to be doubtful. Also, whether the admission of a *cestui que trust* having a partial interest can be received as evidence against the trustees when suing for other parties. In *Doe d. Rowlandson v. Wainwright*, 8 Ad. & E. 691, which was an action by trustees, the deft. tendered a mortgage deed executed by a *cestui que trust* for life, with a view to show, by the description of the premises conveyed thereby, that a yard and outhouses which the plt. claimed. had passed under the general words of a former deed, the court considered the question, whether the declaration of such party was admissible against the trustees as one of serious difficulty, but held, that though, by saying that the premises had passed under a former mortgage the tenant for life had divested herself of the beneficial occupation thereof, she had, at the same time, procured to herself thereby an advance of money; and, therefore, the

court could not see that it was a declaration clearly and unambiguously against her interest, and on that account held the evidence properly rejected. The declaration of the plt.'s son, under whom the plt. claims by an assignment to secure a debt alleged to be due from him, as to his being so indebted is not admissible in evidence, though made before the date of the assignment (*Coble v. Graham*, Exch. Dec. 5, 1848).

The indorsee of a negotiable instrument, for valuable consideration, takes by a new and superior title of his own, and therefore, the declarations of a payee, or, prior holder that it was an accommodation note, &c., are not receivable against a subsequent holder, unless, it be first shown that the latter gave no consideration, or, that he took it after it was due (*Barough v. White*, 4 B. & C. 325; *Beauchamp v. Parry*, 1 B. & Ad. 89; *Phillips v. Cole*, 10 Ad. & E. 106). But, what is said, or, done by the payee at the time the note is made, is evidence to show its original infirmity, as being the best evidence of what the contract was (*Kent v. Lowen*, 1 Camp. 177).

So, in an action by the assignees of a bankrupt, against the sheriff for taking the bankrupt's goods, the acts and declarations of the bankrupt are not receivable as against the deft. to prove the validity of the commission (*Bernasconi v. Farebrother*, 3 B. & Ad. 372). In an action by the assignees of a bankrupt, to try the right to the property in goods, which have been delivered before the bankruptcy to a bailee for a specific purpose, the declarations made by the bankrupt subsequent to the delivery of the goods are admissible in evidence, though offered with a view to show the property in the bankrupt himself (*Sharpe v. Nurholme*, 8 Sc. 23).

So, where an auctioneer advertised for sale the property of J. S., a bankrupt, held evidence of bankruptcy in an action, by the assignees against the auctioneer, for the proceeds of sale (*Maltby v. Christie*, 1 Esp. 340); and on a plea denying the title of the assignees (*Ingles v. Spence*, 1 C. M. & R. 432). So, when deft., in an affidavit to obtain a commission, swore that the party had *become bankrupt (*Ledbetter v. Salt*, 4 Bingh. 623). So, a bankrupt who has petitioned for his discharge cannot dispute the [*70] validity of the commission in an action against his assignees (*Watson v. Wace*, 5 B. & C. 153). But, if the admission that he has become bankrupt be made in the course of a dealing with third parties the bankrupt may show in an action against his assignees that he has not become bankrupt (*Heane v. Rogers*, 9 B. & C. 577). So, he may dispute the commission, although, he has surrendered, or, petitioned for enlargement of the time for so doing (*Mercer v. Wise*, 3 Esp. 219); and although, he has applied to a commissioner to appoint an official assignee to investigate the petitioning creditor's debt (*Munk v. Clark*, 2 N. C. 299). As against a creditor the merely proving a debt under the commission will not dispense with the regular proof of bankruptcy when disputed (*Rankerd v. Horner*, 16 East, 19). So, if B. have dealt with A. as farmer of post-horse duties, this is evidence in an action between them, that A. is such farmer (*Badford v. McIntosh*, 3 T. R. 632; see *Peacock v. Harris*, 10 East, 104); and proof that the deft. collected taxes is sufficient proof of his being a collector, although he was appointed by warrant (*Lister v. Priestly*, Wright, 67). So, the payment of tithes to the plt. by a parishioner precludes him from disputing the plt.'s title to the living (*Chapman v. Beard*, 3 Anstr. 942). But, the mere attestation of a paper as witness is not of itself proof of the contents of it (*Harding v. Crethorn*, 1 Esp. 58).

What is said by a private member of a corporation has been ruled not to be evidence against the corporate body (*Mayor of London v. Long*, 1 Camp. 22; but see *R. v. Hardwick*, 11 Ea. 584); but where a corporation sues for a disturbance in exercising a corporate office, what is said by a corporate

officer respecting the exercise of it, is evidence against the corporation (Ib. 25); and in an action by a member of an incorporated company, against the company, entries in the company's books have been holden inadmissible against the plt., on the ground that he had no control over them, and must be regarded as a stranger, though, the act of incorporation gave each member a right to inspect them (*Hill v. Manchester Water Works Company*, 5 B. & Ad. 866). The admission of a surveyor to a corporation respecting a house of the corporation, is evidence against the latter in an action for an injury to the plt.'s house by work done to the deft.'s premises (*Payton v. St. Thomas's Hospital (Governors)*, 4 M. & R. 625).

It seems that the acts, or, declarations of the principal, which would be clearly admissible against himself, are not admissible in an action against the surety. In *Evans v. Beattie*, 5 Esp. 27, Lord Ellenborough ruled that the deft. who had guaranteed the payment of goods supplied to A., had a right to insist on strict proof of delivery, and rejected evidence of an admission by A. that he had received them (*Bacon v. Chisnie*, 1 Stark. 192; and in *Smith v. Whittingham*, 6 C. & P. 78, Gurney, B., ruled the same way. And see, per Tindal, C. J., in *Ward v. Suffield*, 5 B. N. C. 383). In *Middleton v. Melton*, 10 B. & C. 317; *Whitmarsh v. George*, 3 M. & R. 42; and *Goss v. Watlington*, 6 Moo. 355, the court forbore to decide the point, holding the evidence tendered receivable on another ground. Yet, in actions against the sheriff, for an escape on *mesne process*, it is held that whatever would be admissible evidence of the debt, as between the plt. and the original deft., is receivable against the sheriff (see *Sloman v. Herne*, 2 Esp. 695; *Williams v. Bridges*, 2 Stark. 42; *Gibbon v. Coggon*, 2 Camp. 188; *Rogers v. Jones*, 7 B. & C. 86).

[*71] **Admissions by Parties on the Record.*] The declarations, or admissions of a party on the record, whether made by a trustee or nominal party, are receivable in evidence for the opposite party, though, the former have no interest in the suit (*Bauerman v. Radenius, infra*; *Gibson v. Winter*, 5 B. & Ad. 96). Thus, where in an action brought against a shipowner for damages to goods on board, it appeared that the plts. had shipped the goods as agents, and that they were indemnified by the owners of the goods, for whose benefit the action was brought, a letter written by them, exonerating the deft. from all blame, was held admissible; and Lawrence, J., said, "I have looked into the books to see if I could find any case in which it has been held that the admission of a plt. on record is not evidence, but have found none" (*Bauerman v. Radenius*, 7 T. R. 664). And Grose, J., said, "As long as Bauerman and Co. are the plts. on record, they must be taken to be so in all the consequences."

And where the plt., after an assignment of his effects, for the benefit of his creditors, gave the deft. a receipt in full, such act was holden a bar to a subsequent action by the assignees in the debtor's name, though there was no assignment in fact (*Bristow v. Eastman*, 1 Esp. 172; *Alner v. George*, 1 Camp. 392; and see *Gibson v. Winter*, 5 B. & Ad. 96). An amount given under such circumstances, seems in fact to be equivalent to an executed gift of the money (see *Bramston v. Roberts*, 4 Bingh. 11). As between the underwriter and assured, the acknowledgment in the policy of the amount of the premium by the broker is undeniable (*Dalzell v. Mair*, 1 Camp. 532). A receipt not under seal is only *prima facie* evidence of payment, and may be contradicted and explained (*Graves v. Key*, 3 B. & Ad. 318). If an agent employed to receive money, and bound by his duty to his principal to communicate to him whether the money is received or not, render an account from time to time, continuing an intentional mis-statement that the money

had been received, he is so far bound by the account that he cannot make his principal refund money paid upon it (*Shaw v. Picton*, 4 B. & C. 729; *Skyring v. Greenwood*, *ib.* 281).

In *Alner v. George*, *supra*, the receipt was held conclusive, unless, it were shown that it had been obtained by fraud or misrepresentation practised on the *plt.* So, in an action on a policy, unless, there was fraud practised by the assured to induce the broker to give credit to him (*Foy v. Bell*, 3 Taunt. 493). Where, however, there are several *plts.*, and a receipt by one is put in, it is competent for the others to show that it was fraudulent as to them, and thus, to defeat its effect (*Scaife v. Jackson*, 3 B. & C. 421; *Farrar v. Hutchinson*, 1 P. & D. 437); thus, qualifying the general rule that whatever is an answer to one co-*plt.* is an answer to all (*Jones v. Yates*, 9 B. & C. 539; *Wallace v. Kelsall*, 7 M. & W. 264).

But the declarations of a guardian or *prochein ami* are not admissible against the infant (*Cowling v. Ely*, 2 Stark. 366; *Webb v. Smith*, R. & M. 106; 3 Mo. 258; but see *James v. Hatfield*, 1 Stra. 548); though, it seems, he is so far a party on record, that he cannot be compelled to give evidence (see *Fenn v. Grainger*, 3 Camp. 177); nor, on the other hand, can he be a witness for the infant (see *R. v. St. Mary Magdalene*, 3 Ea. 7). And, in an action by a special administrator, under 38 Geo. III. c. 87, the declarations of the executor named in the will, made while he was the acting executor, were held inadmissible against the *plt.* (*Rush v. Peacock*, 2 M. & Rob. 162; but see *Smith v. Morgan*, 2 M. & Rob. 257). So, the declarations of an assignee suing as such, made before he became so, are not admissible against him (*Fenwick v. Thornton*, M. & M. 51; *see *contra*, [*72] *Smith v. Morgan*, M. & Rob. 257). The principle upon which such declarations are evidence, is that when accompanying the act done, and tending to explain it, they are part of the *res gesta*, and therefore admissible (*Wilson v. Kinnaird* (Lord), 6 East, 188). But such declarations are not admissible unless the act itself which they accompany are admissible (*Wright v. Latham*, 5 Cl. & Fin. 676; 2 Jur. 461). In *assumpsit* against several debtors, a statement made by one is receivable in evidence, as the *plt.* may proceed by steps to fix each of the defendants separately (*Whitford v. Tutin*, 10 Bing. 395). If one is seen felling timber in a wood, it is a *prima facie* evidence that he is owner of it, and anything that he says as to any one else being the owner of it, is evidence (*Doe v. Arkwright*, 5 C. & P. 575).

Admission in Petition and Schedule.] Where the defendant has applied for relief to a commissioner of bankruptcy under 1 & 2 Vict. c. 110, s. 105, and filed a schedule and petition, including a debt due to the *plt.*, but the proceedings were abandoned on its appearing that the debts exceeded 300*l.*; held, on action brought to recover a debt included in the schedule, that a copy thereof was evidence to prove an admission of that debt by the debt.; that the proceedings were not *coram non judice* by reason of the debts exceeding the jurisdiction of the commissioner, and that they were therefore recoverable; and *semble*, that the schedule and petition were admissible, though the rest of the proceedings were not produced (*Green v. Balls*, 11 Law, T. 48).

Admission by Parties interested, though not on Record.] The declarations, or admissions of the party interested, are in all cases receivable, and the attorney, conducting the cause in court, may be called by the other side and asked who employs him, in order to let in admissions of such party (*Levy v. Pope*, M. & M. 410). Thus, in an action on a policy, averring

the interest in A. B., the declaration of A. B. is admissible against the plt. (Bell. v. Ansley, 16 Ea. 141). In actions by the master of a ship for freight, the admissions of the owner are evidence for the deft. (Smith v. Lyon, 3 Camp. 465; Hart v. Horn, 2 Camp. 92). So, in an action on a bond conditioned for payment of money to a third person, the admission of that person, that nothing was due, was holden conclusive against the plt. (Hanson v. Parker, 1 Wils. 257). And in trover, for a deed detained at the instance, and, on behalf of W. R., his declaration in favour of the plt.'s right to it, was holden properly received (Harrison v. Vallance, 1 Bing. 45; and see Robson v. Cinarader, 1 Stark. 372). So, the admission of a party proved to be a co-contractor with the deft., though, not joined in the action, is evidence for the plt. (Grant v. Jackson, Pea. 203; Wood v. Braddick, 1 Taun. 104). The declarations of a party for whose benefit the plt. sues on a bill are admissible (Wildstead v. Levy, 1 M. & Rob. 138). So, of a party, from whom he received the bill or note when overdue (Beauchamp v. Parry, 1 B. & Ad. 89). Admissions by one of several trustees will not affect his co-trustees, where they are not all personally liable (Davies v. Ridge, 3 Esp. 102). Nor, it is said, will those of a trustee, be evidence against a *cestui que trust* (B. N. P. 237).

In replevin, where deft. makes cognizance under A. B., and *non tenuit* pleaded, A. B. is not a competent witness, and therefore, his admission is receivable for the plt. (Golding v. Nias, 5 Esp. 272; King v. Baker, 2 Ad. & E. 333; *contra*, Sturt v. Horn, 2 Camp. 92; but where there are several cognizances making title under different persons, if the deft. at the [*73] trial consent to a verdict on one *of them, that person for whom the verdict is taken may be called as witness in support of any of the other cognizances (King v. Baker, *supra*); and, of course, his declarations are no longer admissible.

So, in ejectment, the admission of the lessor of the plt. is evidence, for the deft., since he cannot be compelled to give evidence against, and will not be permitted to be a witness for, himself (Fenn v. Granger, 3 Camp. 177); and where there are several demises, the admission of any one of them, unless, the plt. abandon that at the trial, and then as he may examine that lessor on behalf of the others his admission is not evidence (King v. Baker, *supra*). Where an action of ejectment was brought by a trustee having the legal estate, and the deft. offered evidence of an admission made by the *cestui que trust* of the particular estate, it was considered doubtful, for the interest of the *cestui que trust* was not co-extensive with that of the lessor of the plt., and the declarations were prejudicial to the remainderman (Doe d. Rowlandson v. Wainwright, 8 Ad. & El. 691). The interest of the *cestui que trust* ought to be identical with that of the trustee, and it is not enough to prove a trust without showing the nature of it, or that the *cestui que trust* is the real party to the action, and the nominal party a mere agent (May v. Taylor, 6 M. & G. 261).

On this ground, the declaration of a *rated* (see R. v. Lumley, 6 T. R. 157) parishioner was, at common law, receivable in evidence against the parish, since, being considered a party in interest, he was privileged from being called by the other side (R. v. Woburn, 10 Ea. 395; R. v. Hardwick, 11 Ea. 578; R. v. Whitley, 1 M. & S. 636). On the other hand, he was not a competent witness for the parish. The statute 54 Geo. III. c. 170, enacted that no inhabitant rated, or, liable to be rated, or, holding any office in the parish, shall be deemed, by reason thereof, an incompetent witness for, or, against the parish in certain matters specified; but, as this still left the overseers and churchwardens incompetent, as being parties to the record (Reg. v. Rec. of Bath, 9 Ad. & E. 719), the statute 3 & 4 Vict. c. 26, enacts

"That no person called as a witness on any trial in any court shall be disabled, or, prevented from giving evidence by reason only of his being rated, or, liable to be rated;" and "that no churchwarden, overseer, or, officer of a parish, or, any person rated, or, liable to be rated, shall be disabled, or, prevented from giving evidence on any trial, appeal, or, other proceeding, by reason only of his being a party to such trial, &c., or, liable to costs in respect thereof, when he shall be only a nominal party, and only liable to contribute to such costs in common with the other rate-payers." These enactments do not render a rated inhabitant compellable to give evidence against his parish, and do not therefore, as it should seem, make any alteration in the law, as to the admissibility of his declaration. He was always at liberty to appear as a witness against his parish; but it was never necessary, in order to let in an admission by him, that he should be called to give evidence, and should refuse (*R. v. Whitley Lower*, 1 M. & S. 637).

In actions against the sheriff to try the validity of a commission, any admission, or, declaration by the petitioning creditor, as to the amount of his debt, is evidence for the plt., if, it appear that the sheriff is indemnified by the assignees, or, that they defend the action (*Dowden v. Fowle*, 4 Camp. 38; *Dyke v. Aldridge*, cited 7 T. R. 665); *semble*, not otherwise (but, see *contra*, *Young v. Smith*, 5 Esp. 121). So, in an action against the sheriff for an escape, an admission by the sheriff of the fact is evidence for the plt., since it is notorious that the under-sheriff is the party interested by reason of his bond to save harmless (*Yabsley v. Doble*, 1 Ld. *Raym. 190). And, in an action on a guaranty, an admission by the prin- [*74] cipal as to the debt is evidence against the debt. (see *Middleton v. Melton*, 10 B. & C. 317, *sed quære*). So, in an action by the indorsee of a bill, against the acceptor, the declaration of the payee, as to the illegality of consideration, is admissible against the plt., if, it be shown that he gave no value for it, or, that he took it after it was due, but, not otherwise (*Beauchamp v. Parry*, 1 B. & Ad. 89).

[*Admission by Partners.*] The admission of a person proved to be partner with another as to matters relating to their joint concern, whether made in an answer to a bill filed against himself (*Grant v. Jackson*, Pea. 203), or, in a voluntary affidavit (*Vicrey's case*, Bac. Ab. Evid. 623), or, otherwise, is evidence against that other (*Nicholls v. Dowding*, 1 Stark. 81), though no party to the suit (*Wood v. Braddick*, *infra*; but see *Booth v. Quinn*, 7 Price, 198), whether made during the partnership, or, after its dissolution (*Wood v. Braddick*, 1 Taun. 104), and even, if, after the admission he have become bankrupt (*Grant v. Jackson*, Peake, 203). In an action by partners for a breach of contract, a declaration by one of them, that the subject-matter of the contract was his private property, was holden admissible to defeat the action (*Lucas v. De La Cour*, 1 M. & S. 249). A notice signed by partners, stating that the partnership has been dissolved, is evidence of such fact, although the partnership was by deed (*Doe v. Miles*, 1 Stark. 181).

The fact of the partnership must first appear, or, be proved *aliunde*, in order to let in the admission of one as evidence against the other. But, where two out of three defts. were outlawed in an action, and the third pleaded *non assumpsit*, a letter written by him, in which he admitted the partnership, was, for an obvious reason, holden receivable (*Sangster v. Mazaredo*, 1 Stark. 161).

The admission need not be made during the partnership; though in a case where one had become bankrupt, Lord Kenyon considered that if, at the time of making the admission the bankrupt had obtained his certificate, and thus, become discharged, the evidence would not have been receivable against the

others (*Grant v. Jackson*, Pea. 203). Admissions made by one of several partners, after a dissolution of partnership, are admissible to prove payment, after the dissolution, of a debt due to the partnership (*Pritchard v. Draper*, 1 Russ. & M. 191). But, it must relate to the partnership concern. The declaration of one partner as to a matter which occurred before the partnership commenced, or, after its dissolution, is not evidence against the other, unless, a joint responsibility be proved as a foundation for the evidence (*Catt v. Howard*, 3 Stark. 5; *Pritchard v. Draper*, 1 Russ. & M. 191; *France v. White*, 8 Sc. 257; 8 Dowl. 53; 6 Bing. N.C. 33, S.C.).

In an action for work and labour by A. and B., who were partners at the time the cause of action accrued, the deft. put in evidence a letter written by C., who had since the transaction become a partner with B., in the room of A., admitting that the plts. had given credit to another party. Held, inadmissible, without proof that C. had authority from B. to make the statement. (*Tunley v. Evans*, 2 D. & L. 747).

It is sufficient that the parties have a community of interest in the matter to which the admission refers, though, they may not be general partners (see 11 Ea. 589). Hence the admission of one of two makers of a promissory note that it has not been paid, is evidence against all (*Whitcomb v. Whiting*, Doug. 652), and an admission by one executor as to assets, or, as to the liability of the testator, is evidence against his co-executors, but, not as to collateral* matter (see *Fox v. Waters*, 12 Ad. & E. 43). An [*75] admission by a partner as to a subject not of co-partnership, but of joint ownership in a vessel, is not binding on his co-partner (*Jagers v. Bennings*, 1 Stark. 64); and where a proprietor of an incorporated company sued the company on a bond, it was held, that entries in the company's books were not receivable against the plt.; that the principle applicable to partners did not apply, for the plt. had no control over the books, though, by the act of incorporation every proprietor was at liberty to inspect them (*Hill v. Manchester Water Works Company*, 5 B. & Ad. 866; see *post*, "PARTNERS," "STATUTE OF LIMITATIONS." In an action against two co-partners on a deed executed by one of them for self and partner, a subsequent acknowledgment of the deed by the other deft. is not evidence to prove the actual execution by him, without producing the authority under seal (*Steiglit v. Egginton*, Holt, 141).

Admissions by Co-trespassers.] Where parties are established to be co-trespassers, or, wrong-doers, or, to have entered into the same criminal design, with a view to its accomplishment, the admissions of the one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object (per *Ld. Ellenb.*, *Rex v. Inhabitants of Hardwicke*, 11 Ea. 585; *Daniels v. Potter*, M. & M. 505), and this, though such admissions be made by one in the absence of the others. Thus, if three defts. have *jointly* imprisoned the plt., the declarations of one of the defts., made some weeks after, in the absence of the others, tending to show that the imprisonment arose from malice, are admissible evidence in an action for false imprisonment brought against all three (*Wright v. Court*, 2 C. & P. 233). And such admissions are not evidence in actions *ex contractu*, unless, they relate to a matter in which there is a community of interest. Thus, where the plt. in covenant alleged an eviction by two defts., under a prior lawful title, an admission by one of the defts. after eviction, was held no evidence of such title, although the defts. were co-executors of the covenantor, and had joined in the eviction (*Fox v. Waters*, 12 Ad. & E. 43).

Admissions by Party represented, as Bankrupts, &c.] An admission by the party represented is usually receivable in evidence against his representative (*Bateman v. Bailey*, 5 T. R. 513; *Smith v. Simmes*, 1 Esp. 330, 389). An admission made by a bankrupt before the act of bankruptcy is evidence to charge his estate with a debt (*Bateman v. Bayley*, 5 T. R. 513); but, an admission made afterwards is not receivable for that purpose. Admissions made by an insolvent subsequent to his insolvency are not admissible against the trustees of his estate (*Smith v. Simms*, 1 Esp. 330). As to the admissions of bankrupts to prove petitioning creditor's debt, *post*, "BANKRUPT." In an action by assignees of bankrupt, *Tindall, C. J.*, admitted declarations made by them before their appointment (*Smith v. Morgan*, 2 M. & Rob. 257; see *contra*, *Fenwick v. Thornton, M. & M.* 51, per *Ld. Denman, C. J.*). In an action by a bankrupt against his assignees to try the validity of his commission, depositions of deceased persons taken under the commission and enrolled by the assignees are not evidence against them in consequence of such enrolment (*Chambers v. Bernasconi*, 1 C. M. & R. 347).

Admissions by Agents.] In all cases, before the admission of an agent can be given in evidence, the fact of his agency must be established, and evidence that the party has acted as agent in other like *instances, in which the principal has recognised his acts, will be evidence of a [*76] general authority (*Neal v. Irving*, 1 Esp. 6; *Watkins v. Vince*, 2 Stark. 368). A receipt for debt and costs indorsed by the plt.'s attorney's town agent, on a writ of summons, is evidence of payment against the plt., without further proof of agency (*Weary v. Alderson*, 2 M. & Rob. 127).

Admissions by agents are divisible into three classes.—1. Those which are made by an agent in the course of, and, with reference to his employment. 2. Declarations made by a party to whom the principal refers another for information as to the particular subject; and, 3. Declarations which the principal adopts, and, uses for his own purpose.

1. *Declarations, &c. made by an Agent in the course of his Employment.]* As, if A. employs B. to enter into a contract, whatever B. does, or, says, or writes in the making of that contract respecting it, is admissible in evidence, because, it is a part of the contract which he makes for A. (see *Fairlee v. Hastings*, 10 Ves. 128, and per *Gibbs, J.*, in *Langhorn v. Allnutt*, 4 Taun. 519). It is on this ground alone, that such evidence is receivable, and, therefore, when an agent writes to his employer by way of narrative, of what he has done, it cannot be used in evidence against the employer (*Ib.*; see *Moesters v. Abraham*, 1 Esp. 375). For the same reason, what an agent says before, or, after the particular transaction is not evidence (see *Helyear v. Hawke*, 5 Esp. 72; see *Irving v. Motley*, 7 Bing. 543). Where the principal, through the medium of an agent, chartered a ship, and warranted it sea-worthy, a letter *previously* written by the agent to a third person, offering the ship for hire, was holden inadmissible against the principal, as not forming part of the contract, and it was held, that the agent himself must be called (*Betham v. Benson*, Gow. 45). Letters of an agent to his principal, containing a narrative of the transaction in which he has been engaged, are not admissible against the principal (*Kath v. Janson*, 4 Taunt. 565; *Fairlee v. Hastings*, 10 Ves. 128). So, in a *qui tam* action for selling coals short of measure, what was said by the def't.'s manager as to the disposition of the coals then lying at the wharf, was held admissible, but not what he said respecting by-gone sales (*Peto v. Hague*, 4 Esp. 134).

If a person agree to admit a claim, provided J. S. will make an affidavit in support of it, such affidavit is proof against him (*Lloyd v. Willan*, 1 Esp. 178; *Stevens v. Thacker*, Pea. 187); but not conclusive (*Garnett v. Ball*, 2 Stark. 160); except in an action on the special agreement (*Amy v. Andrews*, 1 Freem. 132). So, where a vendee of goods says, "If the carrier's servant says he delivered the goods I will pay you," the answer of the servant is evidence (*Daniell v. Pitt*, 1 Camp. 366, n.); *Williams v. Innes*, ib. 364). So, where in an action for the loss of a horse, through deft.'s negligence in not fencing a shaft, deft. promised to pay compensation if a mining jury said that the shaft was his; held, that their finding was admissible, but not conclusive (*Sybray v. White*, 1 M. & W. 435).

In an action against the sheriff for an escape, a subsequent admission of the fact by the under-sheriff is evidence; but, this is on the ground of the latter being the party liable (*Yabsley v. Doble*, 1 Ld. Ray. 190). Hence, where the sheriff was sued for extortion by his bailiff, declarations by the under-sheriff tending to show that the person who executed the writ was the officer of the sheriff, was holden properly rejected, it not appearing that the under-sheriff himself was the party to be charged, nor that they accompanied an act done (*Snowball v. Goodriche*, 1 N. & M. 234; *S. C.* 4 B. & Ad. 542). But the declaration of either when contemporaneous [*77] with, and, forming part of the instruction is admissible (ib.; *North v. Miles*, 1 Camp. 389).

Again, to make the statements of the agent admissible, they must be made with reference to the subject-matter of his employment. In *detinue* against a pawnbroker for plate which had been pledged for 200*l.*, the plt., in order to prove the deft.'s possession of the plate, tendered a declaration by his shopman to this effect, and this the court held, was properly rejected. And *Tindal, C. J.*, observed, in giving judgment, "If the transaction out of which this suit arises had been one in the ordinary trade, or, business of the deft. as a pawnbroker, in which trade the shopman was agent, or, servant to the deft. a declaration of such agent that his master had received the goods might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an inquiry made by any person interested in the goods deposited with the pawnbroker. But the transaction with deft. appears to us not a transaction in his business as a pawnbroker, but, was a loan by him, as by any other lender of money, at five per cent.; and there is no evidence to show the agency of the shopman, in private transactions, unconnected with the business of the shop." The learned judge further observed that it was dangerous to open the door to declarations of agents beyond what the cases had already done (*Garth v. Howard*, 1 M. & Sc. 628; *S. C.* 8 Bing. 451; see also *Lawrence v. Thatcher*, 6 C. & P. 671; *Price v. Marsh*, 1 C. & P. 60; *Schumack v. Lock*, 10 Moo. 39).

2. *Declarations, &c., by Party referred to.*] Where a party agrees to be bound by what another says, he makes the expressions of the other evidence against himself. Thus, if on being applied to for a debt, he says, "I'll pay you if A. B. says it is due," and A. B. says it is due, his answer is evidence, and A. B. need not be called as a witness. So, if he refers the party generally to another for information on a particular subject, what that party says is admissible without calling him (*Williams v. Innes*, 1 Camp. 364; *Daniel v. Pitt*, ib. 365, n.; *Brock v. Kent*, ib. 366, n.). So, where the deft. had referred the plt. to his attorney for payment, an admission by the attorney of the debt, made some years afterwards, was held receivable (*Burt v. Palmer*, 5 Esp. 145); and it is said to have been decided by the twelve judges, at

Hastings's trial, that where a person is referred to, to settle and adjust any account, or, business, what he says, if it is connected with the business referred to him, is evidence (Ib. per Ld. Ellenb. ; see also Hood v. Reeve, 3 C. & P. 532). Where a letter written by the plt. to the deft. was answered by A., who stated that the deft. had handed the plt.'s letter to him, it appearing *aliunde* that A. had been acting for the deft. in that transaction, an admission in A.'s letter was holden receivable against the deft. (Morel v. Ld. Harborough, 1 Gale, 146 ; and see Roberts v. Gressley, 3 C. & P. 380).

So, though, the calling a witness on his behalf at a trial, or, in a suit in equity, does not render all which the witness says evidence, in a subsequent trial, against the party calling him, yet, when a party calls a witness to prove a particular fact, and the witness proves the contrary, the statement of such witness is evidence in another trial as an admission (Cole v. Hadley, 3 P. & D. 458).

3. *Declarations, &c., adopted by the Principal.*] Where a party adopts the acts, or, expressions of another, or, makes use of what another asserts, he thereby gives it all the force of an admission by *himself. As where the deft. procured another to make an affidavit of certain [*78] facts in order to put off the trial, such affidavit was held admissible evidence against the deft. of the facts stated therein (Johnson v. Ward, 6 Esp. 47 ; Buckell v. Hulse, 7 Ad. & E. 454). So, where a petitioning creditor procured another to depose to an act of bankruptcy, and an action was subsequently brought against him by the assignees of such bankruptcy, in which the deft. denied the act of bankruptcy, the deposition was held admissible against him (Gardner v. Moulton, 10 Ad. & E. 464). In these cases, the party had made use, on his own behalf, of the particular document, the contents of which he knew. But a deposition made on the party's behalf, in a suit in Chancery, cannot on that account be used against him afterwards, as an admission, because, he does not know beforehand what the witness will depose to (Rushworth v. Countess of Pembroke, Hardr. 472). For the same reason, a party is not bound, in an after proceeding, by all which his witness at *nisi prius* might have said (Buckell v. Hulse, Gardner v. Moulton, *supra*). Yet, where a person summoned another before the magistrates for a malicious trespass, and having stated that he should prove a certain fact by calling Mr. D., and Mr. D. when called proved the contrary, the Court of Q. B. held, on the authority of Gardner v. Moulton, *supra*, that what Mr. D. then stated was evidence against the plt. on a subsequent trial between the same parties (Cole v. Hadley, 3 P. & D. 458).

Admissions by Counsel.] It seems, that a statement made by a counsel in his address to the jury is not receivable in another action as an admission by the client. At all events, it must appear that the client was within hearing, and some evidence be given that the statement was authorized (Colledge v. Horn, 3 Bing. 119). Where the counsel so conducts a cause as to lead to an inference that a certain fact is admitted by him, the jury may take it as proved (Stracy v. Blake, 1 M. & W. 168) ; and if a fact be assumed at *nisi prius* for the purpose of proving one issue, it is admitted also for the purpose of disproving another *semble* (Bolton v. Sherman, 2 ib. 403) ; and if plt.'s counsel open a fact from which his client's possession of a document may be presumed (thus, the payment of a cheque), though he offer no proof of it, yet defendant may give secondary evidence of it after notice to proceed without further evidence of plt.'s possession (Duncombe v. Daniel, 8 C. & P. 222). But a special case, signed by counsel, is admissible evidence of the facts therein stated, in another trial of the cause (Van Wart v. Woolley, R.

& M. 4). Where the statement of counsel as to the limitations of a deed on a former trial was tendered as secondary evidence of its contents, the court questioned the admissibility of it, even, if the parties had been the same, but ultimately rejected it, on the ground that the deft., against whom it was offered, was different (*Ove v. Ross*, 7 M. & W. 102).

Admissions by Attorneys.] We have seen that an admission made by the attorney in the cause, for the express purpose of having proof on the trial, is binding and conclusive on the client, both in that, and any subsequent trial (*Wright v. Young*, 1 Camp. 139; *Milwood v. Temple*, ib. 375; and see *Truslove v. Burton*, 9 Moore, 64, *ante*, p. 61). Any statement, or, admission of the attorney made, not for this purpose, but, with a view to the other party acting on it, is also evidence of the fact, as against his client. Hence, where before the action was commenced, the attorney wrote an undertaking to appear for the defts., whom he therein described as joint owners of the vessel respecting which the action was brought, *this was held sufficient evidence of the fact that the defts. were joint owners (Marshall v. Cliff, 4 Camp. 133). So, where the deft.'s attorney proved that, before action, he had carried certain propositions to the plt., which he refused to disclose on the ground of privity; it was ruled, that what he said on that occasion might be proved *aliunde*, and was evidence against the deft. (*Gainsford v. Grammar*, 2 Camp. 8). And the receipt on the back of a writ by the agent who issued it, is admissible evidence of the payment without calling him (*Weary v. Alderson*, 2 M. & Rob. 127). The agreement of an attorney "to admit on the trial of this cause the execution of," &c. may be used on a new trial (*Elton v. Sarkins*, 1 M. & Rob. 196), although it be retracted before such new trial (*Doe v. Bird*, 7 C. & P. 6).

But nothing that is said, or, done by the attorney on other occasions, or, for other purposes than those of the particular suit, can be given in evidence as an admission against the client. Hence, in an action on a bill of exchange, Lord Ellenborough rejected proof of a statement by the deft.'s attorney to one of the witnesses, that the bill was an accommodation bill (*Young v. Wright*, 1 Camp. 139; *Parkins v. Hawkshaw*, 2 Stra. 239). So, where, in an action for use and occupation, the plaintiff proved his case in the ordinary way, but it was elicited, in cross-examination by deft.'s counsel, that the plt.'s attorney had stated to a witness that the premises were let under a written agreement; held, that such a statement was not admissible in evidence, and that the plt. was entitled to recover (*Watson v. King*, 1 New Pract. Cas. 534, C. P.; 3 C. B. 608). So, where a statement was made by the plt.'s attorney to the deft.'s attorney, in conversation, during the assizes, with respect to the nature of the claim in the action, such statement not being expressly made for the purpose of being used as evidence; held, that it was not admissible (*Petch v. Lyon*, 15 L. J. 398, Q. B.). In an action for malicious arrest, where it appeared that the deft.'s attorney went to the prison where the plt. was confined, and told an officer there, that, if the plt. would exchange receipts with his client he would give him a discharge, the Court of C. P. held this inadmissible as not being accompanied by any act done in the cause. But Mansfield, C. J., said, that had it been made as a proposal to the plt. he should have received it (*Wilson v. Turner*, 1 Taun. 398). In a recent case of trover for a horse, in order to show the taking by the deft. the plt. proved that his attorney had written two letters to the deft., each charging him with the fact, to which the deft. returned no answer, and then proposed to put in a letter by the attorney defending on the record, in which he stated that the deft. had handed him the letters in question, and that he was prepared to prove that the horse was legally distrained. There being no proof that

this had been written with the deft.'s sanction, Parke, J., rejected the evidence, and the Court of Q. B. held he was right (*Wagstaff v. Wilson*, 4 B. & Ad. 339; see also *Pope v. Andrews*, 9 C. & P. 564). And *a fortiori* an offer to pay so much in the pound, made by the attorney on behalf of another person, as the deft.'s father, the deft. being an infant, is no evidence of the existence of the debt as against the deft., though the same attorney defends the action (*Burghart v. Angerstein*, 6 C. & P. 695).

Admissions by Wife.] The admissions of a wife, in cases where she can be considered the agent of her husband, are evidence against him (*Emerson v. Blonden*, 1 Esp. 142; *Barker v. Vaughan*, 4 Jur. 222). Therefore, where the wife has acted for the husband, and with his consent, in the transaction of his affairs, he will be bound *by admissions made [*80] by her respecting those affairs (*Plimmer v. Sells*, 3 N. & M. 423). Thus, where she has been suffered to transact the business at home, and purchase the articles used in the business, her admission as to the state of the accounts between her husband and the plt. who supplied her with the goods, are evidence against the husband (*Anderson v. Sanderson*, 2 Stark. 204; S. C. 1 Holt, 591). And where the wife has been accustomed to serve in the shop, and to transact the business in her husband's absence, an offer made by her to settle the demand is admissible in evidence in actions for goods sold against the husband (*Clifford v. Burton*, 1 Bing. 199). And where the wife pays for goods, and manages the business generally, her admission will take a case out of the Statute of Limitations (*Palethorp v. Furnish*, 2 Esp. 511, n.). So she will be deemed his agent with reference to admissions by her for goods (necessaries) furnished her (*Gregory v. Parker*, 1 Camp. 394). So, the declarations of the wife that she agreed to pay 4s. a week for nursing a child were admitted to charge the husband, for women usually transact such matters (*Anon.* 1 Stra. 527). In an action for necessities supplied to the wife, the defence being that the husband had turned her out of doors for adultery, her declarations as to the adultery made previously to her expulsion are evidence (*Walton v. Green*, 1 C. & P. 621). So, declarations of deft.'s wife tending to show that she aided and colluded with her husband in seducing the plt.'s daughter, are evidence in aggravation in an action for the seduction (*Knowles v. Compigne*, Taunton Sum. As. 1835, *per* Gurney, B.).

But, the general rule is, that a wife's admissions will not bind the husband, "as breaking in upon the confidence subsisting between man and wife" (*Aveson v. Lord Kinnaird*, 6 Ea. 196). Therefore, in an action by the husband for wages due to the wife, her admission of the receipt of the money is no evidence against him (*Hall v. Hill*, 2 Stra. 1094; *Carey v. Adkins*, 4 Camp. 92). So, in an action by husband and wife for a loan by the wife *dum sola*, her admissions after coverture were refused as against the plt. (*Kelly v. Small*, 2 Esp. 716). But, in an action against deft. as administrator of his wife for money lent to her before marriage, admissions of the debt made by her during coverture are evidence (*Humphreys v. Boyce*, 1 M. & Rob. 140). Even, in an action by the husband and wife, in right of the wife, as executrix, her declarations will not be evidence (*Alban v. Pritchett*, 6 T. R. 680). An admission by the wife of a trespass cannot bind the husband (*Den v. White*, 7 T. R. 112); nor, can the answer of the wife in equity be read against the husband (*Wrottesley v. Bendish*, 3 P. Wms. 238). But their joint answer is admissible against the husband, but not the wife (*Elston v. Wood*, 2 Myl. & K. 678). When husband and wife are incompetent witnesses for, or, against each other, see *post*, "WITNESS."

See as to admissions by payment of money into court, "MONEY PAYMENT INTO COURT."

Admissions, Nature and Effect of.

This is a most comprehensive, and important branch of evidence, embracing whatever a person writes, or, says, or, does, which affords any presumption against him. For, it is to be presumed that he acted, spoke, or, wrote consistently with his knowledge of the truth (see 2 Stark. 17).

Where the existence of a debt, or, of a particular right, has been asserted in the presence of a party, and he has not contradicted it, such acquiescence, and silence amount to an admission of the debt or, right. But the

[*81] deposition of a witness taken in a judicial *proceeding against a party is not evidence in another proceeding against that party merely on the ground that he was present and did not cross-examine the witness (Melen v. Andrews, M. & M. 336). So, an acquiescence and endurance, when acts are done by another, which, if wrongly done, are encroachments, and call for resistance, and opposition, are evidence as a tacit admission that such acts could not be legally resisted (Jarrett v. Leonard, 2 M. & S. 265; Morris v. Burdett, 1 Camp. 218; Steel v. Prickett, 2 Stark. 471; 2 Stark. Ev. 37). If A., having title to premises in the possession of B., suffer B. to make alterations inconsistent with such title, it is evidence for the jury that A. has recognised the right of B., and has done such acts as are necessary to confirm it (Doe v. Pye, 1 Esp. 364; see Neale v. Parkin, 1 Esp. 229). Where a notice to quit is served personally on a tenant, and he makes no objection to the time specified in the notice, it is *prima facie* evidence of the correctness of such notice, if the party read, or, understand the tenor of it at the time of the service (Doe d. Baker v. Wombwell, 2 Camp. 559; Doe d. Clarges v. Forster, 13 Ea. 405; Doe d. Leicester, 2 Taun. 109). If the occupier of a house submit to a distress for rent, described in the notice of distress to be due from him as tenant of the distrainor, it is an admission of the tenancy (Panton v. Jones, 3 Camp. 372; 1 H. Bl. 311). If a party, holding goods as a lien, claim them on another ground when they are demanded, and do not make mention of the lien, he is precluded from afterwards setting it up (Boardman v. Sill, 1 Camp. 410, n.; Martini v. Coles, 1 M. & S. 147; *post*, "LIEN").

The omission to insert in an insolvent's schedule a debt, is an admission against him that the debt is not due (Nicholls v. Downs, 1 M. & Rob. 13).

A receipt for rent up to a given period affords a presumption that all the previous rent has been paid. A promise to pay a bill of exchange admits the handwriting (Helmessley v. Loader, 2 Camp. 450; Bosanquet v. Anderson, 6 Esp. 43), and the notice of dishonour.

The not having an attorney's bill taxed, is an admission that the charges therein are reasonable (Pea. Ev. 262, 264; Anderson v. May, 2 B. & P. 237; 1 Doug. 193; Lee v. Jones, 2 Camp. 496).

The general rule is, that whatever is said, or, done, by any person who is a party to the record, is admissible in evidence against him, even, though, it go to the contents of a written paper or deed which is directly in issue in the suit. Thus, in covenant on a composition deed, by which the deft. engaged to indemnify the plt. against the debts of every person mentioned in a schedule annexed, who had not executed the deed, the question was whether a debt due to one Thomas was, or, was not included in the schedule. The schedule itself was rejected for want of a stamp; whereupon the plt. tendered evidence of a verbal admission by the deft. that such debt was included in the schedule, and the Court of Exchequer held that such evidence was receivable, and that, without notice to produce, or, accounting for the absence of the written

instrument. The reason is, as stated by Parke, B., in giving judgment, "that such statements are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case where better evidence is withheld; whereas, what a party himself admits to be true, may reasonably be presumed to be so." And Lord Abinger, C. B., said, that he had always considered it as clear law, that a party's own statements were in all cases admissible against himself, whether they corroborate the contents of a written instrument, or not (*Slatterie v. Pooley*, 6 M. & W. 664; see *Fox v. Waters*, 12 Ad. & E. 43; see also *Newhall v. Holt*, ib. 662; *Howard v. Smith*, 3 Sc. N. R. 574; *Doe d. Watson*, 2 Stark. 230). So, if a party [*82] go over the items of an account with the debtor, and he acknowledge their correctness, he may be held liable on such acknowledgment though the account be inadmissible for want of a stamp (*Jacob v. Lindsay*, 1 East, 460). Plt. gave in evidence an admission by deft. that he owed 147*l.* on a bill of exchange which had been dishonoured: held admissible, though no notice to produce the bill had been given (*Fryer v. Brown*, R. & M. 145). An admission of a party in an answer in chancery, of the execution of a deed, is only secondary evidence, and does not supersede the necessity of proving it in the regular way (*Call v. Dunning*, 4 East, 53; *Cunliffe v. Sefton*, 2 ib. 187).

The weight and value of evidence of this kind, as observed by Parke, B., in the case above cited, is quite another question. Where in an action of trover the deft. proved a statement by the plt. that he had been discharged under the Lords' Act, the court held this insufficient to warrant a nonsuit, as the fact, if true, could have been easily proved by the records of the court (*Summersett v. Adamson*, 1 Bing. 73; *Scott v. Clare*, 3 Camp. 236; see also *Rees d. Howell v. Bowen*, M'Cle. & Yo. 391).

Need not be voluntary.] It is immaterial whether the admission have been made by the party spontaneously, or, whether it have been extorted in the course of a legal investigation. The examination of a witness in court in another cause may be used against him in an action wherein he is party, though he were prevented from entering into an explanation of the circumstances (*Collett v. Lord Keith*, 4 Esp. 213), or, though, the questions be improper and might have been objected to (see *Jackson v. Benson*, 1 Y. & J. 32; *Stockfleth v. De Tastes*, 4 Camp. 10; *Smith v. Beadnell*, 1 Camp. 30). So, an answer in chancery to a bill filed by other parties (*Grant v. Jackson*, Peake, 103; *Ewer v. Ambrose*, 6 D. & R. 127; *Ashmore v. Hardy*, 7 C. & P. 503; *Slack v. Buchanan*, Peake 5); an examination before commissioners of bankruptcy (*Stockfleth v. De Tastes*, *supra*; *Robson v. Alexander*, 1 M. & P. 448; *R. v. Wheeler*, 2 Moo. C. C. 45), though part only of the deposition was noted down (*Milward v. Forbes*, Esp. 172, n.); or, before a committee of the House of Commons (*Rex v. Mercer*, 2 Stark. 366; see *Gilham's case*, 1 Moo. C. C. 203), wherein the party has admitted, or, confessed a fact, is evidence against him to prove such fact for any purpose. But, admissions in a joint answer by husband and wife are not receivable against the wife, such answer being considered as that of the husband alone (*Elston v. Wood*, 2 Myl. and K. 678). The compulsion must not be illegal (*Garbett's case*, Den. C. C. 236). A compulsive admission is no evidence of an account stated (*Tucker v. Barrow*, 7 B. & C. 623). The admissions of a deft. against himself in examinations before a commissioner of bankrupts are evidence against him, but his statements in his favour are not evidence for him (*Groom v. Richardson*, 5 Jur. 1061). *Quære*, whether

an admission obtained by compulsory examination before commissioners of bankrupts can be used as evidence in an action by the assignees on an account stated (*Tucker v. Barrow*, 7 B. & C. 622); even in a criminal case (*Wheeter's case*, 2 Lew. C. C. 157; see *R. v. Britton*, 1 M. & Rob. 247).

Admissions "without Prejudice."] Admissions made expressly "without prejudice," or by way of concession, with a view to a compromise which has gone off, are not receivable in evidence (*Thomson v. Austin*, 2 D. & R. 358; *Gregory v. Howard*, 3 Esp. 113; *Cory v. Bretton*, 4 C. & P. 462; *Doe d. Curzon v. Edmonds*, 6 M. & W. 295; *Wallace v. Small*, M. & M. 446; **Healey v. Fletcher*, 8 C. & P. 388). And where a letter [*83] containing an offer was held inadmissible, by reason of its being "without prejudice," the answer to it was also rejected, though it was not in terms so guarded (*Paddock v. Forrester*, 3 Sc. N. R. 734).

Where, however, the parties have come to a definitive arrangement, evidence of that arrangement is admissible (9 Price, 122). And where an arbitration turns out to be ineffectual, and the parties proceed to trial, any admissions, or, statements made before the arbitrator may be used as evidence on the trial, and the arbitrator may be called to prove them (*Slack v. Buchanan*, Peake, 5; *Gregory v. Howard*, 3 Esp. 113; *Westlake v. Collard*, B. N. P. 236; *Doe d. Lloyd v. Evans*, 3 C. & P. 219).

So, if it appear that the admission, though made pending a treaty for compromise, was not made on the faith of, or, simply with a view to it, such admission is receivable. Thus, where the plt., in an interview between him and the deft.'s attorney respecting the settlement of their accounts, said he was anxious to get out of law, and would refer the question to the witness as an arbitrator, and upon this being declined by the witness, added that he had received 800*l.* on the deft.'s account, the latter statement was held receivable in support of a set-off, though the witness was desired to communicate it to the deft. for the purpose of inducing him to agree to a compromise (*Thomson v. Austin*, 2 D. & R. 358). And where, after the record had been withdrawn on the faith of an arrangement which afterwards went off, the deft. was asked whether the acceptance of the bill for which the action was brought was in his handwriting, and answered that it was, this was held receivable on a subsequent trial (*Waldridge v. Kennison*, 1 Esp. 143).

Admission—Extent of, and how construed.] The whole admission must be taken together, in order to show the meaning of the party, and the extent to which he is bound (see *Thomson v. Austin*, 2 D. & R. 358; *Smith v. Blandy*, R. & M. 257). Hence, if part of a conversation be proved, the other party is entitled to elicit, and the court is bound to receive, the whole, so far as it relates to the particular subject (*Thomson v. Austin*, *supra*; *Glyn v. Houston*, 2 Sc. N. R. 548; *S. C.* 2 M. & G. 337; see p. 84). If an answer in chancery be put in, to prove an admission in it, and any document be annexed to it (see *Long v. Champion*, 2 B. & Ad. 284), the whole is made evidence (*Lynch v. Clarke*, 3 Salk. 154; 5 Mod. 9; *Roe d. Pellatt v. Ferrars*, 2 B. & P. 542); and if, upon exceptions taken, a second answer have been filed, the party is entitled to have that read also (*Ib.*; B. N. P. 237; *R. v. Carr*, 1 Sid. 418); and, in strictness, he is entitled to have the whole of the bill read as introductory to the answer (*Pennell v. Meyer*, 8 C. & P. 470). But the judge will caution the jury not to take the allegations as true (*Ib.*). Where an answer in chancery by a witness is put in only to prove his competency, the adverse party cannot thereupon read the whole in order to prove the issue (B. N. P. 238). If an examination (before commissioners of bankruptcy) was over two days, the party cannot use one day's examina-

tion without putting in the other (*Smith v. Biggs*, 5 Sim. 39), nor the cross-examination without the examination in chief (*Ib.*). The assertion of a party in a conversation, given in evidence against him, of facts in his favour, is evidence of those facts (*Smith v. Blandy*, *supra*).

So, if, in making an admission, the party refers to a written document, without which the admission is not complete, that must be put in (*Smith v. Young*, 1 Camp. 439); but otherwise, if the verbal admission be complete without it (*Ib.*; and see *Jacob v. Lindsay*, 1 *East, 460). [*84] Where a person, on his examination before commissioners of bankruptcy, not having his books with him, consented that the accountant should go and examine them, Lord Tenterden, C. J., would not allow the accountant to prove, from his inspection of the books, what the dealings between such party and the bankrupt had been without putting in the examination (*Yates v. Carnsew*, 3 C. & P. 99; and see *Long v. Champion*, 2 B. & A. 285).

But where, in answer to a written application for payment of a debt, the deft. writes a letter promising payment, the latter may be put in without the former (*Lord Barrymore v. Taylor*, 1 Esp. 325; *Mortimer v. Wright*, 4 Jur. 465; *Sturge v. Buchanan*, 2 M. & Rob. 90). But such letters are not evidence in favour of the writer except in proof of a notice, or, demand (*Richards v. Frankam*, 9 C. & P. 221). Where the plt. called for the production of the deft.'s books, and read an entry from one of them, it was ruled that though the deft. was entitled to have the whole of the particular entry read, he could not insist on reading distinct entries in other parts of the book (*Catt v. Howard*, 3 Stark. 3). And where, in his answer to a bill in chancery, the deft. referred to a certain letter of his, which, in consequence of its being altered, had not been filed with the answer, but a copy of which had been inspected by consent at the office of the defendant's solicitor, the court, declining to determine whether, if the letter had been filed, it could have been read alone, held that, as it had not, in fact, been made parcel of the answer, the plt. might give such copy in evidence as an admission without putting in the answer (*Long v. Champion*, 2 B. & Ad. 284; see *Hewitt v. Piggott*, 5 C. & P. 75; *Prince v. Samo*, 3 N. & P. 139; *S. C.* 2 Jur. 323). So, where a particular portion of a conversation is given in evidence against the party, plt., or deft., as an admission, he is entitled to elicit the whole of what he said on the subject which tends to explain, or qualify the former, but nothing else. Where, therefore, in an action for a malicious arrest, the question was whether a sum of 60*l.*, which the plt. had received from the deft., was a gift, or, a loan, and one of the plt.'s witnesses on cross-examination proved that the plt. had stated that he had been insolvent, it was held that the plt. had no right to ask the witness on re-examination whether he had not also stated in the same conversation that the money was given, and not lent (*Prince v. Samo*, 3 P. & D. 139; *S. C.* 7 Ad. & E. 627; overruling the opinion of the judges in the Queen's case, 2 B. & B. 297). Where the plt. called for the production of deft.'s letter-book, and read letters of the deft. from it, the deft. cannot read from it on his own behalf other letters not referred to in those read by plt. (*Sturge v. Buchannon*, 10 Ad. & E. 598).

It follows from this rule, that if a party admits a debt claimed, but says also at the same time that he has paid it, this declaration is evidence to go to the jury of the *fact* of payment, as well as of the existence of the debt. Hence, where, in proof of his demand, the plt. put in an account rendered by the deft., which contained all the items claimed by the plt., but which stated also a counter claim as due to the deft., it was held that the jury were right in taking the whole account together, and giving a verdict for the balance only, though the deft. offered no evidence in support of his counter claim (*Randle v. Blackburne*, 5 Taun. 245). And where the drawer of a bill for

200*l.*, who had received no notice of dishonour, said that "he did not mean to insist on the want of notice, but, that he was only bound to pay 70*l.*," Abbott, C. J., directed the jury to find a verdict for 70*l.* only (*Fletcher v. Froggart*, 2 C. & P. 569). In an action for money lent evidence was given of an admission by the deft. that he had had the money, accompanied with a statement "that it had been allowed in the rent." The rent was [*85] due *from plt.'s brother to the deft.'s mother-in-law. The plt. then tendered the mother-in-law's rent-book produced by the defendant in obedience to a notice, in order to show that no allowance was made in the rent. Held, admissible evidence for that purpose (*Hill v. Haywood*, 7 L. T. 82). But where the plt.'s case was clearly supported by a qualified admission made by the deft.: held, no mis-direction that the judge did not distinctly tell the jury that the whole admission must be taken together (*Beckham v. Osborne*, 6 M. & G. 771). If a deft. be arrested for 20*l.* 10*s.*, and after the arrest, and before declaration, call on the attorney, and say that if no further proceedings are taken he will pay the debt, and also write to him, saying he has applied to a friend to assist him "in paying the debt you have sued me for," it will be for the jury to consider whether by this the deft. merely recognises a debt, or that indorsed on the writ (*Rainbow v. Bishop*, 7 C. & P. 591; see *Batcheler v. Bradley*, 2 M. & Gr. 339).

The jury, however, are not bound by such statements of a party in his own favour: and as, on the one hand, the other party may disprove them (*Rose v. Savory*, 2 Bing. N. C. 145), so, if, from circumstances, they appear undeserving of credit, the jury may reject them, and act on the admission only (*Smith v. Blandy*, R. & M. 257).

AFFIDAVIT.

Affidavits, as we have seen, are evidence against the parties making, or using them, by way of admission as to the facts therein stated.

An affidavit, though filed, is not considered for all purposes as a record, so as, to be capable of proof in the same way as an answer in Chancery, &c.; but the mode of proving it depends on the purpose for which it is used. In order to show merely the fact that such an affidavit was made and filed, it suffices to produce a copy and prove it to have been examined with the original at the office of the court (*Cashburn v. Reid*, 2 Moo. 60; *Crook v. Dowling*, 3 Doug. 75; see *Scott v. Lewis*, 7 C. & P. 347). If, as an admission only, no proof need be given that it was sworn to, but the original itself must be produced, and the handwriting of the party must be verified in the usual way, or, proof be given, that he used, or, adopted it (*Rees d. Howell v. Bowen, McClel. & Yo.* 391; see B. N. P. 238; *Cameron v. Lightfoot*, 2 W. Bl. 1190; *Rex v. James, Show.* 97). An office, or examined copy will not suffice (*Ib.*). If wanted in proof of the fact that the party made such an affidavit, then, besides this proof (see *Cashburn v. Reid, supra*; B. N. P. 235,) if it purport to have been sworn before a commissioner, or, other inferior functionary, his handwriting must be proved, and his authority to administer an oath, but, this may be done even upon an indictment for perjury, by proof of his *acting* generally, or, in other instances, in such capacity. The commissioner himself need not be called, nor his commission produced (*R. v. Howard*, 1 M. & Rob. 187; *R. v. Verelst*, 3 Camp. 432; *R. v. James, Show.* 397). Nor need it be shown that the party was actually sworn (*R. v. Benson*, 2 Camp. 508; *R. v. Morris*, 2 Burr. 1189). If sworn before a judge of one of the superior courts, no such evidence is required. If sworn abroad, it must be by the certificate of the principal British authority there (which proves itself), or the handwriting and authority

of the party administering the oath must be proved as above described (see *French v. Bellew*, 1 M. & S. 302; *Dalmer v. Barnard*, 7 T. R. 251). Affidavits taken by a commissioner of the Q. B. are admissible without proving the commission; acting as such is enough (*R. v. Howard*, *supra*).

Wherever a copy is receivable, the party should be prepared [*86] to *prove its correctness. It does not appear safe, in any case, to rely on an *office* copy as being admissible, without proof of its having been examined (but see *Dean v. Fulford*, Burr. 1177; *Wightwick v. Banks*, Forr. 153). A witness may refresh his memory from an affidavit made by him shortly after the fact to be proved on examination before commissioners of bankrupts (*Smith v. Morgan*, 2 M. & Rob. 257). Where the deft., a sheriff, had used an affidavit of his officer on an interpleader rule, such affidavit was read in evidence against him, though the officer was present in court and was not called (*Brickell v. Bulse*, 7 Ad. & E. 455).

As to the proof of affidavits filed by newspaper proprietors, &c., see *post*, "LIBEL."

AGENT,(a) ACTIONS BY AND AGAINST.

BY—AGAINST PRINCIPAL, p. 86.

THIRD PERSON, p. 89.

BY PRINCIPAL AGAINST AGENT, p. 91.

BY THIRD PERSON AGAINST AGENT, p. 103.

This title relates to the rights and liabilities of a general agent;—1. In actions by agent against principal; 2. By agent against third persons; 3. By principal against agent; 4. By third persons against agent.

As to the rights and liabilities of the principal, see "PRINCIPAL AND AGENT." See also that title for proof of agency. As to an agent's admissions, *ante*, p. 75. As to particular agents, as *attorneys, auctioneers, bailees, bankers, carriers, servants, sheriffs, wharfingers, &c.*, see those respective titles in the index and throughout the work.

I. ACTIONS BY AGENT AGAINST PRINCIPAL.

Form of Remedy and Pleadings, p. 86.

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Form of Remedy and Pleadings.

By the custom, or usage of some particular trades, agents, or brokers are entitled to a specific commission or reward for their trouble; thus, a London broker selling colonial produce (*Eicke v. Meyers*, 3 Campb. 412); a London ship-broker chartering a ship (*Cohen v. Paget*, 4 ib. 96, see p. 87); a spirit-broker offering rum for sale (*Stewart v. Kahle*, 3 Stark. R. 161). A ship-

(a) See 3 U. S. Dig. Tit. "Principal and Agent," p. 233; 2 Supp. U. S. Dig. 584; 1 Ann. Dig. p. 406; 2 Id. 307; 3 Id. 368.

broker is not a sworn broker within the London regulations as to brokers (see *Gibbons v. Rule*, 4 Bing. 301; 6 Anne, c. 16, s. 4).

The form of remedy by an agent against his principal, for commission, or, money paid, is usually in *assumpsit*, or, debt; and there is nothing peculiar in the form of the pleadings. *Assumpsit*, or, case lies against the principal, if he employ the agent to dispose of goods of which the principal had no right to dispose, whereby the agent was damnified (*Adamson v. Jarvis*, 4 Bing. 66). *Indebitatus assumpsit* lies for commission on a *del credere* commission, though, the transaction in which the plt. is employed is not complete; especially after verdict (*Solly v. Weiss*, 2 Moo. 420; [*87] S. C. 8 Taun. 371; **Caruthers v. Graham*, 14 East, 578). See further, "*WORK AND LABOUR*." See a special form of declaration in *assumpsit*, by an agent employed to buy goods and draw a bill on his principal for the amount, against the principal for not indemnifying him against the bill (*Huntley v. Sanderson*, 1 C. & M. 467).

Precedents.

Indebitatus for commission.

[*Commencement and conclusion*; see "*ASSUMPSIT*,"—"DEBT,"] for the work and labour, care, diligence, journeys, and attendance of the plt., by him before that time done, performed, given, and bestowed, as the agent [factor or broker] of, and, for the debt; and on his retainer and request, and for certain commission, and reward due, and of right payable, from the debt, to the plt., in respect thereof, and the debt. afterwards, &c.

The general form of count "for work then done, and material for the same provided by the plt. for the debt. at his request, and for commission due and payable from the debt. to the plt. in respect thereof," would suffice (see *Clark v. Mumford*, 3 Camp. 37), and is the form usually adopted in practice; although generally sufficient, the full form, as above, is retained, as it is still applicable, and may in some cases be expedient.

Since the new rules an *indebitatus quantum meruit* count is never used. The general issue, by putting in issue the facts from which the promise is implied, has given the effect of a *quantum meruit* count to the general count on work and labour. (*Cousens v. Paden*, 2 C. M. & R. 547.)

Indebitatus for del credere commission.

[*Commencement and conclusion*, see "*ASSUMPSIT*,"—"DEBT,"] for certain commissions before that time, and then due, and, payable from the debt. to the plt., for and on account of the plt. having before then guaranteed the payment of divers large sums to the debt., upon certain insurances before then effected by the plt., as the broker and agent of, and for the debt., and at his special instance and request, &c.

See precedent of an action by agent, on a policy, 2 Ch. Pl. by Pearson.

Evidence for Plaintiff.

[*In Action for Commission, &c.*] The plt. should prove the retainer, and the work done (see "*WORK AND LABOUR*"). He must prove a privity of contract between him and debt. (*Schmaling v. Thomlinson*, 6 Taun. 147; S. C. 1 Marsh. 500). If there be any specific commission agreed on, the same should be proved: if not, and there be any custom, or usage as to the amount, the same shall be proved: if there be neither of these, plt. should adduce general evidence of the reasonableness of his charges, and on which it will be for a jury to decide. In some cases the amount is regulated by statute (Payl. 89). Amongst auctioneers, the usage is, that after an auctioneer is employed, and the property advertised for sale, he is entitled to full

commission on a sale being effected, although not through his direct agency (*Rainy v. Vernon*, 9 C. & P. 559). Where an estate was put up for sale on these terms: if not sold the owner was to pay 200*l.*, and the expenses of advertising; if it should be sold, then all expenses were to fall into the commission, which varied according to the value of the estate; the estate was put up to auction, but not sold. The owner afterwards employed another agent (of which he informed the auctioneer) through whom the estate was sold. Held, that the first auctioneer was only entitled to the 200*l.* and expenses, and was not entitled to the commission on the sale of the estate (*Green v. Hall*, Exch. 7 Nov. 1848).

So amongst ship-brokers, the usage is that when a broker has introduced the purchaser, and the seller of a ship, or the captain, and a freighter together, and they, by his means, enter into a negotiation, he is entitled to commission (*semble*, 5*l.* per cent. *Brown v. Nairne*, 9 ib. 204; *Cohen v. Paget*, 4 Camp. 96) if a sale, *or, charter-party be effected between them, though, it be completed without his instrumentality, or, even, [*88] through another broker (*Wilkinson v. Martine*, 8 C. & P. 1; *Burnett v. Bouch*, 9 ib. 620). But, if, the negotiation goes off on account of any fault in him, he is not entitled to recover any thing for remuneration, or, ordinary expenses (*Dalton v. Irwin*, 4 ib. 289); and by the usage of the city of London, he is not entitled to commission, unless, the contract is *perfected* (*Read v. Rann*, 10 B. & C. 438); even, where the negotiation goes off by the act of the owner (*Broad v. Thomas*, 4 ib. 338; 7 Bing. 99; 4 M. & P. 732; *Hill v. Kitching*, C. B., T. T. 1846). Where A. employs B. to get a charter for a ship, and B. employs another broker, it would seem, that evidence of a custom of trade is admissible to show which broker is entitled to be paid the commission by A. (*Smith v. Butcher*, 1 C. & K. 573; per *Cresswell*, J.).

Among land-agents a somewhat similar usage prevails (*Murray v. Currie*, 7 C. & P. 584); but the jury are not bound under all circumstances to give the full commission (*Ib.*). If the agent, not being able to sell, procures a loan, he cannot under 12 Car. II. c. 13, s. 3, and 12 Anne, c. 16, s. 2, recover more than 5*s.* per cent. (*Price v. Wilkinson*, 2 Bing. 470; 10 Moore, 177). If the agreement be for a commission on all sales effected, or orders executed, the principal to be responsible for bad debts, and the agent to draw his commission monthly, he is entitled to commission on bad debts, though the usage of the trade is not to allow commission on sales producing bad debts (*Bower v. Jones*, 8 Bing. 65; 1 M. & Sc. 140). Where a surveyor was employed to negotiate for the sale of certain lands, and was to receive a commission of 2*l.* per cent. "on the sum which might be obtained either by private treaty, arbitration, or trial by jury," it was held that he could not recover the commission till the money was actually received by the deft. (*Bull v. Price*, 5 M. & P. 2; 7 Bing. 237). The plt. cannot charge in addition to his commission for attendances as agent; but he may, if the attendances are matter beyond his duty as agent—and whether they are so, or, not, is a question for the jury (*Marshall v. Parsons*, 9 C. & P. 656.) It would be as well to prove deft. derived a benefit from plt.'s acts, though, not absolutely necessary, if a clear case of agency be made out (see *Brown v. Millner*, 1 Moore, 65). See further, "WORK AND LABOUR," "MASTER AND SERVANT."

In Action for Money paid by Agent.] He should prove the payment was made, and that it was so, by the express directions of the deft.; or, else, that it was payment incidental to the employment, and made in the regular course of it, as a payment for duties, tolls, customs, warehouse-room, &c.; or, a payment made to preserve, or, to recover the property from loss, &c. (Payl.

79; 2 Bro. P. C. 323; *Curtis v. Barclay*, 5 B. & C. 141; 7 D. & R. 539). If the payment be not warranted by the deft.'s original directions, or, by the nature of the employment, proof of a subsequent acquiescence of the deft. would render him liable (5 Burr. 2727; *Clayton v. Dilly*, 4 Taun. 165). But the plt. cannot recover a loss sustained in consequence of giving a guaranty which he was not authorized to give, as the quality of certain goods which he sold for his principal, but in his own name (*Johnson v. Osborne*, 1 Jur. 943). See further, "MONEY PAID."

Evidence for Defendant.

In Action for Commission, &c.] Deft. should endeavour to disprove plt.'s case. He may show that plt. merely trusted to deft.'s honour whether any thing was to be paid (1 M. & S. 290); or, that he derived no benefit whatever from the plt.'s acts, proving the plt.'s misconduct, or, negligence, and its consequences *(Com. Con. 271; *Hamond v. Holiday*, 1 [*89] C. & P. 384; *Stewart v. Kayle*, 3 Stark. 161; *Hurst v. Holding*, 3 Taun. 32; *White v. Chapman*, 1 Stark. 113; *Jones v. Nanney*, McCle. R. 25; *Denew v. Daverell*, 3 Camp. 451; 7 Moo. 237), or hiring himself to another (*Thompson v. Havlock*, 1 Camp. 527.) But an agent who acts *bona fide* on the best advice he is able to obtain in the affairs of his principal, is not liable for the consequences (see *Miles v. Bernard*, Pea. Ad. Ca. 61); or, he may show that the plt.'s employment was in an illegal transaction (2 Wils. 133; *Josephs v. Pebrer*, 3 B. & C. 639; 5 D. & R. 542; *Fomin v. Oswel*, 3 Camp. 357; *Haines v. Busk*, 5 Taun. 521). A sworn London broker can charge his principal only the cost price of articles purchased for him, and his commission (*Proctor v. Brain*, 2 M. & P. 284; see further, "WORK AND LABOUR"); or, he may show plt. and himself were partners in the transaction (*post* "PARTNERS"); or, that plt. was to be paid on a contingency not yet happened (5 Taun. 531). But the plt. is entitled to recover for defeating a contract which may be void if it be not clearly illegal (*Wells v. Porter*, 3 B. N. C. 722). Deft. may show that although the plt. acts in London as a sworn broker, yet he is not qualified to act as such pursuant to 6 Anne, c. 16, in which case he cannot recover his commission (*Gibbons v. Rule*, 4 Bingh. 301; *Cope v. Rowlands*, 2 M. & W. 149).

In an action at the suit of a clerk of a company for wages, it is no defence to show that there is an act of parliament, directing that the company shall be sued in the name of their clerk (the plt.), for the plt. cannot sue himself (*Radenhurst v. Bates*, 3 Bing. 471).

Commission.] The following letter was addressed to an African captain and supercargo by his employers: "Your commissions are 6*l.* per cent. on the net proceeds of your homeward cargo, after deducting the usual charges as arranged by the African Association, viz., 4*l.* per ton from the gross sales of the oil when taken from the quay, and 4*l.* 15*s.* when warehoused:" Held, that the commission was payable only on the sums actually realised after deducting bad debts as well as other charges (*Caine v. Horsfall*, 1 Ex. 519; 17 Law J., Eq. 25).

Where a custom-house agent entered into a custom-house bond with respect to goods consigned to him by the plt., and claimed a per centage on the sum mentioned in the bond, and no contract or usage for the payment of such was proved: held, that the plt. was not entitled to any such percentage; and that, therefore, no question as to the reasonableness of the amount claimed could be put to a witness (*Hall v. Gurney*, 2 Car. & K. 644, *Cresswell*).

Upon a negotiation between A. and B. for an exchange of advowsons, A.

agrees to pay to the agent C. 100%, "one-third down, and the remaining two-thirds when the abstract of conveyance is drawn out." The one-third is paid. A. delivers an abstract of his title, but no abstract is delivered on the part of B., and the negotiation drops. C. cannot maintain an action against A. for the remaining two-thirds of his commission, the event on the happening of which his right to it was to arise not having occurred (*Alder v. Boyle*, 4 C. B. 635).

A., a supercargo, sailed to Calabar in charge of a ship called the "Magistrate," his commission being 5% per cent. Some time after his departure, the principals despatched another ship, called the "Windermere" to Calabar, with instructions to A. to find a cargo for her, and to consider her "in one turn" with the "Magistrate," and offering him, in respect of this second ship, a commission of 2½ per cent. A. wrote to his principals rejecting the 2½ per cent. commission; but, notwithstanding this, he proceeded to load the "Windermere," that course being in his view the best for his principals; held, that, as he had acted on the instructions of his principals in loading the "Windermere," he was bound by their offer as to commission, and could not recover more than 2½ per cent. in respect of the cargo of that ship (*Moore v. Maxwell*, 2 Car. & K. 554, Rolfe).

In an action by an auctioneer on a contract for payment of commission upon the sale of an estate, if the sale should be within two months after an auction; held, that evidence of the conduct of the parties to the contract would not alone withdraw the construction of the word "months" from the judge, but that evidence of that word, meaning in the trade of auctioneers calendar months, was to be left to the jury (*Simpson v. Margetson*, 12 Jur. 155; 17 Law J., Q. B. 81).

In Action for Money Paid, &c.] Deft. should endeavour to disprove plt.'s case. He may prove that the payment was a mere voluntary, and officious one, not warranted, as being against deft.'s express directions, or, against his interest, and not necessarily incidental to plt.'s employment (*Edmiston v. Wright*, 1 Camp. 88; 8 T. R. 610; *Grove v. Dubois*, 1 T. R. 112); or, that the payment was made by reason of plt.'s unskillfulness, or misconduct (*Cap v. Topham*, 6 Ea. 392); or in an illegal transaction (*Steers v. Lashley*, 6 T. R. 61; *Clayton v. Dilly*, 4 Taun. 165). If A. advance money to another, being the natural son of a brother of B., and when B. is applied to for payment he pays half, and by letter promises the remainder, this is not sufficient for the jury to draw an inference that A. acted as the agent of B., and that B. afterwards sanctioned the agency so as to render B. liable (*Ellaby v. Saunders*, 8 Law T. 367, Exch.). See further "MONEY PAID."

II. ACTIONS BY AGENT AGAINST THIRD PERSONS.

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Plaintiff's Interest, p. 90.

Evidence for Defendant, p. 91.

Plaintiff's Interest, p. 91.

Form of Remedy, Pleadings, and Precedents.

The form of the remedy, pleadings, and precedents depends upon the subject-matter of the cause of action; and no observation, as may peculiarly relating

to this action, need be made. The declaration state the contract to be made with plt. generally, though it appear from it, it was made by him as agent (Atkins v. Amber, 2 Esp. 493).

Evidence for Plaintiff.

The evidence, as to the subject-matter of complaint, is the same as in other cases.

**Plaintiff's Interest.]* In an action on a contract, it will suffice to [90] prove that the contract was in terms made with the plt. (Sargent v. Morris, 3 B. & A. 281; Joseph v. Knox, 3 Camp. 321; Gardiner v. Davis, 2 C. & P. 49; Schack v. Anthony, 1 M. & S. 575; Jesson v. Solly, 4 Taun. 53; Garratt v. Handley, 4 B. & C. 666; Dancer v. Hastings, 4 Bing. 2); or, that plt. has a beneficial interest in the performance of it, as, in his lien for commission, &c. (Grove v. Dubois, 1 T. R. 112; Martini v. Coles, 1 M. & S. 147; 1 H. Bl. 81; Farebrother v. Simmons, 5 B. & A. 333; 1 Ch. P. 5); or, that his nominal principal has repudiated the contract, which plt. had no authority to make (Langstroth v. Toulmain, 3 Stark. 145); and in which latter case plt. should prove he gave notice to deflt., before action brought, of the facts (Bickerton v. Burrell, 5 M. & S. 383; Rayner v. Grote, 15 M. & W. 359). A. contracted with B., who appeared on the face of the contract to be an agent for C. for whom B. had sold the goods, but B. was in fact the principal. Evidence was adduced to show A.'s knowledge that B. was the principal and not the agent: held, that such evidence was rightly received, and that the jury might infer from the facts that A. knew he was dealing with B. as principal and not as agent (Rayner v. Grote, 8 Law T. 471, Exch.; 15 M. & W. 359; 16 Law J. 79, Exch.); or, that he has a special property or interest in the subject-matter of the agreement, as that he is a factor, broker, carrier, warehouseman, auctioneer, or, other agent acting for reward (Sadler v. Leigh, 4 Camp. 195; Morris v. Cleasby, 1 M. & Sel. 581; Atkinson v. Hamber, 2 Esp. 493; Rayner v. Linthorn, R. & M. 325; Martini v. Coles, 1 M. & Sel. 147). If, at the time of a contract which the agent has authority to make, the deflt. is told that there is an unnamed principal, and if that principal afterwards renounce the contract, and the agent acquiesce in that renunciation, yet the agent may recover. (Short v. Spackman, 2 B. & Ad. 962). If the contract be under seal, and made with the agent, although expressed to be on behalf of another, the agent only can sue (Berkley v. Hardy, 5 B. & C. 355; Schack v. Anthony, *supra*; Dancer v. Hastings, *supra*; Appleton v. Binks, 5 East, 148; see Handcock v. Hodgson, 12 Moo. 504); and there is no difference between a deed and parol agreement (Norton v. Herron, 1 R. & M. 229; Spilett v. Lavender, *supra*). Where A., a merchant at Newcastle, having overdrawn his account with his agents (the plts.), advises them that he will ship goods to cover his draft, and does accordingly ship them, and receives from the wharfingers' servant (the captain of the ship) a boat receipt to the effect that they were to be delivered to the plts., the wharfingers are estopped from denying the plt.'s title in the goods upon their arrival in port, and no bill of lading is requisite to vest the property in the plts., as, between them and A. the relation was not of principal and factor, but, pawnor and pawnee, in which case the property vests in the pawnee without actual delivery, as, in that of vendor and vendee (Evans v. Nichol, 5 Jur. 1110, C. P.). Where bankers are employed to obtain payment of a bill drawn on a person resident at Calcutta, and they forward it to their agents in India, and these receive the amount, and the bankers announce the fact of the payment to their principal, but, do not credit him in their books with the amount—yet,

they are liable to him for the amount, though their sub-agents in India fail before payment to them (*Mackersy v. Ramsays*, 9 Cl. & Fin. 818). In an action for a tort, he should prove he has a beneficial interest, or, a special property in the property injured (see 1 Ch. P. 71, 169). When plt. sues as a clerk, &c., under an act of parliament, the act should be proved (see "ACT OF PARLIAMENT").

**Evidence for Defendant.*

[*91]

*The evidence for deft. relative to the subject-matter of complaint will be the same as in other cases.

Plaintiff's Interest.] Deft. may, on the other hand, show that the plt. was, in fact, a mere agent, entering into the contract, or, possessing the property assigned as such, without any *beneficial* interest (*Piggot v. Thompson*, 3 B. & P. 147; *Williams v. Millington*, 1 H. Bla. 84; *Rayner v. Linthore*, R. & M. 325; *Bowen v. Morris*, 2 Taun. 374; *Evans v. Evans*, Har. & Wol. 239). Deft. may show that the true owner of the goods sold by the agent, has required, or obtained a completion of the contract with himself personally (*Dickinson v. Naul*, 4 B. & Ad. 638; *Coppin v. Walker*, 7 Taunt. 237; see *Hornby v. Lacy*, 6 M. & Sel. 166; *Paley*, 243). It seems that the mortgagor, or, assignor of a ship contracting in his own behalf with a third person to let it, &c., cannot be regarded by the mortgagee, or, assignee as his agent, so as to enable the latter to sue for the freight, &c., in his own name, for the mortgagee, or assignee, is no party to the contract that is made after the transfer, and it is not material that he is entitled to the ship's earnings (*Chinnery v. Blackman*, 3 Dougl. 391; *Morrison v. Parsons*, 2 Taunt. 407; *Case v. Davidson*, 5 M. & Sel. 79; *Dean v. M'Ghie*, 4 Bingham. 45).

III. ACTIONS AGAINST AGENT BY PRINCIPAL.

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Form of Remedy.

Form of Remedy.] The remedy for a principal against his agent for breach of his duties, is, either, by an action on the case, or, by [*92] **assumpsit*; but in general, the latter is the more advisable form of remedy, especially if there has been a receipt of money by the agent (*post*, "*ASSUMPSIT*," "*CASE*"). For not accounting for the proceeds of sales, or, receipt of money by the agent, whether upon his express, or, implied undertaking, it is usual to declare against him in a special action of *assumpsit*, and which is a more convenient remedy than a bill in equity, or, action of account (*Wilkin v. Wilkin*, Carth. 89; *S. G.* 1 Salk. 9; *Topham v. Braddick*, 1 Taun. 572). The law will imply a promise to account for such goods as are not sold, and to return them to *plt.* (*Ib.*). If the declaration allege that the goods have been sold, if traversed, it will require to be proved (*Elbourn v. Upjohn*, 1 C. & P. 572); but, after a reasonable time a sale will be presumed (*Hunter v. Welsh*, 1 Stark. 224). And this form of action may be adopted, however long, and complicated the account may be (*Tomkins v. Willshear*, 5 Taun. 431; *S. C.* Marsh. 115, over-ruling *Scott v. McIntosh*, 2 Camp. 238). Where there is evidence of receipt of money, the same may be recovered under the count for money had and received. On misapplication of money received by the agent for his principal, whether for a particular purpose (*Willes*, 404), or otherwise, or, at all events, where a refusal to account renders the debt absolute, debt, or *indebitatus assumpsit* lies (11 Moo. 92; 12 *ib.* 521; *Sty.* 287); and, even though, paid for an illegal purpose, if not so applied (*Tenant v. Elliott*, 1 B. & P. 3; *Farmer v. Russel*, *ib.* 296, 7 Ves. 473; *Taylor v. Lendey*, 9 Ea. 49). *Assumpsit* lies in all cases against a *del credere* agent (*Foster v. Allanson*, 2 T. R. 479). *Assumpsit* does not lie, however, where there is a covenant to account (*Bulstrode v. Gilburn*, 2 Str. 1027), the remedy being on the deed (*Ib.*); unless a balance be agreed to and *deft.* promise to pay it, (*Foster v. Allanson*, 2 T. R. 479). Case lies for selling at an inferior price, or, on credit where the *deft.* was desired to sell at a particular price, or, for ready money only (*Dufresne v. Hutchinson*, 3 Taun. 117; *Ferrars* (Earl) *v. Robins*, 2 C. M. & R. 152.) Case lies against accountants hired by a firm to make out the accounts of the firm, and the separate balance of each partner, at the suit of one of the partners, for making out the account so erroneously, and negligently, that, he relying on their statement, was a considerable loser thereby, and it is not a variance to aver that he hired them (*Story v. Richardson*, 6 Bing. N. C. 123; 8 Sc. 291).

Form of Pleading.

Form of Pleading.] When a party declares specially, whether, he proceed in case, or, *assumpsit*, the contract must be stated to raise the duty and employment; therefore, in an action for not insuring, an undertaking for a conditional voyage to a place under certain contingencies will not support an undertaking for an absolute voyage to that place (*Lopes v. De Tastet*, 1 B. & B. 544). And, where the *deft.* acts under a *del credere* commission, the

fact of such a commission being contracted to be paid must be stated in the declaration; and, where it was merely alleged that the deft. was indebted to the plt. in respect of goods delivered by him to the deft. to be sold and disposed of, and it appeared in the evidence that the deft. acted under a *del credere* commission, on guarantying the solvency of the purchasers, it was held, that the declaration was insufficient, by reason of its omitting to state that the deft. was to receive a *del credere* commission (Gill v. Comber, 1 Moo. 279); but, in Grove v. Dubois, 1 T. R. 112; Bise v. Dickason, ib. 285, it was considered that the amount of the value of the goods might be *recovered from an agent of this nature under the count [*93] for goods sold and delivered.

A declaration against a broker has been held bad in arrest of judgment for averring that it was his duty, as broker, not to deliver goods entrusted to him for delivery on payment, without the price thereof being first paid to him (Boorman v. Brown, 4 P. & D. 401; 6 Jur. 165). But, see the declaration sustained on error, on the ground of its disclosing an express contract from which this duty resulted, Brown v. Boorman, 3 Ad. & E., N. S. 516; 11 Cl. & Fin. 1. In an action against an agent, with a special count for not paying over the proceeds of goods sold by him, the receipts of the proceeds should be averred (Serra v. Wright, 6 Taun. 45; Varden v. Parker, 2 Esp. 710). But the moneys received are recoverable under the common count for money had and received (p. 92).

In an action for not accounting, *non assumpsit* "will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment, or, employment as would raise a promise in law to the effect alleged, but not of the breach." In every species of assumpsit the deft. must plead specially set-off, mutual credit, and all other matters in confession and avoidance (R. G. H. T. 4 Will. IV. r. 2; see *post*, "ASSUMPSIT"). Where an agent, employed to recover a sum of money, was entitled to retain a just allowance for his labour, and service, as such allowance was not in the nature of a cross demand, or, mutual debt, he might formerly give it in evidence, under the general issue, in an action for money had and received (Dale v. Sollet, 4 Burr. 2133), and when the plt. sues in indebitatus assumpsit for an alleged balance in the agent's hands, this, still, appears to be the law, notwithstanding the new rules (Rosc. Evid. 344).

Precedents.

Declaration in assumpsit against agent employed to sell goods, &c., for not accounting for them.

For that whereas, heretofore, to wit, on, &c. [*any day about time of delivery*], in consideration that the plt., at the request of the deft., had delivered to the deft. (*if the goods were not delivered, say, that in consideration that plt. had employed deft. to sell, &c.*) divers goods and chattels; to wit [*here describe the goods, as in trover, &c.*]. It does not appear necessary to describe them with exact number, &c., of the plt., of great value, to wit, of the value of £100 [*state a sufficient sum*], to be sold and disposed of, by the deft., for, and on account of the plt., for reward, to the deft. in that behalf, he, the deft., then promised the plt., that he would, on being thereunto requested, render to him a just and true account of the sale of the said goods and chattels, and of the moneys arising from such sale, and would deliver up to the plt. such of the said goods as should remain unsold by the deft. after a reasonable time in that behalf should have elapsed from the time of the sale of the said goods and chattels, and the plt. avers that the deft. did afterwards, to wit, on the day and year aforesaid, sell and dispose of the same, for, and on account of, the plt. (*if this cannot be proved then, say, that the deft. then promised to account for the said goods, &c., on request, and let the breach be for not accounting for the goods on being requested,*) for divers large sums of money, and that, although the plt. afterwards, and

after a reasonable time for that purpose had elapsed from the time of the said sale, to wit, on, &c., requested the deft. to render a true and particular account of the sale, and of the moneys arising therefrom, to the plt., and to deliver up to him, the plt., such of the said goods as then remained unsold by him, the deft., yet the deft. not regarding his said promise hath not rendered to the plt. a just and true, or, any other account of the said sale of the said goods and chattels, or of any part thereof, or of the moneys arising from such sale, or of any part thereof, nor hath the deft. delivered up to him the plt., any goods unsold, as aforesaid, but hath hitherto wholly neglected and refused, and still [*94] doth neglect and refuse,* so to do. (*Add the common counts for money had and received, and account stated, and breach.*)

The like for not taking due care of the goods.

For that whereas, heretofore, to wit, on, &c., in consideration that the plt., at the, &c., of the deft., had delivered to the deft. divers goods and chattels, to wit, &c., of great value, to wit, of the value of £50, he, the deft., undertook, and then promised the plt., to take due and proper care thereof. Yet the deft., not regarding his said last-mentioned promise, &c., but contriving, &c., did not, nor would take due and proper care of the said last-mentioned goods and chattels, but, wholly neglected so to do, and took such bad care thereof, that afterwards, to wit, on, &c., the said last-mentioned goods, &c., became and were wholly lost to the plt. (*See directions in preceding precedent.*)

Against an agent on a promise not to sell under a fixed price, and to account for sale, &c.

For that whereas, heretofore, to wit, on, &c., in consideration that the plt., at the request of the deft., had then retained and employed him, for commission and reward, in that behalf, to sell and dispose of divers chaises, gigs, and other carriages, of, and for him, the plt., at, and for certain prices respectively, to be therefore stated to the deft., by the plt., he, the deft., then promised the plt., not to sell the said chaises, &c., under the said prices, and to render a just and true account of the sales by him made, as agent as aforesaid, and to deliver up to the plt., such of the said chaises, &c., as should remain unsold by him, the deft., when he should be thereunto afterwards requested; and, although he, the deft., as such agent, afterwards, to wit on, &c., had and received divers, to wit, fifty chaises, fifty gigs, and fifty other carriages, of, and from the plt., as such agent, as aforesaid, upon the terms aforesaid, and he, the plt., then stated the prices of the same, respectively, to the deft.; yet the deft., disregarding his said promise in this, to wit, that he, after the making of his said promise, to wit, on, &c., as such agent, without the knowledge and against the will of him, the plt., sold and disposed of divers, to wit, thirty of the said chaises, &c., at much smaller prices, to wit, to the amount of £— less than the said prices so stated to him, the said deft., by the plt., in respect thereof, as aforesaid; and also in this, to wit, that the deft. hath not as yet rendered to the plt. a just and true, or, other account of the said sales, or, delivered up to him, the plt., the residue of the said chaises, &c., being of great value, to wit, £—, which remained unsold by him, the deft., as aforesaid, but, hath wholly neglected and refused, and still doth neglect and refuse, so to do, although he, the deft., was afterwards, and before the commencement of this suit, and after the lapse of a reasonable time in that behalf, from the delivery of the said goods to the deft. as such agent, as aforesaid, and the times of the said sales, to wit, on, &c., requested by plt. to do so. (*Add money count to recover what deft. received, if not paid over, and account stated, and breach.*)

Count against agent for not selling at the best price.

For that whereas, heretofore, to wit, on, &c., in consideration that the plt., at the &c., of the deft., had delivered to the deft., to sell and dispose of, for the plt., divers large quantities, to wit, &c., of cloth and kerseymere, of great value, to wit, &c. he, the deft., undertook, &c., to perform his duty in, and about the sale and disposal of the same cloth and kerseymere; and, although the deft. then accepted and received the said last-mentioned cloth and kerseymere for the purpose aforesaid, and it thereupon then became, and was, the duty of the deft. to use due endeavours to sell and dispose of the same for the best prices that could have been obtained for the same; yet the deft., not regarding, &c., did not, nor would, use due endeavours to sell and dispose of the said last-mentioned cloth, and kerseymere, for the plt., for the best prices that could have been obtained for the same, but wholly neglected so to do; and afterwards, to wit, on, &c., aforesaid, and on divers, &c., contrary to the said last-mentioned promise and undertaking of the deft., so improperly conducted himself with respect to the said last-mentioned cloth, and kerseymere, that the same has produced much less, to wit, the sum of £200 less, for the use of the plt., than the same would have produced if it had been duly sold by the deft. for the plt.

Against an agent for not taking due care of goods delivered to him at different times, and selling them under value, and by bartering them, &c.

*For that whereas, heretofore, to wit, on, &c., at &c., in consideration that the plt., at the request of the deft., would [from time to time] retain and employ him, [*95]: the deft., for commission and reward in that behalf, to sell and dispose of cloth and kerseymere of the plt., to be delivered by the plt., to the said deft.; he, the deft., undertook, and then promised the plt., to take and use due and proper care and diligence in, and about the selling and disposing of such cloth and kerseymere, and the plt., in fact, says, that he, confiding in the said promise and undertaking of the deft., afterwards, to wit, on, &c., aforesaid, and on divers other days and times afterwards, and before the commencement of this suit, did retain and employ him, the deft., for commission and reward in that behalf, to sell and dispose of divers large quantities of cloth, and kerseymere for the plt., and during that time, to wit, on, &c., first aforesaid, and on divers, &c., delivered to the deft. divers large quantities, to wit, fifty pieces of cloth, and five hundred pieces of kerseymere, of the said plt. of great value, to wit, of the value of £—, for the purpose aforesaid, and the deft., on those several days and times, accepted and received the said quantities of cloth and kerseymere for the purpose aforesaid; and, although it thereupon became, and was the duty of the deft., to use and exercise care and diligence, in, and about the endeavouring to sell and dispose of the said cloth and kerseymere, for good and sufficient prices, and although the deft. could and might, and ought to have sold the said cloth and kerseymere for good and sufficient prices, whereof he, during all the time aforesaid, had notice, to wit, on, &c. yet the deft., not regarding his said promise and undertaking, so by him, in manner and form aforesaid, made, but contriving and fraudulently intending craftily and subtly to deceive and defraud the plt. in this behalf, did not, nor would, use due and proper care and diligence, in and about the endeavouring to sell and dispose of the said cloth and kerseymere for good and sufficient prices, but wholly neglected so to do, and also afterwards, to wit, on the said several days and times, wrongfully and injuriously bartered and exchanged divers large quantities of the said cloth and kerseymere, for other goods, wares, and merchandises, of much less value than the said cloth and kerseymere, contrary to the said promise, and undertaking of the deft., and his duty in that behalf.

For selling to persons unfit to be trusted.

For that whereas, heretofore, to wit, on, &c., in consideration that the plt., at the, &c., would retain and employ the deft. to sell and dispose of divers quantities of cloth and kerseymere of the plt., on commission, he, the deft., undertook, &c., not to sell, or dispose of the said last-mentioned cloth, or kerseymere to any person or persons unworthy of credit, in the way of trade and dealing, and unfit to be trusted with goods on credit; and the plt., in fact, saith, that he, confiding, &c., did afterwards, to wit, on, &c., last aforesaid, and on divers, &c., retain and employ the deft. to sell and dispose of such cloth and kerseymere for the plt., and during that time, and on divers, &c., and before the commencement, &c., delivered to the deft. divers large quantities, to wit, &c., of great value, &c., for the purpose last aforesaid, and the deft., on the several days and times last aforesaid, accepted and received the said last-mentioned cloth and kerseymere for the same purpose; yet the said deft., not regarding, &c., afterwards, to wit, on, &c., last aforesaid, and on divers, &c., wrongfully sold and disposed of the said last-mentioned cloth and kerseymere, for divers sums of money, to divers persons respectively, to wit, to Messrs. T., B., and D., and divers other persons respectively, unworthy of credit in the way of trade and dealing, and unfit to be trusted with goods on credit, by means whereof, the price of the said mentioned cloth and kerseymere remains, and is, wholly in arrear and unpaid to the plt., and he is likely wholly to lose the same. (*Add money counts and account stated, &c.*)

Against an agent employed to sell goods on his promise to use due endeavours to obtain payment of proceeds.

For that whereas, heretofore, to wit, on, &c., aforesaid, in consideration that the plt., at the, &c., of the deft., had retained and employed him, the deft., for reward to him in that behalf, to sell and dispose of certain goods, wares, and merchandises of the plt., of great value, to wit, of the value of 100*l.*, of lawful money, in certain parts beyond the seas, for the plt., he, the deft., undertook, and then promised the plt., to use due endeavours to obtain *payment of the money for which the said goods, wares, and merchandises should be sold, for the plt., and, although the deft. afterwards, to wit, on, [*96] &c., aforesaid, sold the said last-mentioned goods, wares, and merchandises, for, and on account of the plt., for a large sum of money, to wit, for the sum of £—; yet

deflt., not regarding his said promise and undertaking, so by him, in manner and form aforesaid, made, but contriving and fraudulently intending craftily and subtly to deceive and defraud the plt. in this behalf, did not use due endeavours to obtain payment of the said moneys for which the said last-mentioned goods, wares, and merchandises were so sold as aforesaid, but wholly neglected and refused so to do; and by means and in consequence thereof, the plt. hath not as yet received the proceeds of the said last-mentioned good, wares, and merchandises, and is likely to lose the same.

Evidence for Plaintiff.

In General.] In actions against carriers and other bailees for not delivering, or, not keeping goods safe, or, not returning them on request, and in actions against agents for not accounting, *non assumpsit* will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment, or, employment as would raise a promise in law to the effect alleged, but not of the breach (R. G. H. T. 4 W. IV.). Plt. should, in the first place, prove the deflt.'s retainer and employment as stated in the declaration (Lopez v. De Tastet, 1 B. & B. 544). If, the same was by any written document between them, it should be produced and proved in the usual way. If, the damage resulted from a deviation from specific orders, such orders should be proved (Bexwell v. Christie, Cowp. 395); and so, if it resulted from not following the usage of trade and dealing, the usage should be proved (Smith v. Lascelles, 2 T. R. 188; 4 Burr. 2061; Russell v. Hankey, 6 T. R. 12). In general, in order to render an agent liable, plt. may show that he did not exert the same vigilance, care, and diligence, as a prudent person would exert, and which is a question for a jury (see Kilsby v. Williams, 5 B. & A. 820; Paterson v. Gandasequi, 15 Ea. 62). Even, though, the agent is bound to adopt the usual course of trade, plt. may still, to prove deflt.'s liability, show that he adhered more closely to it, than a prudent and skilful agent would have done, and thereby occasioned a loss (2 Wils. 325; Smith v. Lascelles, 2 T. R. 188; Yelv. 202). And, where there are specific instructions, or, in the absence of them, an usage of trade, and plt. sustains a loss by deflt.'s departure from them, the circumstance of deflt.'s intending a benefit to his principal by such departure will not avail him (Catlin v. Bell, 4 Camp. 183; Dyer, 161; 1 H. Bla. 159; Bexwell v. Christie, Cowp. 395); though, on the other hand, he will, in general, be safe, if, he pursue the instructions of his principal (Moll. 329). Any admission made by deflt. of his liability should be proved (*ante*, "ADMISSIONS").

In an Action for not accounting for Goods, *non assumpsit* denies that the deflt. ever was such agent as alleged, also the retainer and the promise, but would admit the request to account and the neglect to do so; plt. must, in addition to the foregoing evidence as to retainer, prove the delivery of the goods to deflt., in the character of agent, as alleged in the declaration; *post*, title "PRINCIPAL AND AGENT"). Proof of the delivery or consignment of goods will vary according to the fact. If there be an invoice, it should be proved (*post*, "SECONDARY EVIDENCE"). The value of the goods should be proved: if the deflt. have sold the goods, or, any part of them, the sale

*should be proved, although no money may have been received so [*97] as to charge the deflt. with the proceeds, he will be liable for refusing to render an account of the sale under this special count. An auctioneer, who delivered goods without receiving the price from the purchaser, was held liable in this form for the full produce of the goods (Brown v. Station, 2 Ch. R. 353). If seller consent to the goods being sold on credit, no

action will lie against the agent for not paying over the produce, unless, the delay in the payment have been occasioned by the agent's neglect, or, the transaction be closed (Vardeer v. Parker, *infra*): the plt. should prove a request to account, though it may be presumed after a reasonable time (Topham v. Braddick, 1 Taun. 572; 12 Mod. 444), and also, if possible, the receipt of the proceeds of sale: the purchaser will be a good witness for this.

In an Action to recover the proceeds of Sales, or, Moneys received by the deft., which would be recoverable under the count for money had and received, it will, in addition to proof of the receipt of the money, in general, be necessary to prove the transaction is closed (Vardeer v. Parker, 2 Esp. 710; Lucás v. Groning, 1 Stark. 392), or else, show that it is the fault of the agent, that it is not (Ib.). Letters written by the agent to the principal will be evidence against him; and, if, he has rendered an account, he will be bound by it (Shaw v. Picton, 4 B. & C. 729; 7 D. & R. 201; Shaw v. Woodcock, 7 B. & C. 73; Shaw v. Dartnell, 6 B. & C. 56; 9 D. & R. 54). A sale of the goods, and actual receipt of the money for them, will be presumed, when a reasonable time has elapsed after deft.'s refusal to account (per Ld. Ellenb. Hunter v. Welsh, 1 Stark. 224); and plt. will recover on proving their value (Ib.). Proof of deft. being an agent under a *del credere* commission supersedes the necessity of proving the receipts of the proceeds (Paley, 76; Grove v. Dubois, 1 T. R. 112; Bise v. Dickason, ib. 285). See further, as to the proof against an agent for money had and received, *post*, "MONEY HAD AND RECEIVED." If the deft. has been guilty of misconduct, and, he seeks to deduct the amount of his commission on the sales from plt.'s claim, plt. should prove such misconduct (White v. Chapman, 1 Stark. 113; *ante*).

In an Action for selling at an Under-price, if the deft. received any specific instructions as to price, they should be proved (Dufresne v. Hutchinson, 3 Taun. 117; Scott v. Surman, Willes, 407; 3 B. & P. 489). So, if, there was any custom, or, usage of trade. If there were no specific instructions, plt. should prove the value of the goods and the sale of them. Prove retainer of deft. and delivery of goods.

In an Action for selling on Credit, if deft. has received specific instructions, they should be proved; otherwise it should be proved that the usage of trade was against selling on credit (12 Mod. 514; Scott v. Surman, Willes, 407). As, an usage of this kind in the sale of stock (Wiltshire v. Sims, 1 Camp. 258; Lefevre v. Lloyd, 5 Taun. 749; 12 Mod. 514), or, in a sale by an auctioneer, by auction (Brown v. Staton, 2 Ch. R. 353; Ferrars (Earl) v. Robins, 2 C. M. & R. 152). See a declaration in case against a broker, where it was held that the duty alleged in the declaration resulted from the express contract therein described, and did not arise simply from the deft.'s character of broker (Boorman v. Brown, 3 Q. B. 511). Proving deft. bartered the goods would make him liable (Guerriero v. Peile, 3 B. & A. 616). In such an action, if it appear that the deft. sold the goods upon getting a bill of exchange drawn *by the vendee upon, and accepted [*98] by one D.; that the plaintiff, at first, refused to take it, but, that an agent of his, ultimately took it, in order to get it discounted; that the bill was never presented, nor, was any notice of dishonour given to the drawer, or, the deft. until 10 days after the bill had become due, and if, the jury find that the plt. had not accepted it, in satisfaction for the goods, his negligence in not presenting it, and giving notice of dishonour, by which the drawer was

discharged from liability, is not an answer to the action (*Ferrars (Earl) v. Robins*, 2 C. M. & R. 152; 1 Gale, 70; 5 Tyrw. 705). Though, there be no specific instructions, or, usage against selling on credit, plt. will render deft. liable by proving the credit given was unreasonable, and not customary (*Buls*, 183). Prove the retainer and delivery of the goods.

If the agent have taken a security, instead of cash, plt. may show the security was such as would give him unnecessary trouble, or, risk (*Yelv*. 202). If a broker employed to sell goods, sell them for a bill at a given date, and draw on the buyer for the amount, he is answerable on the bill to his principal (*Lefevre v. Lloyd*, 5 Taunt. 749); or, if, he take a security payable to himself from the purchaser, and give his own security to the principal for the net proceeds, he will be liable (*Simpson v. Swan*, 3 Camp. 291); and he will be liable for a loss arising from mixing up the proceeds of the sale with his own, at his banker's (11 Ves. 382; *R. & M.* 382).

In an Action for selling to a Person unfit to be trusted, plt. should show the party was in reputed bad circumstances at the time of the sale (12 Mod. 514; *Wiltshire v. Sims*, 1 Camp. 258), or, that such was known to deft.: the circumstance of deft.'s selling his own goods for ready money would be a strong inference against him (*Ib.*). Prove the retainer and delivery of goods.

In an Action for the Loss of Goods, non assumpsit operates as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach (*R. G. H. T.* 4 Will. IV.); if the agent did all that by his industry he could for their preservation (*Vere v. Smith*, 1 Vent. 121), and kept them with the same care he did his own (*Coggs v. Bernard*, 2 Raym. 917; *Maltby v. Christie*, 1 Esp. 341), he will not be liable, and proof must be adduced accordingly against this. An agent is not liable in cases of fire (2 Mod. 100), robbery (*Co. Litt.* 88, b.), or, any other accidental damage happening without his default (*Ib.* and *Roll. Abr.* 124). However, if the plt. can prove the loss happened by previous neglect, though, not the immediate fault of the agent, he will render the deft. liable; as, if goods be burned in a warehouse, in the removal of which there has been an improper delay (6 Ves. 496). Prove the retainer and delivery of goods.

In an Action for not using due Care in selling, non assumpsit denies the receipt of the goods for the purpose alleged, the retainer, and the promise, but, not the sale, or, the want of due care in selling.

In Action for Misconduct when employed to purchase.] The retainer must be proved: it is the duty of an agent to buy for his principal in the most beneficial manner, and, as in all other cases, to exercise proper skill, &c.; and he will be liable whenever he deviates from his orders in price, quality, or kind (*Paley*, 28-36); plt. should, therefore, adduce his [*99] proof accordingly. Where an *agent grossly misstates the quantity of goods purchased by him, and such misstatement be productive of loss to his employer, he would be liable, though the agent thereby derived no additional pecuniary benefit (*Lord Mayor of London v. Brandon*, *Holt*, 438, 441, n.). Where plt. ordered tobacco of the best quality, and the agent purchased it of so inferior a description that a person to whom it was shipped brought an action against plt. and recovered, it was held, that plt. could recover from his agent the whole damage that he had suffered by his neglect (*Mainwaring v. Brandon*, 8 Taun. 202); and it will be no waiver of principal's right, though, he may have received a bought note not

stating it to be of the best quality (Ib.). Plt. may show he sustained a loss in consequence of deft. himself being the seller (3 Ch. Com. L. 217).

In Action for not Insuring, after proof of the retainer, plt. should prove his interest in the property to be insured (Park. Ins. 4; Delaney v. Stoddart, 1 T. R. 24). The agent must insure where it has been the course of dealing to do so; or, where the principal, having effects in the agent's hands, orders him to insure, or, where bills of lading are sent to the agent conjointly with orders to insure, he must do so, though, his principal have mortgaged to him the subject of insurance, and the mortgage have become absolute. But, he is not bound to insure at all events, but only to do his utmost to effect it (Smith v. Lascelles, 2 T. R. 187). If, he cannot effect it, it is part of his implied duty to give notice to his principal, and an actual promise to that effect, though averred, need not be proved (Callender v. Olericks, 5 Bing. N. C. 58; 6 Sc. 761). 'And, in all cases where he makes an ineffectual insurance, or neglects to insure, he will be liable in the same manner as if he had been the insurer himself (Mal. Lex Mer. 86; Delaney v. Stoddart, 1 T. R. 24; Wallace v. Telfair, 2 T. R. 188, n.). Therefore, if an agent omit to insert a clause usual in the policy, and loss ensue by the omission, he will be liable for the sum directed to be insured, deducting the premium (Mallough v. Barker, 4 Camp. 150). But, he will not be liable to an action for neglecting to insert in a policy a liberty to carry simulated papers not mentioned in his written instructions, though, it may have been verbally communicated to him that simulated papers were to be used in the voyage (Fomin v. Oswell, 3 Campb. 357); or, wording the clause so as not to include certain goods intended to be insured, he will be liable (Park v. Hammond, 2 Marsh. 189; S. C. 6 Taunt. 495). See a form of declaration for effecting a different insurance than that required, Callender v. Olericks, *supra*; and one in case, Turpin v. Bolton, 5 M. & Gr. 455.

In Action for not giving Plaintiff Notice of a fact known by the deft., and which ought to have been communicated to plt., and for the want of which a loss is sustained to plt., he should prove deft.'s knowledge of that fact, and that it was a material one: such as proving a sale by deft. without information to plt. (13 Vin. Ab. 4); or, a bill of exchange remitted to deft. (Beawes, 431); or, a notice of insolvency of an underwriter (2 Camp. 546, n.). As to attorney not giving notice, *post*. The retainer should be proved.

In an Action against a gratuitous Agent, as, he is not liable for a mere nonfeasance, plt. must prove he has been guilty of misfeasance (2 Raym. 909; Elsee v. Gatwaed, 5 T. R. 143; Wilkinson v. Coverdale, 1 Esp. 74). As, if, an attorney should undertake gratuitously to conduct a cause, and he did so conduct it, plt. should show he did it in such a gross manner as to create the loss. And, in all cases, in order to render a gratuitous agent liable, plt. should show he did not pay the same attention to the [*100] trust as he reasonably would for himself in his own affairs (3 Ch. Com. L. 215). Mixing money of a principal with his own at bankers, and they fail, he is liable for the loss (1 J. & W. 241; Robinson v. Ward, R. & M. 274; Maud v. Waterhouse, 2 C. & P. 579). The retainer should be proved.

Damage.] The plt.'s damage must be proved. In general, it is not necessary to prove special damage, and, if plt. makes out his case, he will be entitled to nominal damages at all events (Van Wort v. Wolley, M. & M. 520;

per Tenterden, C. J.). If plt. seek to prove an actual damage, a loss of some legal benefit should be proved: proof of the loss of a probable advantage is not sufficient (Webster v. De Tastet, 7 T. R. 157; Park, Ins. 303, *ante*). The plt. will be entitled to recover the amount of any direct loss by the goods (Moll. 327; Cro. J. 265), as well as any sums expended by him in reparation to others, and the measure of damages ought to be the damages and costs recovered in the action against the plt. (Mainwaring v. Brandon, 8 Taun. 208). But, the debt to be recovered from the agent is the balance only of money received by him after deducting all just allowances, though not pleaded by way of set-off (Dale v. Sollett, 4 Burr. 2133); but he will be liable for interest if he applies the money to his own use, or, even, mixes it up with his own at his banker's (Rogers v. Taylor, 2 Esp. 704; Robinson v. Ward, R. & M. 274): *secus*, if he suffer it to lie dead in his hands (*Ib.*). And, where the goods are forfeited by the agent's making improper entries at the Custom House, the extent of his liability, is said, to be the *cost price* of the goods, if to be exported, and the sale price, if, they are to be imported, with reference to the country where the seizure is made (Mal. Lex. Mr. 83; 13 Vin. Ab. 4). In actions against agents for not insuring (*ante*, p. 99), plt. can only recover according to his interest, which, as well as the loss, he must establish in proof (Park, Ins. 4; Delaney v. Stoddart, 1 T. R. 24; *post*, "POLICY"). The amount of the damages which the plt. will be entitled to recover, will be the sum directed to be insured, deducting the premiums paid (Mallough v. Barker, 4 Camp. 150). As to what deft. may deduct, see *post*, p. 103.

Evidence for Defendant.

In general, deft. should be prepared to disprove plt.'s case. A variance in the declaration, in stating the retainer as an absolute, when it was only a conditional, one, would be ground of nonsuit, (Lopes v. De Tastet, 1 B. & B. 544). Deft. may show in defence, that he performed his employment; and, if the terms of the employment are in dispute, he should be prepared to prove the nature of them. In an action for misconduct, he may show he pursued the express orders of his principal, or, in the absence of them, that he pursued the usual and accustomed course of trade and dealing, proving the same. Proving his good intentions towards his principal forms no defence (*ante*, p. 96).

"It is a settled rule of law that an agent shall not be allowed to dispute the title of his principal, and that, therefore, he shall not, after accounting with his principal and receiving money in that capacity, afterwards say that he did not do so, and did not receive it for the benefit of his principal, but, for that of some third person" (per Abbott, C. J., Dixon v. Hamond, 2 B. & A. 313).

Factors having made advances to their principals in respect of consignments already made, have no right to sell contrary to the *princi-
[*101] pal's orders, even after demand of payment, and notice that in default they will sell to pay themselves. And in such case, if they do sell, it is no defence that they believed the sale to be, and that it was also for the principal's benefit (Smart v. Sandars, 11 Law T. 178, C. P.).

An agent employed to recover a sum of money is entitled to retain a just allowance for his labour and service therein, which, not being in the nature of a consideration, or, mutual debt, he may prove under the general issue in an action for money had and received (Dale v. Sollett, 4 Burr. 2133); *semble*, notwithstanding the New Rules.

Fraud.] Deft., in an action for misconduct, may also show that the transaction in which he was employed was fraudulent, but, he must show that it was part of the employment to defraud; as in the case of defrauding by the non-payment of duties, for, if he merely show that the duties were not paid, it will be insufficient (*Catlin v. Bell*, 4 Camp. 184; see *Wilkinson v. Loudonsack*, 3 M. & S. 117; *Gross v. La Page*, Holt, 105-7). He may also, show that his compliance with his instructions would have been a fraud upon others: as, where an agent was employed to sell certain articles, and the condition of sale purported that the highest bidder should be the purchaser, but the agent had private instructions not to sell under a certain sum, in which case it is sufficient if he sold to the highest bidder, though, for less than the sum to which he was secretly limited (*Bezwel v. Christie*, Cowp. 395).

The agent of a party to an illegal contract, who receives money under it to the use of his principal, cannot set up the illegality of the transaction to an action brought against him by his principal (*Tenant v. Elliott*, 1 B. & P. 3; *Farmer v. Russell*, ib. 296); *semble*, it is otherwise, where the agent is also *particeps criminis* (*McGregor v. Lowe*, R. & M. 57).

A., a merchant, employed B. as his agent to sell goods; B. employed as his sub-agent C., with whom he had a running account; B. became bankrupt, and his assignees claimed from a balance due for the sale of goods, which afterwards appeared to be the property of A., who also claimed the amount; C. interpleaded: held, that A., the owner of the goods, had a right to recover the price from the sub-agent, and the mere fact of entering the amount by C. in his books, to the account of B., was not such an appropriation of the money so received in payment of the debt of B. to C., within the principle laid down in *George v. Claggett*, 7 T. R. 359, as to bar A.'s right (*Frith v. Cazenove*, Exch., 17 Nov. 1848).

That Principal has adopted his Acts.] Though deft. has not complied with plt.'s instructions, he may show plt. has adopted his acts, as where deft. has put out plt.'s money on interest, and he receives it for any time with knowledge, it will be an affirmation of the transaction, and will exempt the agent from liability, if, the security fail (2 Free. R. 48; Eq. Ca. Abr. 708; *Ward v. West*, 2 Salk. 442; *Wilson v. Poulter*, 2 Stra. 859; *Macleane v. Dunn*, 4 Bingh. 722; *Robinson v. Gleadow*, 2 B. N. C. 161). But, *quære*, wherever satisfaction after action brought and plea pleaded is sufficient (*Taylorson v. Peters*, 2 Nev. & P. 625). When an agent deviates from his instructions, the principal has a right, as soon as he knows of the deviation, to repudiate what he has done; but, if he does not mean to accede to what has been done, he is bound immediately to take steps to notify his dissent (per Bayley, J., *Prince v. Clark*, 2 D. & R. 270). Deft. may also show that plt. did not disclose to him facts within his (principal's) knowledge, and whereby the loss occurred (*Mayhew v. Eams*, 3 B. & [102] C. 603).

In an Action for not Accounting (*ante*, 67), he should be prepared to disprove plt.'s case, and show he has duly accounted.

In an Action to recover the Proceeds of Goods, or, moneys received by him, he should disprove, if possible, the plt.'s case as to the receipt of such moneys. He may prove the transaction is not closed (*ante*, p. 97); he may show that he has paid over the money to another person, and that he had authority to do so; the *onus* lies upon him to show that he had such authority (*Smith v. Watson*, 2 B. & C. 407; 3 D. & R. 751); or, he may show a

balance due to him, even, though, he agreed to pay over the whole proceeds without setting off a debt then due to him from his principal, as such an agreement is not binding upon him (*M'Gillivray v. Simpson*, 9 D. & R. 35; 2 C. & P. 320). Deft. may also prove that he remitted the money received by him for his principal in the usual way, and it will be a sufficient defence; therefore, where plt. engaged deft. to receive money for him, and remit a bill for it by post, which the agent did, but the letter was suppressed, and the money upon the bill received at the banker's by some unknown person, the agent is discharged (*Warwick v. Noakes*, Pea. 68). And, where a steward, in receiving rents, takes bills from persons of reputed credit, yet he will be excused, though, the bills be dishonoured, and the money lost (*Knight v. Plymouth*, 3 Atk. 480). And, where a banker, who had received bills of exchange for the purpose of procuring payment, took the acceptor's check instead of money, yet, he was held discharged, though the check was dishonoured, as it appeared that the banker only pursued the usual course of business (*Russell v. Hankey*, 6 T. R. 12). Where an agent takes securities, they must be such as the principal can avail himself of, by reasonable diligence, and without risk, or trouble (1 Buls. 104; *Yelv.* 202; *Winch.* 53). And an agent residing abroad may show that money was subsequently depreciated by edict, &c. (*Moll.* 424). As to fraud, see *ante*, p. 101.

In an Action for purchasing damaged Goods, he may show that the goods were damaged after, and not before, he bought them (*Moll.* 84).

In Actions for selling on Credit, or, to a Person unfit to be trusted, or, for the Loss of Goods, the evidence for deft. may be collected from *ante*, 67-8. When customary to sell on credit, an agent has implied authority to sell on such terms (*Scott v. Surman*, Willes, 406; *Houghton v. Matthews*, 3 B. & P. 489).

In an Action for not Insuring, it will be no defence to him to show that he was directed to insure against *British* capture, for that will not render the whole insurance void, but only *pro tanto* (*Glaser v. Cowie*, 1 M. & S. 52). Deft. may show that his promise to insure was merely gratuitous; and that he never acted on such promise; for, if, he once actually interfered, he would be liable for gross neglect (*Wilkinson v. Coverdale*, 1 Esp. 74; *Marsh.* 208); or, that he had no effects in his hands, and declined from the first (*Smith v. Lascelles*, 2 T. R. 189); and, if bills of lading were consigned to him, that he refused at the same time to accept them (*Ib.*). In an action against an agent for a failure in making assurance, as, it is a principle that he stands in the place of an insurer, he is entitled to *any [*103] defence which an insurer could have made (*Park, Ins.* 4; *Delaney v. Stodart*, 1 T. R. 24); he may, therefore, avail himself of a deviation in the voyage (*Ib.* 22); or, the illegality of the intended insurance (*Webster v. De Tastet*, 7 T. R. 157). And, if the neglect complained of be, that by the non-communication of a material fact to the underwriters in making the insurance, the policy was avoided, the agent may make it appear, by way of defence, that the fact, if communicated, would have made it impossible to get the insurance effected (*Anon., coram, Chamber, J., York. Sum. Assizes*, 1808).

In an Action against a gratuitous Agent, he should be prepared to show, he was one, and that he acted to the best of his knowledge, and was not guilty of gross negligence, but, took the same care of plt.'s goods as of his own; and, where a general merchant entered goods of his own, and another

person's at the Custom House, under a wrong entry, whereby they were forfeited, it was held that he was not liable as he received no reward, and was not of a profession that implied skill (*Shields v. Blackburne*, 1 H. Bl. 158).

To reduce Damages, deft. is entitled to deduct all just allowances, which he has a right to retain out of the sum demanded, without pleading, or, giving notice of set-off (*Dale v. Sollet*, 4 Burr. 2133; see *ante*, p. 100). As to such charges, see *ante*, p. 100. Deft. may as well prove, if possible, he acted with an intention of benefitting the principal, but this will not afford a ground for defence (*ante*, p. 96).

ACTIONS AGAINST AGENT, BY THIRD PERSONS.

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Form of Remedy, Pleadings and Precedents.

There is no peculiar form of remedy in an action at the suit of third persons against an agent, he being liable only as a principal, and not, as *agent*: consequently, there are no forms of pleading, or, precedents. For those relative to attorneys, auctioneers, bailees, carriers, and other such particular agents, see those titles.

An action in form *ex contractu* will not lie against an agent for money had and received, unless, there is some privity of contract between himself, and the plt., and therefore, where an attorney was accustomed to receive certain dues for the plt., and his clerk, in his absence, received money on account of those dues (having authority *to do so), and on the [*104] master's not returning home refused to pay it over to the plt., it was held, that he was not liable in *assumpsit* to the plt. as he was accountable for it to his master, who was accountable over to the plt., and that between the clerk and the plt. there was no privity of contract (*Stephens v. Badcock*, 3 B. & Ad. 354). So, where the agent of the managing owner of a ship in the service of the East India Company has received money on account of the ship from the company, upon a receipt signed by the managing owner, and one of the other owners, and has placed it in his books to his principal's credit as managing owner, he is not liable to the other part-owners, as, there

is no privity of contract between him and them (*Sims v. Brittain*, 1 N. & M. 594; 4 B. & Ad. 375; and see *Sims v. Bond*, 2 N. & M. 608; and *Stephens v. Elwall*, 4 M. & S. 259). But, where M. & Co. abroad, through the agency of A. and Co., procure B. to consign goods to them, and remit to A. and Co. bills, specifically appropriating them to pay B., and also, to B. to say they have done so, and before payment A. and Co. become bankrupt, as the original transaction was through their agency, they must be considered as agents throughout the transaction, and there is therefore sufficient privity between them and B. to enable him to recover the bills from them, although, M. and Co. were indebted to them at the time (*Ex parte Thompson*, 2 Jur. 734; 1 Mont. & Chit. 1).

Evidence for Plaintiff.

In Action against Agent contracting on his own Account.] The proofs relative to the subject-matter of the action in this, as well as, the other following actions against agents, will be similar to those against other parties in general. Plt. should show that the deft. personally contracted, either by parol, or, under seal, for the performance of the agreements in his own name; and deft. will, in general, be responsible, though, he describe himself as agent, and though the principal be known; particularly if he so far exceed his powers as to render his principal irresponsible (*Ch. Contr.* 227; *Paley*, 251, *et seq.*; *Paterson v. Gandasequi*, 15 East, 62; *Smith's Lead. Cas.*; *Spittle v. Lavender*, 5 Moo. 276; *McBraine v. Fortune*, 3 Campb. 317). Where an agent employed to wind up the concerns of a person deceased, gave an undertaking to a creditor of the deceased to furnish money to meet an acceptance which such creditor had given, in furtherance of an arrangement for delaying payment, in hope that funds might be forthcoming, he was held liable on such undertaking, though, he was merely a clerk, and had no interest in the goods sold by the creditor, nor, had received any funds (*Maud v. Waterhouse*, 2 C. & P. 579).

If an agent, employed to wind up the business of a firm, draw a bill in the name of the firm upon a debtor to the firm, who accepts it, the agent is not liable on the bill, without some proof that he had no authority to draw it for his employer, or, that he had not acted *bona fide*. And it is doubtful if he had not such authority, whether he would be liable in an action upon the bill (*Wilson v. Barthorp*, 2 M. & W. 863; *Mur. & H.* 811). But if an agent contract in writing on behalf of his principal, as, thus: "I undertake on behalf of E. to pay," he is not personally liable on the contract, unless, he had no authority to make it, or, exceeded the authority (*Downman v. Jones*, 14 Law J., N. S. 226, Q. B.); and the other contracting party did not know of the want of authority (*Jones v. Downman*, 4 Q. B. 23, n.; 9 Jur. 454). Where deft. wrote the following letter to plt. "Your bill of charges in this matter, amounting to 527l. 5s. the sum claimed in the action, I also [*105] undertake on behalf of Messrs. Esdaile & Co. to pay, and will arrange with you the time and mode;" an earlier part of the letter contained an unqualified promise to deft. to pay plt. another sum; and, in letters written shortly before, the plt. and deft. named E. and Co. as the parties to the negotiations, and mentioned the debt now claimed as "to be settled and paid by E. and Co.," but spoke of the negotiations as to other debts with reference merely to plt. and deft.: held, by the Court of Exchequer Chamber, that the first-mentioned letter, upon the face of it, and especially when connected with the other passages above-mentioned, imported as to the sum claimed only an undertaking by deft. as agent for E. & Co., and that in the absence of evidence directly showing a want of authority in deft. to give

such undertaking, or any excess of his authority in giving it, deft. was entitled to judgment (*Downman v. Williams* (in error), 7 Q. B. 103, reversing in part the judgment of the Queen's Bench, 4 Q. B. 235). Where a mortgagor was sued for principal and interest, and D., an attorney, and a friend of his, but, not employed by him as attorney, wrote to the plts., promising if, they would not issue execution for two months, that certain steps would be taken, and further, "I shall pay all the principal, interest, and costs through a friend of mine in London, to whom a transfer of all the securities you have will have to be made. The cash will be ready, if the securities will, on the 16th;" D. was held personally liable on this undertaking (*Harper v. Williams*, 4 Ad. & El. N. S. 219).

Where A. employs B. to sell goods for him, and C., as B.'s broker, procures a purchaser, and draws a bill for the amount, payable to A., which is accepted by the purchaser, but dishonoured: it was held that C. is answerable to A., as drawer of the bill (*Lefevre v. Lloyd*, 1 Marsh. 318; S. C. 5 Taun. 749). An agent to a country bank, to whom plt. sent a sum of money, in order to procure a bill upon London, drew, in his own name, for the amount, upon the firm in London, the two firms being the same: held, that the agent was liable, as drawer, although, plt. knew that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank to which the agent paid over the money (*Leadbitter v. Farrow*, 5 M. & S. 345). When a British merchant buys goods for a foreigner, the credit is given to the former (1 Ch. Contr. 225, 230).

So, if an agent sign a written agreement for the sale and delivery of goods, it is not open to him on *non assumpsit* to show that the agreement was made by him as agent, and that the plt. knew the fact at the time (*Higgins v. Senior*, 8 M. & W. 834). So, if he deliver an invoice in his own name, he is bound by the representation in it, and cannot prove that he acted as agent, and that the plt. knew it (*Jones v. Littledale*, 1 N. & P. 677; 6 Ad. & E. 486). So, if he, a broker, and known to be such, sign a contract for the sale of shares in his own name, he cannot set up that he acted merely as broker (*Magee v. Atkinson*, 2 M. & W. 440; Mur. & H. 151).

And if an agent expressly stipulate *by a written agreement*, or, *under seal*, though, he describes himself as an agent, and acting on behalf of another, whom he mentions, he will be liable. Therefore, where an agent, by a written agreement, expressed to be made by himself, *on behalf* of A. B. of the one part, and the plt. of the other, stipulated to execute a lease of certain premises to the plt., he was held to be personally liable; and it was said by Best, C. J., that there was no distinction between agreements of this nature by parol, or, by deed (*Norton v. Herron*, R. & M. 229; 5 Moo. 278; 1 C. & P. 643). And so, where the deft., who described himself as agent and consignee of a ship chartered for a specific voyage, signed an agreement in his own name, "witnessing that the said parties had *agreed to vary the voyage," and it appeared that he gave instructions and conducted himself [*106] throughout, as principal, he was held personally responsible (*Kennedy v. Gouveia*, 3 D. & R. 503). Where A. and B., merchants in London, receive orders from G., St. Petersburg, for a quantity of Havannah sugars, for the amount of which they are to draw on L., G.'s agent at Hamburg, by a bill at three months, and he accepts the bill, and writes to G. for instructions as to what account to apply the amount, because A. and B. had been accredited for Havannah sugars and not Brazil, and then, writes to them to say that he had accepted the bill under their guarantee, for the present, as, he had not received the *accreditiv* (*i. e. semble*, the order to execute the contract for Brazil sugars, instead of that, for Havannah sugars), and G. then writes to him giving him credit for the Brazil sugar, and requesting him

to release A. and B. from their guarantee; and G. fails before the acceptance becomes due; L. is liable to A. and B. on this acceptance, notwithstanding that they, after G.'s failure, wrote to L., "We have received from G. the assurance that he has arranged with you the needful for the protection of the draft; we reserve to ourselves any advantage from the insurance of the goods, if, you have written to G. that you have not honoured the draft we cannot consider your acceptance as valid in any other way than on account of G. (*Lohmam v. Rougemont*, 6 Bing. N. C. 253).

And where attorneys gave the following written undertaking: "We, as solicitors to the assignees, &c., undertake to pay the landlord his rent, provided it does not exceed the value of the effects distrained," they were held personally liable (*Burrell v. Jones*, 3 B. & A. 47). And, if, an attorney personally undertake to withdraw a record, he will be liable (*Iveson v. Conington*, 1 B. & C. 160; 2 D. & R. 307; *Prosser v. Allen*, Gow. R. 307; *Redhead v. Cater*, Stark. 14; *post*, "ATTORNEYS"). And where, by deed, an agent covenants, "for himself, his heirs," &c., for the act of another, he is personally liable, although, he describe himself as agent (*Appleton v. Bincks*, 5 Ea. 148). But, the liability must clearly appear from the whole context of the instrument; therefore, where A., an auctioneer, being employed to sell an estate of B.'s, signed an agreement with C. for the purchase, in his own name, as agent of B., and B. himself shortly afterwards signed it, adding, "I hereby sanction this agreement, and approve of A.'s having signed it on my behalf;" it was held that A. was not personally liable, as the agreement by A. and ratification by B. formed but one transaction, and showed that it was the understanding of all parties that A. should not be liable (*Spittle v. Lavender*, 5 Moo. 270). Where the seller of goods, with the assent of the agent, chooses to give a distinct credit to such agent, knowing him to be such, the agent alone can be sued (*Paterson v. Gandasequi*, 15 Ea. 62; *Leggatt v. Reed*, 1 C. & P. 16). As to evidence in defence, *post*, p. 109. So, on the following agreement: "Mr. B. (the deft.) agrees to hire a phaeton, &c., for Capt. W.; provided Capt. W., should be disposed to buy it, the price is 50*l*. for the lot, as per agreement between Mr. B. and Mr. L. (the plt.): held, that B. was liable as principal (*Lyell v. Brown*, Q. B., 9 Nov. 1848).

Where a servant is supplied beforehand, by his master, with money to pay over to a tradesman with whom the dealings have always been on ready-money terms, the master is not liable if the servant do not pay the tradesman (*Fleming v. Hector*, 2 M. & W. 181, per Lord Abinger, C. B.). Where the latter invariably had paid when the articles amounted to a certain small sum, if the tradesman allow the account to remain undischarged until

it amount to a large sum, the master is not liable, for, by so doing [*107] the latter is presumed to give credit *to the servant (*Stubbing v.*

Heintz, Pea. R. 47). So, where the master was in the habit of paying ready money for articles furnished in certain quantities to his family, if the tradesmen obtain additional goods of the same sort, to be delivered without informing the master, or, satisfying himself that they were for his use, when in fact they were not, the master is not liable (*Pearce v. Rogers*, 2 Esp. 214). And where the mistress of a servant authorized a tailor to make for her servant two suits of livery a year, and the tailor supplies one suit, and at the servant's request a suit of plain clothes instead of the other, the mistress is not liable for the latter (*Hunter v. Berkeley* (Countess) 7 C. & P. 413). But, the master would be liable if he once authorized the servant to pledge his credit, although he subsequently give him money to settle the demand, which the servant omits to do (*Wayland's case*, 3 Salk. 234; *Bolton v. Hillersden*, 1 Ld. Raym. 225; *Rusly v. Scarlett*, 5 Esp. 76). But a domestic servant never employed in any other capacity cannot

bind his master by purchasing goods unconnected with domestic use, or by accepting bills of exchange in his master's name (Paley, 139; Fenn v. Harrison, 3 T. R. 757; Nickson v. Brohan, 10 Mod. 109). But, the master will not be liable where a servant, employed to sell a horse, warrants him, after the master has particularly ordered him not to do so (Hilyar v. Hanke, 5 Esp. 72; Alexander v. Gibson, 2 Camp. 552).

In an action where the Principal was unknown.] The plt. may show the deft.'s liability on a contract, by reason of his having entered into it without disclosing his principal, and though, it be known that the agent acts in a representative character. Therefore, where an auctioneer does not disclose the name of his principal at the time of sale, he is liable for the non-completion of the contract (Hanson v. Roberdeau, Pea. 163; Mitchison v. Hewson, 7 T. R. 350; M'Brain v. Fortune, 3 Camp. 317; 15 Ea. 62; Paley, 293; Spittle v. Lavender, 5 Moore, 270; Franklyn v. Lamond, 4 C.B. 637). And, where an agent residing in this country enters into a contract for another residing abroad, he will be personally liable (De Gaillon v. L'Aigle, 1 B. & P. 368; 15 Ea. 69). A master of a ship is generally liable for necessities furnished abroad (Rich v. Coe, Cowp. 639; Westerdell v. Dale, 7 T. R. 312); and in this country, unless they were furnished upon the credit of the owner, either he, or, the owners may be sued.

If brokers in selling goods send in invoices, or, bought and sold notes in their own names, as sellers, they are personally liable, and parol evidence would be admissible on their part to show that they sold as agents for third parties (Jones v. Littledale, 1 N. & P. 677; Moore v. Atkinson, 2 M. & W. 440).

In an Action where there was no responsible, or, apparent Principal, the agent is liable. Thus, where the acting commissioners under a navigation act entered into an engagement with an engineer to complete a certain work, it was held, that they were liable, though they had no funds (Ambl. 769, 772). But, where, by a private act of parliament, the expenses attending its passing were directed to be paid out of tolls raised, or to be levied under it, and the attorney who prepared the bill, sued the commissioners in the name of the clerk for the amount of his bill: held, that he must show that there were sufficient funds in the hands of the commissioners in respect of the tolls to satisfy the demand (Andrews v. Dally, 4 Bing. 566). So, where A. agreed with B. and C. to pave certain streets, and they, on behalf of the parish, agreed to pay, they were held liable (Hard. 205; 1 Bro. C. C. 101; Paley, 293). So, where commissioners* under an in- [*108] closure act drew drafts on their bankers, it was held that they were personally responsible to the bankers for the sums paid by them on such drafts (Eaton v. Bell, 5 B. & A. 35; Burrell v. Jones, 3 B. & A. 47). So, where parishioners at a vestry make an order, authorizing the churchwardens to repair a church, the churchwardens are alone responsible (Lanchester v. Tricker, 1 Bing. 201; Same v. Frewer, 2 Bing. 361). Commissioners, and churchwardens, or others, the agents, who employ, or, enter into a contract with another, or, for whom an agent acts, are in general liable when they have a power of reimbursing themselves at the time of the contract; and on this principle the cases in 1 Bro. C. C. 101; Eaton v. Bell, 5 B. & A. 34; and Brooke v. Guest, cited in 3 Bing. 481, were decided. And on the same principle, in Higgins v. Longton, there also cited, it was held, that commissioners of a turnpike were personally liable to persons employed about the construction, and repairs of a road; and in Brooke v. Guest, a churchwarden was held personally liable to a person whom he had employed to draw plans

for a church; and, as, we have before seen, it is clear such agents are liable, if they personally contract (*ante*, p. 104). In *Sprot v. Powel*, 3 Bing. 478, it was held that vestrymen, who signed a resolution, ordering the parish surveyor to take steps for defending an indictment for not repairing a road, were not liable to the attorney employed by the surveyor; they having no power at that time to reimburse themselves, the surveyor should have been sued. But the agents of government, acting for the public, are not liable to be sued upon contracts made with them on behalf of government. So, the governor of a colony has been held not to be liable (*McBeath v. Haldimand*, 1 T. R. 172; *Unwin v. Wolsey*, ib. 674). And an action does not lie against a public officer (as the secretary at war), by individuals, for sums which, as a public officer, he is authorized to pay them, although, he may have received the money applicable to that purpose (*Gidley v. Lord Palmerston*, 3 B. & P. 275). Where the party making the contract had not a shadow of authority to contract for the third person, and did not profess at the time to act for him, it seems that the subsequent assent of such third party to be bound as a principal has no operation (see *Fenn v. Harrison*, 3 T. R. 757; *Sanderson v. Griffiths*, 5 B. & C. 909; *Vere v. Ashby*, 10 B. & C. 298, per Parke, J.).

In an action where the Agent has exceeded his Authority, so that the Principal is not liable, or, acted under an Authority which he knows the Principal has no right to give, he will be liable; as, where an agent sells property under a notice that it does not belong to his principal, and in which case the plt. should prove such notice (Cowp. 566; 4 Bur. 1984; B. N. P. 133; Fenn v. Harrison, 3 T. R. 757; Greenway v. Hurd, 4 ib. 553). The plt. should, in an action against an agent for exceeding his authority, be prepared to prove the agency. See "PRINCIPAL AND AGENT."

In Action for Money had and received.] The proofs in this action will, for the most part, be found, *post*, "MONEY HAD AND RECEIVED." The plt. must, as a general rule, prove the receipt of the money, for the purpose of being paid over to the plt., and the deft.'s engagement so to pay it over (*Williams v. Everett*, 14 Ea. 590; 2 Roll. R. 441; *Firbank v. Bell*, 1 B. & A. 36; 1 Moo. 74). Where the action is to recover money received by an agent for another, who has no right to it, plt. must prove the payment of the money, and the purpose for which it was paid; and he should also [*109] prove it has not been paid over (*Cox v. Prentice*, 3 M. & S. 344; Cowp. 565); *or, else, that the receipt of the money was obviously illegal, or, that the agent's authority was wholly void (*Townson v. Wilson*, 1 Camp. 396, 564; *Lovell v. Simpson*, 3 Esp. 153). As to stakeholders, *post*, "MONEY HAD AND RECEIVED."

*In Actions for Torts, an agent is considered liable for all torts, and wilful trespasses, though, done by the authority of his master, and in the assertion of his master's rights (12 Mod. 448; 6 ib. 212; 2 ib. 242; 1 Wils. 328; 6 Ea. 450); trover lies against him (ib.; Stephens v. Elwell, 4 M. & S. 261); post). The plt. should, therefore, prove that the tort was done wilfully; proof of a mere neglect, or, nonfeasance will not suffice (1 Ch. Pl. 72). He need not adduce any proof as to the agency. And where a coachman loses a parcel, the master is the proper person to be sued (6 Moo. 47). An agent is never liable for the negligence of sub-agents, but, recourse must be had against the principal, or, the person actually committing the injury (*Stone v. Cartwright*, 6 T. R. 411; *Bush v. Steinman*, 1 B. & P. 405; *Bromley v. Coxwell*, 2 ib. 438; *Matthews v. West London Waterworks Company*, 3 Camp. 403). But see *Humphreys v. Mears*, 1 M. & R. 187).*

Evidence for Defendant.

In an Action against an Agent contracting on his own Account, he should endeavour to prove the contrary, and that he contracted in the capacity of an agent, which was known to the plt. at the time of the contract, and that the deft. had authority from his principal to make the contract, and that he named his principal as the person to be responsible (Ex parte Harlop, 12 Ves. 352; Paterson v. Gandasequi, 15 Ea. 62, 66; 3 P. Wms. 277, 279; 3 Ch. Com. L. 194, 211; Paley, Prin. and Ag. 251).

In an Action against an Agent where the Principal was unknown at the time of making the contract, the deft. should endeavour to disprove the fact, either from reputation, or, which is preferable, from the plt.'s own knowledge.

In an Action against an Agent for exceeding his Authority, so that the Principal was not liable, or for acting under an Authority which he knows the Principal had no right to give, deft. should be prepared to show the contrary, and prove the authority he had from his principal, or, that the principal had such right.

Where a bill was presented at the drawee's for acceptance when he was absent, Walter, who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, accepted it, by procuration of the drawee; the bill was dishonoured, and the drawee was sued, but upon proof of these facts the plt. was nonsuited; the indorsee sued Walter for falsely representing that he was authorised to accept by procuration, and on the trial, the jury negatived all fraud in fact, yet, he was held liable, because the making of a representation which a party knows to be untrue, and calculated to induce another to act upon it, so that he may incur damage, is a fraud in law, but that W. was not liable as an acceptor, for no one can be but the person to whom the bill is addressed, unless, an acceptor for honour (Polhill v. Walter, 3 B. & Ad. 114).

In Action for Money had and received.] If the action be for not paying over the money paid to the agent for the plt., deft. may show that the plt., by his conduct, did not consider the deft. as holding the money on plt.'s account; and that deft. appropriated the money *properly to other purposes before the plt. called on him for it (Stewart v. Fry, Holt, 372). In [*110] an action to recover money received by an agent for another, who had no right to it, he may prove in answer that he has paid it over to his principal (1 Stra. 480; Cowp. 69; 1 Vern. 136; Greenway v. Hurd, 4 T. R. 553). The payment, however, must be an actual payment; therefore the mere passing of such money in account with his principal, or making a rest without any new credit given, fresh bills accepted, or a further sum advanced, is insufficient (Cox v. Prentice, 3 M. & S. 344; Buller v. Harrison, Cowp. 565; 1 Moo. 74; 1 Stra. 480). See the case as to stakeholders, and when an agent is liable for money had and received, to be paid over to a third person, *post*, "MONEY HAD AND RECEIVED."

In Actions for Torts, deft. should be prepared to show that the tort was done through mere negligence, and as the mere agent of another, and by his authority: he should strictly prove the agency.

AGREEMENT.

See "ASSUMPSIT," "HAND-WRITING," "SECONDARY EVIDENCE," "PAROL EVIDENCE," and the various titles of defences.

ALIENS.(a)

An alien cannot purchase, or, inherit any lands in this country, and cannot be inherited (Bac. Ab., Alien, C, and authorities there collected), and could not, therefore, have a real action when that action was in use (Ib.). But, he may join his wife, a British subject, as lessor of the plt. in ejectment, she making out title in her own right (per Coleridge, J., in *Doe d. Miller v. Rogers*, 1 C. & K. 390). He may have personal actions (Co. Litt. 119, *b*; And. 25), though, resident abroad (Dyer, 2, *b*; 1 T. R. 267, 362; 4 ib. 697; 2 H. Bl. 118), even, for a libel published concerning him in England, (*Pisani v. Lawson*, 8 Dowl. P. C. 57; 6 Bing. N. C. 30; 8 Scott, 180), or, slander (*Tuerlotti v. Morrison*, Buls. 134; Yelv. 198). If, residing abroad, he publish a book first abroad, he has no copyright in it here (*Chappell v. Purday*, 9 Jur. 495; 14 Law J., N. S., 258, Ex.). Though, he could not, at common law, hold or inherit lands, yet, if a merchant, he might upon a statute extend lands, for the design of the statute staple and statute merchant was to encourage trade. (11 Edw. III.; Roll. 87; Dyer, 2, *b*). So, he might, suing in a corporate capacity, have any form of action, real, personal, or, mixed (Bac. Ab., Aliens, D). He could not, at common law, purchase a lease for years of lands; but he might, if a merchant, take a lease of a house for his habitation (Poph. 36; Co. Litt. 2, *b*; Roll. Ab. 194; Dyer, 2, *b*); and by 7 & 8 Vict. c. 66, s. 5, "alien friends may take and hold any lands, houses, or other tenements, for the purpose of residence, or, occupation, or for the purpose of any business, trade, or manufacture, for any term of years not exceeding twenty-one years." This act is not a declaratory act (*Count De Wall's case*, 12 Jur. 145). This statute does not expressly notice the 32 Hen. VIII. c. 16, s. 13, which enacted that "all leases of any dwelling-house, or, shop within this realm," &c., "made to any stranger, artificer, or, handicraftsman, born out of the king's obeisance, not being denizen, [*111] *shall be void." Under this act not only a lease, but an agreement for a lease, was void (*Lapierre v. Macintosh*, 9 Ad. & E. 857; 1 P. & D. 629), and therefore the artificer might be ejected at any moment (Ib.); or, if he occupied under a lease, having given, also, a bond as a collateral security, the lessor could not recover on one, or, the other (Sid. 308; 2 Keb. 102, 116), or, even, in assumpsit for use and occupation (*Pilkington and Peach*, 2 Show. 135); but, if, under an agreement not amounting to a lease, the lessor could have assumpsit (Ib.). An assignment of a lease, however, was not void (*Wootton v. Steffenoni*, 12 M. & W. 129). A vintner has been held not to be an artificer within this statute, as his "mystery consists chiefly in making wines, and that is not properly an art, but, a cheat" (*Bridgham v. Frontee*, 3 Mod. 94). A British subject married a French woman, and became domiciled in France; they resided in France until the revolution of 1792, the wife never came within the territory of Great Britain, and died in the lifetime of her husband; held, that by the

(a) See 1 U. S. Dig. Tit. "Alien," p. 134; 1 Supp. U. S. Dig. p. 94; 1 Ann. Dig. p. 31; 2 Id. p. 17; 3 Id. p. 25.

common law of England, she was not a British subject (Count De Wall's case, 12 Jur. 145).

To an action for money paid, it would seem that a plea that deft. is an alien, and that she requested the plt. to purchase an estate for her, and to take a lease thereof for her benefit; that he bought it, and paid the money in his own name, in order to enable the deft. to obtain the benefit of the lease, but had himself retained possession of the estate, is bad on demurrer (Bailey v. Cathrey, 1 Dowl. P. C., N. S. 456).

Aliens' Goods.] The rights of the city of London, as to the unshipping and portage of aliens' goods, are abolished by the 3 & 4 Will. IV. c. 66, whether they are consigned to subjects, or, aliens (Collyer v. Stennet, 4 M. & G. 676; 5 Sc. N. R. 34).

No action can be maintained by an alien enemy—except, perhaps, as executor (see Bac. Ab. Alien, D)—or, by another suing in his behalf, where his interest appears on the record (Brandon v. Nesbit, 6 T. R. 23).

How Defendant may avail himself of Defence of Plaintiff's being one.] This defence must be now pleaded specially in all cases. Where the disability existed at the time of the cause of the action arising, the contract cannot be enforced, even, after restoration of peace (Willison v. Patteson, 7 Taunt. 439); and the deft. might formerly take advantage of it under the general issue (Anthon v. Fisher, Doug. 649, n., 132; Brandon v. Nesbit, 6 T. R. 24, 133), but, when it rose after the cause of action accrued, it should be pleaded specially (Harman v. Kingston, 3 Camp. 151-153; Flind v. Waters, 15 Ea. 260; and see Casseres v. Bell, 8 T. R. 166); and when, after declaration, as it only suspends the remedy till the return of peace, it should be pleaded in abatement (3 Camp. 153; Ex parte Boussmaker, 13 Ves. J. 71; see also Bac. Ab. Aliens, E). If, in such a case, on demurrer to the plea, it appears upon the record that the plt. now is an alien enemy, the court will *ex officio* notice it, and give judgment to bar him from the further maintenance of his action (Le Brett v. Papillon, 4 Ea. 502); but, where the disability arose after verdict, refused to stay judgment and execution (Vaulrynen v. Wilson, 9 Ea. 321). As this plea is not favoured by the courts, it has been for a long time the practice not to allow it to be pleaded with any other plea (Truckenbutt v. Payne, 12 Ea. 206; Schornbeck v. De la Cour, 10 Ea. 326; Thyatt v. Young, 2 B. & P. 27; Angerstein v. Vaughan, 1 ib. 222, n.); and it is, therefore, advisable to plead it in abatement when it can be so. It cannot be pleaded to *scire facias* on a judgment, *if, the objection existed at the time of obtaining judgment (West v. Sutton, [*112] 2 Lord Raym. 853). As to the defence of husband, or, wife being an alien, *ante* "ABATEMENT," "COVERTURE."

Form of Plea, &c.] As this plea is not favoured in law, the greatest degree of certainty is requisite in framing it; and deft. must state that plt. not only was, or, is an alien, but that he came to England without letters of safe conduct from the king (Casseres v. Bell, 8 T. R. 167). To this plea the plt. may either deny the fact, or, if true, may reply a license, &c., to reside in this country (7 Geo. IV. c. 54). See "PLEAS," "REPLICATIONS."

Precedents.] Pleas of this nature are so rare, that it is not considered requisite to give the form of one. (See a form of plea, 3 Ch. Pl. 11; of a replication of license, ib. 427; of plea in abatement, 1 Went. 7, 42, 51)

Lil. Ent. 1; see also Mod. Ent. 9; Aston's Ent. 11; Calvin's case, 7 Co. 2).

[*Replication.*] When the plt. replies a natural-born subject, he must aver a place of birth, or, the replication will be bad on demurrer (Nicolas v. Powlet, Carth. 302; Brodeck v. Briggs, ib. 265; Freeman v. King, Sid. 357; Rast. Ent. 605, 252; Herne, 361; see also Comb. 212; 2 Keb. 98; Leon. 76, 79; Cart. 50). As to how it ought to be averred, see the above authorities. When alienage is pleaded in bar, and the plt. replies *indigena*, he must take issue; but, when in abatement, he may take issue, or, conclude with a verification (per Holt, C. J., Comb. 394; Fort. 222). If the plt. have a protection he must plead it (Sylvester's case, 1 Lord Raym. 283; Farres. 150). See form of replication of license, &c. 3 Ch. Pl. 427.

[*Evidence.*] The evidence must necessarily depend upon the fact put in issue by the proclamation. If the plt. reply that he is not an alien, the proof of the negative, it is said, lies on him. So, if he replies a license, he will be bound to prove it. If he deny he was an enemy, the deft. will be bound to prove he was, by proving the war between this country, and that of which the plt. was a subject. It is said, that whether his prince is at league with ours is to be tried by the record in chancery, as, every league is of record (9 Co. 31). It is not necessary that a war should be formally proclaimed; open acts of hostility are sufficient proof of it (Owen, 43; Cro. E. 142). A proclamation in the "Gazette" is the readiest evidence. Proof, if the plt. is an Englishman, that he is residing and carrying on trade (McConnell v. Hector, 3 B. & P. 113); or, *semble*, that he is merely residing in an enemy's country (O'Mealy v. Wilson, 1 Camp. 481; De Luneville v. Phillips, 2 N. R. 97); or, if an alien, that he is trading in the enemy's country, though, as consul of a neutral state, is sufficient (Albrecht v. Sussman, 2 Ves. & B. 323). See, where mere residence did not, under the peculiar circumstances, incur this disability Roberts v. Hardy, 3 M. & S. 533. Proof that the plt. was sometime ago domiciled in a territory which has become hostile, without showing that he was a native, is not sufficient (Harman v. Kingston, 3 Camp. 152). By 11 & 12 Vict. the home secretary and the lord lieut. of Ireland have the power to order aliens to depart. By 10 & 11 Vict. c. 83, s. 1, all acts of colonial legislatures imparting privilege of naturalization are declared valid from the date of their enactment, and all future laws of the same nature are to be valid (sect. 2), but subject to confirmation or disallowance by her majesty. By section 3, it is declared that 7 & 8 Vict. c. 66, does not extend to the colonies or foreign possessions.

[*113]

*ALTERATION OF CONTRACT.

[*How Defendant may avail himself of it.*] Deft. might formerly avail himself of this defence in assumpsit, or, debt, on simple contract, under the general issue (Hodgson v. E. Ind. Comp., 8 T. R. 280); and in debt on a deed, or in covenant, under the plea of *non est factum* (5 Co. 23, 119; B. N. P. 172; 1 Ch. Pl. 425-8). In the latter case, he can still do so, but, not in the former case, as the effect of the general issue in assumpsit, or, debt is now different from what it was. Therefore, if the plt. where the contract has been altered since it was signed by the parties, declare upon it as it originally stood without noticing the alteration, the deft. must plead the alteration, and cannot take advantage of it under the general issue (Hem-

ming v. Trenery, 9 Ad. & E. 926). An alteration of a bond which avoids it, may be given in evidence on *non est factum*, if it occasion a variance, or, require a fresh stamp. But if the alteration, whether by consent, or otherwise, discharge or, vary the liability of the parties to the bond, then it is matter which must be specially pleaded (Harden v. Clifton, *infra*; Mason v. Bradley, 11 M. & W. 590; Hemming v. Trenery, 9 Ad. & E. 926). It is no defence under the general issue, that a parol contract in writing has been altered, so as to convert it into a deed (Davidson v. Cooper, 11 M. & W. 778, 13 ib. 343). But, if, the plt. declare upon the instrument as altered, the deft. may take advantage of it without pleading it; as where a general acceptance of a bill of exchange had been altered to a special acceptance, this was held to be a good defence under a plea denying the acceptance (Calvert v. Baker, 4 M. & W. 407; and Cock v. Coxwell, 2 C. M. & R. 291; 4 Dowl. P. C. 497). A plea of alteration of a deed should allege that the alteration was in writing, and above the seal (Harden v. Clifton, 1 Q. B. 522; see "BILLS OF EXCHANGE;" see *post*, p. 114, as to Bills of Exchange).

Evidence for Defendant.

Effect of Alteration.] If a contract, either by specialty, or by parol, be once entered into, any subsequent alteration thereof, even after breach, without the consent of the other party, in any material part, by a party interested, or, by a stranger, will render the contract wholly invalid *at common law*, as against the party not consenting to such alteration; and, in such case, he is not bound to perform the contract, even in its original terms, on account of the fraud attempted to be practised on him, and the jealousy of the law to prevent fraud (Pigott's case, 11 Co. 26, b; Com. Dig. Fait.; Markham v. Gonaston, Cro. E. 626; Master v. Miller, 4 T. R. 320; Sanderson v. Symonds, 1 B. & B. 430; Fairlie v. Christie, 1 Moo. 114; Downes v. Richardson, 5 B. & A. 674; Davidson v. Cooper, 11 M. & W. 778; 13 ib. 343). Such an alteration by the drawer of a bill of exchange, taken as a security for a debt, has been held to extinguish even the debt (Alderson v. Langdale, 3 B. & Ad. 660). A material alteration in the sale note by the broker, at the instance of the seller, after the bargain made, and without the consent of the purchaser, has been held to preclude the seller from recovering (Powell v. Divett, 15 East, 29). And any material alteration made in a contract requiring a stamp, after it has been once perfected, and has become an available security, even with the consent of the parties, will require a fresh stamp; which, if not added, will discharge the party by operation of the stamp laws (Bathe v. Taylor, 15 Ea. 416; Bowman v. Nicholl, 5 T. R. 537); and, in the case of bills of exchange and promissory notes, such an alteration would render them absolutely void (*post*, "BILLS OF EXCHANGE"). But no alteration made in furtherance of the original object and meaning of the parties, and for the purpose of correcting an error, can render the instrument invalid, even as respects the stamp laws (*infra*, and *post*, "STAMP").

Whether the alteration be by erasure, or, addition, and whether the original writing be legible, or not, is immaterial (Pigott's case, 11 Co. 26, b; Hibblethwaite v. McMorine, 6 M. & W. 200). The alteration of one, or, two parts of an agreement discharges the party liable thereon, if made without his concurrence. Thus, a material alteration in a sale note by the broker, after the bargain made at the instance of the seller without the consent of the purchaser, annuls the instrument, so as to preclude the seller from recovering upon the contract evidenced by the instrument so altered by him

(Powell v. Divett, 15 Ea. 29; Whitcher v. Hall, 5 B. & C. 269; 8 D. & R. 22); and so, as to a guarantee, as by affixing seals to it to make it a deed (Davidson v. Cooper, 11 M. & W. 778; *in error*, 13 ib. 343). An alteration before execution of the contract cannot affect its validity (*infra*; and Doe v. Bingham, 4 B. & A. 672; Hall v. Chandless, 4 Bing. 123; 5 Bing. 368). An alteration in a material part discharges the debt, even, though, the alteration is beneficial to him (*semble*, Whitcher v. Hall, 5 B. & C. 269; 8 D. & R. 22). It seems, the alteration, however, should be a substantial one (Ib.). With respect to what is a material alteration, it must necessarily depend on its nature, and the nature of the contract. Where, after the execution of a policy, the time of sailing was enlarged by the assured, and acquiesced in by all the underwriters except the debt., it was held this was a material alteration, and that the policy was void as to him (Fairlie v. Christie, 1 Moo. 114; *post*, "STAMP;" and see the various instances as to bills, *post*, "BILLS OF EXCHANGE"). An alteration in an immaterial part must, to discharge the debt., be made by the obligee, or party interested (Pigot's case, 11 Co. 26, b). Such an alteration by the assured in a policy of insurance has, however, been held not to vacate it (Sanderson v. Symonds, 1 B. & B. 426).

An alteration by a stranger must, to discharge the party, be by design, and in a material part. Thus, an alteration of a bill of exchange by a stranger, through mistake, does not vacate it (Roper v. Birckbeck, 15 Ea. 17), or, alter the relative rights of the parties, if it were not a genuine instrument (Wilkinson v. Johnson, 3 B. & C. 428; 5 D. & R. 433. See "BILLS OF EXCHANGE"). So, a deed from which the seal was torn by a young boy (*petit garçon*) was held good to lead the uses of a recovery (Argol v. Cheney, Palm. 402, and see observations of Parke, B., in Davidson v. Cooper, 11 M. & W. 790). So, where, on a bond conditioned to pay 100*l.* by six equal instalments of 16*l.* 13*s.* 4*d.* on the 3rd of October in every year, until the full sum of *one pounds* was paid, a stranger inserted the word hundred between one and pounds, the sense being sufficiently manifest before the alteration, that the condition was for payment of 100*l.*, by six yearly instalments of 16*l.* 13*s.* 4*d.*, it was held, that the insertion of the word hundred did not alter the sense, and was therefore immaterial, and did not destroy the bond (Waugh v. Bussel, 5 Taun. 707), and so, where by deed a mortgagee conveyed the legal estate to the mortgagor, and the latter re-conveyed it to trustees for the purpose of securing an annuity, and at the time of execution by the mortgagee there were several blanks left in a part not affecting him, for the sums to be received by the mortgagor from the grantees of the annuity, which were all filled up, at the time of the execution, by the mortgagor, but *several in-

[*115] terlineations were made in that part of the deed after the execution by the mortgagee, these interlineations being immaterial as to him, did not affect the conveyance from him to the mortgagor, and being made before the execution by the latter did not affect the conveyance from him to the trustees for the payment of the annuity (Doe d. Bingham, 4 B. & A. 672, and see Com. Dig. Fait. F. 1).

Where, after an award was made, but, before it was delivered, the umpire altered it, the court refused to set it aside, but, confirmed it for the original sum awarded, which was still legible; saying, that the umpire was to be considered as a mere stranger, but that if the alteration had been made by a party interested in the award, it would have been otherwise (Henfrey v. Bromley, 6 Ea. 309). This case stands on a different footing from deeds between party and party, and would seem to be overruled by the late case of Davidson v. Cooper, *ante*, p. 114.

The alteration must, to discharge the party, be made *against his consent*;

for, if it be made merely for the purpose of correcting a mistake, and in furtherance of the original intention of the parties, such alteration will not discharge either party, either at common law, or, as regards the stamp laws (*Sanderson v. Symonds*, 1 B. & B. 426; *Doe v. Bingham*, 4 B. & Ad. 672; *Kershaw v. Cox*, 3 Esp. 246; *Jacob v. Hart*, 6 M. & S. 142; *Clark v. Blackstock*, Holt, 474; *Hudson v. Revett*, 5 Bing. 368; 2 M. & P. 663; *Hall v. Chandless*, 4 Bing. 123). A substantial alteration made in an instrument of guarantee, without the consent of the surety, even though, the alteration is beneficial, will discharge such surety (2 Bro. C. C. 579; 2 Ves. J. 542; 3 Mer. 272; *Heard v. Wadham*, 1 Ea. 619; *French v. Campbell*, 2 H. B. 163; 6 T. R. 200, S. C.; *Matson v. Booth*, 5 M. & S. 223; 5 B. & C. 269; 8 D. & R. 22; *Davidson v. Cooper*, *supra*). There can be little doubt that an alteration in a material point would avoid the contract, if made *without the consent* of the party to be bound; although, such alteration rendered the instrument conformable with the original intention of the parties; for parol testimony of such meaning could not, in such case, be admissible in contradiction to the written contract, as is was originally worded by both parties (*Kershaw v. Cox*, 3 Esp. 246; *Cole v. Parkin*, 12 Ea. 471; *Bathe v. Taylor*, 15 Ea. 415). Where there are several parties to, and several interests in, a contract, an alteration by the consent of one of such parties, his interest only being thereby affected, will not discharge the others, though against their consent. Therefore, where a lease of lands was made by A. to B., at the request of C., D., and E., out of which B. was to grant underleases at the direction of D., E., and F. (the object of which underleases was to secure a ground-rent to A. and C.), and, subject to such underleases, was to stand possessed of the lease in trust for D. and E., who were parties to the original lease; after C., D., and E. had executed that lease, and before A. or, B. had executed it, the lease was altered, with the consent and privity of C. only, by an erasure, which excluded a certain portion of land inserted by mistake, but in which D. and E. had no interest, and A. and B. then executed the lease: it was held that this alteration did not render it invalid (*Hall v. Chandless*, 4 Bing. 123).

Proof of Alteration.] If, the alteration appear upon the face of the instrument which the opposite party adduces in support of his case, inasmuch as such alteration gives the appearance of fraud, it imposes upon such party the proof of explaining away the same (*Singleton v. Butler*, 2 B. & P. 283; *Johnson v. Duke of Marlborough*, 2 Star. 313). It is for the holders of a bill to explain and *justify apparent alterations (*Sebley* [*116] v. *Fisher*, 7 Ad. & E. 444). But, as the plt. is obliged to produce the bill without notice, the deft. would have to begin on this issue (*Barker v. Malcolm*, 7 M. & W. 101). But, it is at all times, if practicable, advisable for the other party to prove the alteration; and it is necessary to do so, if the alteration is not apparent on the face of the instrument, or, it is doubtfully so. For this purpose, deft. should be prepared to prove the original contract from a copy, or, otherwise, or, by witnesses who can speak to the same. He should, if possible, prove the alteration itself, and that it was made by the plt. or, for him, with his consent; and, if the erasure, or, alteration be so done as to be scarcely perceptible, it would be advisable to subpoena some party, such as an officer from the bank, who is accustomed to discover forgeries, &c. or alterations of this nature. A declaration by a deceased attesting witness, as to the fact of alteration, is not admissible evidence (*Stobart v. Dryden*, 1 M. & W. 615). Where a special plea stated that a contract had been altered by a stranger, without the knowledge of deft., by attaching a seal to deft.'s signature, so as to make it purport to be sealed by him, and

the plt. replied by traversing the alteration, *modo et forma*; held, that deft. entitled himself to a verdict by producing the contract, and showing that a wafer had been attached by some one before signature (*Davidson v. Cooper*, 11 M. & W. 778; 13 ib. 343, *in error*). If it be expected plt. will endeavour to prove deft.'s assent to the alteration, deft. should be prepared to rebut such evidence.

Evidence for Plaintiff.

When a bill appears to be altered it lies on the party producing it to show that the alteration was not improperly made (*Henman v. Dickinson*, 5 Bing. 183).

We have seen how far the burden of explaining away an alteration lies on the plt. (*supra*); also as to how far an alteration avoids a contract. The plt. should be prepared to show that the erasure was made at the time of the contract being entered into, by means of the subscribing witness, or otherwise. If it was made afterwards, for the purpose of futhering the original intent of the parties, the plt. should be prepared to prove that fact (*ante*, p. 115). In some cases, indeed, the instrument itself would show such intent (*Waugh v. Bussell*, 5 Taunt. 707; *ante*, p. 114). If the erasure was made by the subsequent assent of the deft. such subsequent assent should be proved (see "ADMISSIONS," "WRITTEN EVIDENCE," *post*, "BILLS OF EXCHANGE").

AMBIGUITY.

See "PAROL EVIDENCE."

AMENDMENT.

See *post*, "VARIANCE."

ANCIENT DEEDS, &c.

See "DEEDS."

ANCIENT WINDOWS.

See "NUISANCE."

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The Right to Light, &c.

By Prescription.] No action lies for opening windows, though, the privacy of the adjoining premises be thereby destroyed (*Moore v. Rawson*, 3 B. & C. 340; *Chandler v. Thompson*, 3 Camp. 80). The only remedy is, for the owner of the latter, by means of an erection on his own land, to obstruct the view, and this the owner of the windows cannot prevent, unless the apertures have acquired the privilege of "ancient windows" (*Ib.*).

This privilege, where it did not rest upon an actual grant, or, license, formerly depended upon an *user* for such a period, and under such circumstances as afforded the inference of an ancient grant; and juries were directed to presume a grant from proof of twenty years' enjoyment, where nothing appeared to rebut such presumption (*Lewis v. Price*, 2 Saund. 175, n.; *Campbell v. Wilson*, 3 East, 294); but, if, it appeared that at the time when the enjoyment commenced the owner of the adjoining premises was only tenant for life, or, that for any other reason such grant could not legally be presumed, no right was acquired (*Barker v. Richardson*, 4 B. & A. 579; *Daniel v. Nash*, 11 Ea. 372; *Cross v. Lewis*, 2 B. & C. 686).

Now by the statute 2 & 3 Will. IV. c. 71, s. 3, it is enacted that "where the access and use of light to, and, for any dwelling-house, workshop, or, other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage, or, custom to the contrary notwithstanding, unless, it shall appear that the same was enjoyed by some covenant, or, agreement expressly made, or, given for that purpose, by deed or writing."

And by s. 4, "The period before-mentioned shall be deemed and taken to be the period next before some suit, or, action wherein the claim, or, matter to which such period may relate shall have been, or, *shall be brought into question; and that no act, or other matter shall be [*118] deemed to be an interruption within the meaning of this statute, unless, the same shall have been, or, shall be submitted to, or, acquiesced in, for one year after the party interrupted shall have had, or, shall have notice thereof, and of the person making, or, authorizing the same to be made."

Also by s. 6, "No presumption shall be allowed, or, made in favour, or, support of any claim, upon proof of the exercise, or, enjoyment of the right, or, matter claimed for any less period of time, or, number of years."

The 7th sect. enacts, that when the light is by the court deemed to be absolute, and indefeasible, the proviso, or, exception as to infants, &c., and in the case of enjoyment against tenants for life only, &c., shall not be applicable. The words are "Provided also that the time during which any person otherwise capable of resisting any claim to any of the matters before-

mentioned, shall have been, or, shall be an infant, idiot, *non compos mentis*, *feme covert*, or, tenant for life, or, during which any action, or, suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party, or parties thereto, shall be excluded in the computation of the periods herein before-mentioned, except only in cases where the right, or, claim is hereby declared to be absolute and indefeasible."

The right may now, therefore, be acquired, 1st, by an uninterrupted enjoyment of twenty years, and this, as it seems, will create an indefeasible right under any circumstances whatever, other than, where the enjoyment has been had under a covenant, or, agreement *expressly* made for the purpose, and by which the right is limited, or, qualified. And as no obstruction, not acquiesced in for a year, is to be considered an "interruption," if, after the lapse of nineteen years and a fraction, the enjoyment be obstructed, and the action be brought after the expiration of the twenty years, and within a year after the obstruction, the right is secured (*Flight v. Thomas*, 11 Ad. & E. 688; S. C. 3 P. & D. 442).

2ndly. By Actual Grant or License.] As, if, A., being the owner of a house, and a piece of land adjoining, convey the house, with all the lights, &c., to B., and afterwards the land to C., C. cannot obstruct the lights in the house, for, he stands in the shoes of A., and A. could not derogate from his own grant (*Palmer v. Fletcher*, 1 Lev. 122). And, where a house and piece of ground adjoining were purchased at the same time by different persons, it was held, that the purchaser of the latter could not build higher than a shed which was already there, though the particulars of sale, by which both lots were sold, described the latter as "building ground" (*Swansborough v. Coventry*, 9 Bing. 305). So, where A. leased one of his adjoining houses to B., and the other to C., after which B. took a new lease, it was ruled, that he could not obstruct C.'s lights (*Coutts v. Gorham*, M. & M. 396; see also *Compton v. Richards*, 1 Pri. 27); nor can a tenant obstruct the light of a house adjoining to the land he rents, and in the possession of his landlord, &c., if that light was enjoyed at the time of the execution of his lease (*Riviere v. Bower*, R. & M. 24; *Cox v. Matthews*, 1 Vent. 287; *Rosewell v. Prior*, 6 Mod. 116; *Blanchard v. Bridges*, 4 Ad. & E. 176).

It seems, that if, the owner of premises give another a parol license to open windows overlooking them, and the other acts upon the faith of it, and thereby incurs expense, the former cannot afterwards exercise his right of obstruction without first reimbursing the latter the expense incurred (see

Winter v. Brockwell, 8 Ea. 309; per *Tindal, C. J.*, in *Liggins v. Inge*, 7 Bing. 682; **Bridges v. Blanchard*, 1 Ad. & E. 536; *Willis v. Harrison*, 2 Jur. 1019; *Blanchard v. Bridges*, 4 Ad. & E. 176).

In order to support a claim under the statute, the party must, as it seems, prove an enjoyment commencing at a period not less than twenty years ago, and continuing, without an interval of a year together, down to the time of bringing the action (see *Richards v. Fry*, 3 N. & P. 67; S. C. 7 Ad. & E. 698; *Parke v. Mitchell*, 11 Ad. & E. 788). Hence, it may in many cases be necessary to resort to the old doctrine of presumption, which, it seems, is not excluded by the statute.

The custom of London, which authorized the building upon old foundations, though, it obstructed windows which would otherwise have been privileged (*Plummer v. Bentham*, 1 Burr. 248; *Shadwell v. Hutchinson*, 3 C. & P. 615) is entirely taken away by the above statute (*Salter's Company v. Jay*, 6 Jur. 803; 3 Q. B. 109).

How Lost.] The privilege of ancient windows may be lost by grant, or, non-user. "The right to light is acquired by enjoyment, and continues so long, as the party either continues that enjoyment or, *shows an intention to continue it*" (per Bailey, J., in *Moore v. Rawson*, 3 B. & C. 336). Where the owner, having pulled down his house, built a blank wall, which continued seventeen years, and, in the mean time, the owner of the adjoining premises erected a building opposite the wall, it was held that the former could not afterwards reclaim the privilege (*Ib.*).

Action for Obstructing.] No action lies for merely obstructing a view, or, a prospect, or, a few rays of light; but only where the light is so diminished, as that the obstruction sensibly affects the occupation, enjoyment, or beneficial use of the premises (*Pringle v. Weinham*, 7 C. & P. 378; *Wells v. Ody*, *ib.* 410; *Parker v. Smith*, 5 C. & P. 438; *Back v. Stacey*, 2 C. & P. 465).

If, an ancient window be enlarged, the enlargement is not privileged till the expiration of twenty years; consequently, the building against that is not actionable, if, the access of light to the old part is not affected (*Chandler v. Thompson*, 3 Camp. 80; *Blanchard v. Bridges*, 4 Ad. & E. 176). And if the owner convert the building, as, from a malthouse into a dwelling-house, he cannot claim a greater quantity of light than he enjoyed while the building was in its former state (*Martin v. Goble*, 1 Camp. 320; *Cotterell v. Griffith*, 4 Esp. 69; *Garrett v. Sharp*, 3 Ad. & E. 325; S. C. 4 N. & M. 834; see *Blanchard v. Bridges*, 1 Ad. & E. 536).

Form of Action—Parties.] "Case" is the proper form of action for obstructing ancient windows. It lies for darkening ancient lights, although the building by which they were darkened was erected under the provisions of the building act, 14 Geo. III. c. 78, s. 43, repealed by 7 & 8 Vict. c. 84, and the action was not commenced within the time limited by that act, and no notice of action given (*Wells v. Ody*, 1 M. & W. 452). The action may be brought, either by the tenant, or the landlord, or each may sue and recover his particular damage (*Jesser v. Gifford*, 4 Burr. 2141; 3 Leon. 209; *Saund.* 322, n.; *Turner v. The Sheffield Railway Company*, 10 M. & W. 425; *Shadwell v. Hutchinson*, M. & M. 350); and successive actions may be brought, and damages recovered, until, the obstruction is removed (*Shadwell v. Hutchinson*, 2 B. & Ad. 97). Where the reversion belongs to several, as joint tenants, or tenants in common, all should join in the action (*Bac. Ab. Joint Tenants*, K), or, the deft. may plead the nonjoinder in abatement (*Ib.*). So, if the action be brought against the owners of [*120] the adjoining property, as owners, if all are not joined, the deft. may plead in abatement (*Ib.*). But the objection in either case can only be taken in this way—(*Addison v. Overend*, 6 T. R. 766). The party suing as reversioner must be the party having the legal estate, and not the *cestui que trust* (*Vallance v. Savage*, 7 Bing. 595). For the original erection, either the owner, or, person authorizing it to be made, or the person, or persons actually employed in making it, may be sued, or all may be joined (*Wilson v. Peto*, 6 Moo. 47; *Witte v. Hayne*, 2 D. & R. 33; *Rosewell v. Prior*, 12 Mod. 636). For the continuance of the nuisance, either the landlord, who lets the premises with it, or the tenant who occupies, may be made deft. (*Rosewell v. Prior*, 2 Salk. 460; *Brent v. Haddon*, Cro. J. 555; *Rex v. Pedly*, 1 Ad. & E. 827; *Payne v. Rogers*, 2 H. Bl. 350). But, as against all but the original wrong-doers, it seems, that no action can be brought until notice has first been given to remove the obstruction (*Penruddock's case*, 5 Co. 100, b; see *Winsmore v. Greenbank*, Willes, 583). If the ob-

struction be continued, a second action may be brought, even by a reversioner (*Shadwell v. Hutchinson*, 2 B. & Ad. 97); though the first obstruction were before the plt.'s possession of the property (*Thompson v. Gibson*, 7 M. & W. 456).

Form of Pleadings.

Declaration.] The venue must be local (*Warren v. Webb*, 1 Taun. 379). The form of the declaration is not altered by reason of the statute 2 & 3 Will. IV. c. 71 (see form, 3 P. & D. 442), and it was before in the same form, whether, the plt. claimed by prescription, or, grant (1 Pri. 38; 2 Saun. 113 a, 1, to 114 b); but, the local situation of the premises need not, and, should not be described (2 Ea. 497; R. G. H. T. 4 Will. IV.). If it be, the plt. must prove it, as laid; if not, the deft. cannot object that the venue is wrong, on the general issue, but, must plead the matter specially. Possession, in fact, is sufficient to sustain the action, and no title need be stated (2 Saun. 13 a, n. 1; Com. Dig. Pl. C. 39). Where the declaration stated "a messuage," and the proof was certain rooms in a house; held, no variance (*Fenn v. Grafton*, 2 B. N. C. 617). The word ancient is unnecessary; and where the right exists, by deed, or agreement, it is not strictly correct (*Compton v. Richards*, 1 Price, 27). The mode of obstruction, if stated, should be according to the fact; but, there is no occasion to state such mode, and it will suffice to declare as in the following precedent (3 Leon. 13; Cro. J. 606; 1 B. & P. 180; Raym. 452; Willes, 577). It is not necessary to state the commencement of the nuisance, where the plt. proceeds for its *continuance*, for it is said, that, "as the action of the case declareth the whole matter, it is not material when the nuisance was erected" (Cro. E. 191; see also Raym. 370; 1 Salk. 10; Carth. 455; *vide* "CASE").

Plea, &c.] Formerly, under the general issue, it was held deft. might show a custom of London to build on an ancient foundation to any height (Com. Rep. 273; 1 Wils. 45, 175; 2 Mod. 274); or give in evidence plt.'s license, or any other fact which could show deft. had a right to obstruct the light, &c. (*Winter v. Brockwell*, 8 Ea. 308; 2 Mod. 6; Com. Rep. 273, n.). The plea of not guilty shall now operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the deft., and not of the facts stated in the indictment, and no other defence than such denial shall be admissible under that plea. All other pleas in denial shall *take [*121] issue on some particular matter of fact alleged in the indictment (1 R. G. H. T. 4 Will. IV.).

Hence the deft. may show under the general issue that the light and air were not diminished by the obstruction, or that he was not the party who made, or caused it, but not the plt.'s title to the house, or his right to the windows, or, any matter of justification, such as that he licensed the obstruction, &c., &c. Not guilty denies the mere fact of obstruction, but admits the plt.'s possession of the *house*, and that he was entitled to the right of enjoyment of the house (*Franknurn v. Lord Falmouth*, 2 Ad. & E. 452).

A plea denying the right to the light puts the plt. on proof of his right by twenty years' uninterrupted enjoyment (see *post*, p. 123), or by grant (see *post*, p. 123); and a deft. may show under this tenure that the right has been lost by the plt.'s essentially altering the mode of enjoyment to the deft.'s prejudice (see *Garritt v. Sharp*, 3 Ad. & E. 325). A special plea of mere non-user would be bad (see *Manning v. Wasdale*, 5 B. & A. 758; see 2 & 3 Will. IV. c. 71, s. 5, *post*; see a form justifying under a railway act, *Turner v. Sheffield and Rotherham Railway Company*, 10 Ad. & E. 426).

Precedents.

Declaration in case, for obstructing an ancient window.

In the Q. B. (C. P., or Ex.) On the _____ day of _____, in the year of our Lord 1850.

1. *By the Person in Possession.*] *Venue local, commencement as usual.*—For that whereas, the plt., before, and at the times of the committing of the grievances hereafter mentioned, was, and thence hitherto hath been, and still is, possessed of a certain messuage or dwelling-house, with the appurtenances, situate in the county aforesaid; which said messuage or dwelling-house, during all the time aforesaid, there of right were, and still of right ought to be, divers, to wit, _____ ancient windows, through which the light and air, during all the time aforesaid, ought to have entered, and, until the committing of the grievances hereinafter mentioned, did enter, and still of right ought to enter, into the said messuage or dwelling-house, for the convenient and wholesome use, occupation, and enjoyment thereof. Yet, the deft., well knowing the premises, but intending to injure the said plt., in this behalf, to wit, on, &c. [*any day about the time,*] wrongfully and injuriously erected a wall and building near to the said windows respectively, which said wall and building the said deft. there wrongfully and injuriously kept and continued for a long time, to wit, from the day and year aforesaid, until the commencement of this suit, by means of which said several premises the light and air during all the times aforesaid were, and still are, hindered and prevented from coming and entering unto, into, and through the said windows, or either of them, into the said messuage or dwelling-house, and the same have been, and are, thereby rendered dark, uncomfortable, close, unwholesome, and unfit for habitation, and the plt. hath thereby been, and still is, greatly annoyed and incommoded in the use, possession, and enjoyment of his said messuage or dwelling-house, with the appurtenances, and the same has been, and is, much deteriorated in value. [*If any special damage, state it.*] Thus, and also by means of the premises, the plt. has necessarily incurred divers expenses, to wit, £——, in obtaining light in his said messuage or dwelling-house, through, and by other windows by him opened for that purpose, and incidental thereto, and was, and is, otherwise injured to the damage, &c. [*Conclude as usual.*]

2. *By the Reversioner.*] As to a form, by a reversioner of a house against a railway company, for erecting a station, whereby his ancient lights were obstructed, see Turner v. Sheffield and Rotherham Railway Company, 10 M. & W. 425.

*Count for continuing the obstruction.

[*122]

And whereas, before and at the time of the committing, by the deft., of the grievances hereinafter mentioned, a certain wall and building had been, and was, wrongfully erected, and stood in, and upon, a certain close near to the said windows, and wrongfully obstructed the light and air from entering unto, into, and through the same, into the said messuage or dwelling-house, of which the deft., before the commencement of this suit, to wit, on, &c., had notice; yet the deft., intending to injure the plt. in this behalf, afterwards, to wit, on the day and year last aforesaid, and thence, until the commencement of this suit, wrongfully and injuriously kept and continued, and caused to be kept and continued, in and upon the said close, and near to the said windows as aforesaid, the said wall and building so there erected, and standing as aforesaid, although the deft. being the occupier of the said close, was, to wit, on, &c., requested by the plt. to remove the said obstruction, and by reason of the deft. keeping and continuing the said wall and building so erected, and standing as aforesaid, during all the time he so kept and continued the same, the light and air, were, and are, hindered and prevented from coming and entering into and through the same, into the said messuage or dwelling-house. (*Conclude as in the preceding.*)

Plea, see forms, post, "CASE."

Not guilty.

In the Q. B. (C. P., or Ex. of P.) On the _____ day of _____, in the year of our Lord 1850.

The deft., by _____, his attorney, says, that he he is not guilty of the grievances above laid to his charge, or of any, or either of them, or any part thereof, in manner and form as the plt. has above complained against him, and of this he puts himself upon the country, &c.

Denial of plt.'s possession.

And, for a further plea, the deft. says, that the plt. was not, at the said several times, when, &c., possessed of the said messuage or dwelling-house, with the appurtenances, in the declaration mentioned, or of any part thereof, in manner and form as in the declaration is alleged, and of this the deft. puts himself upon the country, &c.

Evidence for Plaintiff.

Plaintiff's Possession.] Proof that the legal estate belongs to the plt. will be sufficient *prima facie* evidence to support this issue; but, if, it appear that the premises were, at the time of the injury complained of, occupied by another person, not in the character of servant to the plt., whether he occupied as tenant from year to year, or, otherwise, the variance will be fatal. *Aliter*, if the party occupied as the servant of the plt., as, the gatekeeper of a gentleman's park, occupying a lodge; or, a gardener, an outhouse in the garden. And where a cottage was occupied by a labourer in the plt.'s service who paid no rent, but, received less wages on that account, it was held that the plt. might properly declare as on his own possession (*Bertie v. Beaumont*, 16 Ea. 33).

Plaintiff's Title as Reversioner.] Where the plt. declares for an injury to his reversionary interest, and his title is traversed, he must prove an existing tenancy in another. And if the tenant hold under a lease, or, agreement in writing, the instrument itself must be produced (*Cotterill v. Hobby*, 4 B. & C. 465). But, a variance in the name of the tenant where it is alleged under a *videlicet*, as in the foregoing form, is immaterial.

**The Right to the Windows.*] If traversed plt. must prove that [*123] the *identical apertures* have existed (see *ante*) for a period commencing twenty years before, and continuing without interruption for a year together (see *Flight v. Thomas*, 11 Ad. & E. 688; S. C. 3 P. & D. 442,) down to the issuing of the writ. It is observable that the words claiming right thereto, used in ss. 1 & 2, are omitted in s. 3 of 2 & 3 Will. IV. c. 71 (lb. 695). An actual enjoyment for twenty years, even under a permission verbally asked by the occupier of a house, and given by the person having right to obstruct, is sufficient to confer a right under sect. 3, the enjoyment thereunder need not be as of right, or adverse (*Mayor of London v. Pewterers' Company*, 2 M. & Rob. 409); or, if he have not enjoyed them so long as twenty years, that he is entitled under some conveyance, or, grant by which the right is expressly, or, impliedly given (see *ante*); or, if the windows are very ancient, but, a *continuous* enjoyment cannot be shown, then such circumstances as afford the inference of an ancient grant, and repel any presumption which might be raised from the non-user that the right has been abandoned (see *ante*, p. 117). The use of an open area as a timber yard, or saw-pit, for twenty years will not entitle the owner to the unobstructed enjoyment of light and air under the act (*Roberts v. Macord*, 1 M. & Rob. 230).

If traversed plt. must prove, either, that his house, with windows looking into the adjoining premises, has been so standing for twenty years, and that during that time the use of such windows has been uninterruptedly enjoyed (*Moore v. Rawson*, 3 B. & C. 332; *Cross v. Lewis*, 2 ib. 689; *Bealey v. Shaw*, 6 Ea. 208) (and which may be done by calling prior occupiers and witnesses, who can speak to the fact); or, else, he should prove a grant, or,

presumption of a grant from the deft., or, from a person under whom deft. claims: such as proof that a party having land, built on it a house with lights, and afterwards sold the remainder of the land, the plt. and deft. both claiming under the original owner (*Palmer v. Fletcher*, 1 Lev. 122). Proof that plt. and deft. held under the same landlord (either in the case of an adjoining house, or, where a house has been divided), and that the windows obstructed existed at the time of the demise, has been held sufficient, without proving twenty years' prescription for the windows, or, that the house is not of recent construction (*Riviere v. Bower*, 1 R. & M. 25); and proof of the plt. being occupier of one of two houses built nearly at the same time, and purchased of the same proprietor, is sufficient in an action against the tenant of the other for an obstruction of the plt.'s lights by adding to his own building, however short plt.'s previous period of enjoyment of the lights had proved to be (*Compton v. Richards*, 1 Pri. 27). If the action be against the immediate reversioner, &c., who has not been in the possession of the premises, plt. should, if possible, show that his windows have remained undisturbed with the acquiescence and consent of the deft. himself; inasmuch as a landlord, or, immediate reversioner cannot, without notice, be prejudiced by the laches, or, acquiescence of the tenant, in that which is a prejudice to the inheritance (*Daniel v. North*, 11 Ea. 372; *Wood v. Veal*, 5 B. & A. 454; *Barker v. Richardson*, 4 B. & A. 579; *ante*, "ADMISSIONS"). If the plt. has discontinued the enjoyment of his light during the twenty years, he should prove that, at the time and during such discontinuance, he did some act to show an intention of resuming the enjoyment within a reasonable time (*Moore v. Rawson*, 3 B. & C. 332, 579). The interruption which defeats a prescriptive right under 2 & 3 Will. IV. c. 71, is an adverse obstruction, not a mere discontinuance of user by the claimant himself (*Carr v. Foster*, 3 Q. B. 581; see tit. "COMMON"). The position of the plt.'s house may *frequently assist the jury in forming an opinion as to the fact whether the light is, or, is not obstructed (*Cross v.* [*124] *Lewis*, 2 B. & C. 688; 4 D. & R. 234), and for this purpose it should be proved (*post*, p. 125). If the plt. has licensed the deft. to obstruct the windows, without any consideration for such license, he should prove a countermand of such license, and a tender of the expenses incurred by deft. in consequence of such license (*Winter v. Brockwell*, 8 Ea. 308; *Taylor v. Waters*, 7 Taun. 374; *Hewlins v. Shippam*, 5 B. & C. 232).

Deft. caused the Injury.] This is established either by proving his actual erection of the nuisance by himself, or, servants, or, that he is the occupier of the premises whereon the obstruction is placed (*Cheetham v. Hampson*, 4 T. R. 318; *Payne v. Rogers*, 2 H. Bl. 250). Proof that deft. superintended the erection of the obstruction, and that he particularly directed the workmen, will be sufficient, though he be a mere clerk (6 Moo. 47). Where the action is for continuing the nuisance, such continuance, as well as the original obstruction, must be clearly proved. When deft. erects the nuisance and demises, proof of this will render him liable (*Rosewell v. Prior*, 2 Salk. 460; but see *Rich v. Basterfield*, 4 C. B. 783; 16 Law J. N. S., C. P. 273). If notice has been given to the person who immediately preceded deft., it will not be necessary to prove one was given to the deft., "as a person who takes premises on which a nuisance exists, and continues it, takes them subject to all the restrictions imposed upon his predecessor, by the receipt of such notice" (per *Abbott, C. J.*, *Salmon v. Bensley*, 1 R. & M. 189). But, it seems, safest, where the action is not against the original erector, to prove a service of notice to discontinue the injury (*Willes*, 583; *Cro. J.* 555; 5 Co. 100; *ante*, p. 120).

The Injury.] The injury should be proved as described in the declaration, for a variance would be fatal. It is not necessary, however, to prove all the means of obstruction as stated. In an action against a reversioner, it should seem that plt. must prove the obstruction was of a permanent nature, or, else, the damage so material as necessarily to affect his reversionary interest (see *Jackson v. Peshed*, 1 M. & S. 234; *Attersoll v. Stevens*, 1 Taun. 202). It is not necessary to prove a total obstruction of light and air (*Cotterell v. Griffiths*, 4 Esp. 69; 2 Selw. 1046); and where the plt. had only a qualified right, &c., to a window, and blind attached to it to prevent his neighbour from being overlooked, if he remove the blind, yet his neighbour cannot build so as to exclude more light from the plt. than before (*Cotterell v. Griffiths*, supra). And, according to Lord Kenyon's doctrine (*Ib.*), "any thing which tended to deprive a person of the enjoyment of the light and air in the same quantity to which his house was entitled as an ancient messuage, entitles plt. to an action;" but, according to Best's, C. J., judgment (in *Back v. Stacey*, 2 C. & P. 465), "it is not sufficient to constitute an illegal obstruction, that the plt. has in fact less light than before, nor, that his warehouse, the part of his house principally affected, was not used for all the purposes to which it might have been applied. In order to give a right of action and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plt. from carrying on his accustomed business on the premises as beneficially as he had formerly done." His lordship added, "It might be difficult to draw the line, but, the jury must distinguish between a partial inconvenience, and a real injury to the plt. in the enjoyment of the premises." The diminution of light must be such as to render the premises sensibly *less fit for occupation (*Parker v. Smith*, 5 C. & P. 438; [*125] *Wells v. Oddy*, 7 C. & P. 410). The plt. should use great care in getting up his evidence, and come well prepared with surveyors and plans, and every other means within his power of enabling the jury to form a correct decision; and it is, in general, advisable, when it can be conveniently done, that the jury should view the premises (*Back v. Stacey*, 2 C. & P. 466; see *Cross v. Lewis*, 2 B. & C. 688).

In an action for obstructing ancient lights, in which it appeared that the building causing the obstruction was separated from the windows obstructed by a public street in the metropolis, the learned judge left it to the jury to say whether there had been any substantial diminution of light; observing, that whether the intervention of a public street would be a good ground of defence, was a question of law. Held, no misdirection (*Roe v. The Marquis of Westmeath*, 7 Law J. 82).

Damages.] Some substantial injury should be proved, but however slight, it would be sufficient to entitle plt. to damages, though, nominal (*Cotterell v. Griffiths*, 4 Esp. 69; 2 C. & P. 465; supra). In measuring the injury plt. may show, by reason of his particular trade, he has been injured by his being deprived of a display of goods, &c., or, another like fact (*Reviere v. Bower*, 1 R. & M. 25; 2 C. & P. 465). Plt. may, if stated in the declaration, show he has expended money in obtaining other light, or, the like. (See "CASE.")

Evidence for Defendant.

Against Plaintiff's Right.] Inasmuch as twenty years' uninterrupted possession does not confer a legal right, but only raises a presumption of such right, deft. may rebut it by showing it does not exist, and that the possession

has been interrupted (*Cross v. Lewis*, 2 B. & C. 689; S. C. 4 D. & R. 234). Proof that the window has been blocked up above twenty years (*Lawrence v. Obee*, 3 Camp. 514), or, that plt. by some other means discontinued the right of enjoyment, as by building up the window, pulling it down, or, the like; for the right to light is acquired by enjoyment, and may be lost by a discontinuance of it, unless, the party who ceases to enjoy, at the same time does some act to show an intention of resuming the enjoyment within a reasonable time (*Moore v. Rawson*, 3 B. & C. 332; *Cross v. Lewis*, 2 ib. 689). A party may so alter the mode in which he has been allowed to enjoy the easement, as to lose the right altogether, and, therefore, when a person entitled to light through certain apertures in a barn converted the barn into a malt-house, and cut windows where the apertures had been, it was decided that the judge at the trial of an action for a subsequent obstruction, ought not to have rejected evidence offered to show that the mode of enjoying the light had been thus altered to the deft.'s prejudice (*Garritt v. Sharp*, 3 Ad. & E. 325; *Blanchard v. Bridges*, 1 Ad. & E. 536). But where an injury is occasioned to a neighbour, a window may be enlarged without losing the right to its original quantity of light (*Chandler v. Thompson*, 3 Campb. 80). The presumption of a right from twenty years' undisturbed enjoyment of light is excluded by evidence of the custom of London (2 Swanst. 333; 1 Co. Rep. 273). The deft. may also rebut the evidence of the plt.'s prescription, by showing that, though plt. has had windows for twenty years, within that period the land was glebe, and that, therefore, the rector, who was tenant for life, could not grant a sufficient license on which the prescription might attach (*Baker v. Richardson*, *3 B. & A. 579); or, that the [*126] previous occupier within such period was merely his tenant, and he entitled to the immediate reversion, &c., as such act, being merely that of the tenant, could not exclude deft. (*Daniel v. North*, 11 Ea. 372; *ante*, p. 123); or, deft. may show that his obstruction was made in consequence of a license from plt. himself, or, one from whom he claims, which will be a sufficient answer, though, the license may have been revoked after the obstruction was made, unless, indeed, the deft.'s expenses have been tendered, or, paid (*Winter v. Brockwell*, 8 Ea. 308; *ante*, p. 124). Deft. may show a custom of London to build on an ancient foundation to any height (1 Co. Rep. 273; 1 Wils. 45, 175; see *Salters' Company v. Jay*, *ante*, p. 119). The mere circumstance of the windows being in a party wall, contrary to the 14 Geo. III. c. 78, is no answer to an action for obstructing them (*Titterton v. Conyers*, 1 Mar. 140). No diminution of light is a sufficient cause of action, unless, it render the building less fit for the purposes for which it was before used (*Parker v. Smith*, 5 C. & P. 438; *Back v. Stacey*, 2 ib. 465; *Martin v. Gubb*, 1 Campb. 322; 4 Esp. R. 69). It is not sufficient that a ray or two of light should be abstracted, the question is, whether in consequence of the obstruction the plt. has less light than before to such a degree as to injure his property in point of value, or, occupation (*Pringle v. Wernham*, 7 C. & P. 377; *Wells v. Ody*, ib. 410).

If the right, as alleged generally in the action on the case, be denied, all matters in the act mentioned and provided which shall be applicable to the case shall be admissible in evidence to sustain, or, rebut such allegation (2 & 3 Will. IV. c. 71, s. 5).

ANIMALS.

See "NUISANCE."

ANNUITY.

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Evidence for Defendant, p. 131.

What it is.

An annuity is an incorporeal hereditament (Co. Lit. 2 a), partaking of the nature of realty, inasmuch as it is descendible, and may be assigned so as to give the assignee an action of annuity in his own name (Co. Lit. [*127] 144 b; see 53 Geo. III. c. 141, Ch. Stat. Annuities); *but, yet, it is chargeable on the person of the grantor, and thus, is distinguishable from a rent-charge. Hence, though, an annuity of inheritance is, at common law, forfeitable for treason, it is not within the statute of Mortmain, nor, entailable within the statute *De Donis* (Ib. n.; 2 Bl. Com. 41). But, being an incorporeal hereditament it cannot be granted without deed, and the word "grant" is essential (In re Locke, 2 D. & R. 603; see *per* Littledale, J., 6 B. & C. 370). Where the deft. purchased an estate charged with an annuity to M. S., and covenanted with the vendor "to pay the annuity to the person who for the time being should be entitled thereto, and that, he would at all times indemnify the vendor from all actions, claims, &c., on account of the annuity," the annuity was not a personal charge on the vendor; held, that the covenant to pay the annuity was absolute and indefeasible, and not qualified by the covenant of indemnity, and therefore that the vendor might sue for the non-payment thereof to the party entitled to it, although he, the vendor, was not and would not be damnified (*Saward v. Ahstey*, 2 Bing. 519).

Form of Remedy.] The form of remedy for amount of an annuity granted by deed is, if it be a chattel interest, by action of covenant, or, debt (Com. Dig. Debt, A 6). But, the latter is preferable, as the payment is final in the first instance. And it is advisable to sue on the covenant in the deed in preference to suing on the bond, because, breaches in the latter case must be assessed pursuant to 8 & 9 Will. III. c. 11, s. 8 (*Walcot v. Goulding*, 8 T. R. 126). But, debt will not lie for arrears of an annuity granted in fee, or, for life, so long as the freehold interest continues (Com. Dig. Debt, A 7; *Webb v. Jiggs*, 4 M. & S. 113; *Kelly v. Clubbe*, 6 Moo. 335; S. C. 3 B. & B. 130). Contra, for arrears due at the time the estate determined (*Ognel's case*, 4 Co. 49). So, where an annuity is granted issuing out of land, with a covenant to secure its payment, debt does not lie (*Rundall v. Rigby*, 4 M. & W. 131; Vin. Abr. Debt, D.; *Thursly v. Plant*, Sid. 401; *Mills v. Auriol*, 2 H. Bl. 433). In such a case the remedy must be on the bond, or,

in an action of covenant, or, by action of annuity. The latter, though, almost obsolete (see form of declaration, 2 Wils. 221), not being either a real, or, mixed action, may still be brought, notwithstanding the statute 3 & 4 Will. IV. c. 27, s. 36 (Co. Lit. 285 *b*, n. 1; Jon. 214), and with this advantage, that no second action is necessary, but the accruing arrears may be obtained by *scire facias* (Com. Dig. Annuity, H).

Twenty years is the period of limitation for arrears (*Strachan v. Thomas*, 4 Jur. 1183; S. C. 4 P. & D. 229; *Sims v. Thomas*, 12 Ad. & E. 536; see *Francis v. Grover*, 6 Law T. 235). If, the annuity deed have been set aside, or, if, being void the grantor have in any way treated the security as defective, the grantee may recover the consideration money, with interest, in an action for money had and received (*Shove v. Webb*, 1 T. R. 732; *Scurfield v. Gowland*, 6 Ea. 241; *Waters v. Mansell*, 3 Taun. 56). Though it does not appear on what ground the security was set aside, nor whether the objection to it affects the validity of the annuity. Thus, where a rule was obtained by the grantor to set aside the warrant of attorney and proceedings thereon on grounds, some of which would and some would not, affect the validity of the annuity, and the rule was made absolute in terms not showing which objection prevailed, and no evidence was given on this point (*Huggins v. Coates*, 5 Q. B. 443). But in such action, the deft. may, under a plea of set-off, deduct the payment *made on account of the an- [*128] nuity (*Cowper v. Godmond*, 3 Moo. & S. 219; 9 Bing. 748; *Hicks v. Hicks*, 3 East, 12; *Hills v. Hills*, 4 Esp. 19). If the annuity, being defective from the act, or, negligence of the grantor in regard to the memorial, has not been set aside by that, it seems that the consideration-money is not recoverable unless it be shown that the grantor has refused to continue the payment of the annuity, or, upon request so to do, refused to execute valid securities. But it appears to be unnecessary to tender back those deeds (*Widdle v. Symons*, 1 Esp. 309; Peak. Ad. Ca. 30). Action may be brought within six years after the repudiation of the security (*Ib.*). The statute runs from the time when the security is set aside, it not appearing that the consideration has failed before that time. And the statute does not attach if the security was set aside within six years, though six years have elapsed since the annuity was last paid (*Huggins v. Coates*, 5 Q. B. 443). Where an annuity on a life was regularly paid up to the time of death, but no memorial was inrolled: held, that A.'s executors could not on that ground insist that the annuity was void, and recover back the money paid for it, as the contract was executed, and the testator enjoyed the full consideration for his advance, and the claim of the executors was against equity and good conscience (*Davis v. Brown*, 6 B. & C. 651).

In an action by the personal representative of a lunatic to recover from an assurance society the price of two annuities on his life, paid by the deceased to the society; a special verdict found that the purchasing of the annuities were transactions in the ordinary course of the affairs of human life; and that the granting of the annuities were fair transactions, and of good faith on the part of the society, without any knowledge or notice on the part of the society of the unsoundness of the mind of the deceased: held, that the action could not be maintained (*Molton v. Camroux*, 12 Jur. Exch. 800).

The want of inrolment of an annuity-deed, as required by the 53 Geo. III. c. 141, cannot be set up by the grantee of the annuity (*Ib.*)

A judge having made an order under the 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, charging an annuity payable out of the Suitors' Fund, by order of the Lord Chancellor, under 46 Geo. III. c. 128, the court, considering it doubtful whether the judge's order might not be enforced, left the ques-

tion of its validity open, and discharged a rule *nisi*, to set aside the order (Witham v. Lynch, 1 Exch. 391; 17 Law J., Exch. 13).

Pleadings.

Declaration.] There is nothing peculiar in the form of the declaration in debt, or, covenant (see form of declaration in an action of annuity, 2 Wils. 221). The venue is transitory, and cannot be changed on the common affidavit (Taylor v. Becket, 1 Lev. 307; Crompton v. Stewart, 2 C. & J. 473; Foster v. Taylor, 1 T. R. 781). The declaration alleged that, by indenture "purporting to be made between plt. and deft., it was witnessed that," &c.; held, after plea, sufficiently certain (Baynon v. Batley, 8 Bing. 256); *aliter*, in a plea (Steph. Pl. 428; Moore v. Jones, 2 Lord Raymond, 1536; 1 Saun. 274, n. 1; Robertson v. Showler, 13 M. & W. 609). Where the intestate granted an annuity to plt.; after his death his administratrix caused the annuity to be vacated for a defect in the memorial; plt. to recover the balance of consideration-money brought *indebitatus assumpsit* against the administratrix for money had and received by the intestate to plt.'s use, stating promises by intestate and by deft. Held, that although a right to recover the consideration-money became vested in the plt., on the refusal to continue the annuity, such right did not go back by relation to the time when that money was originally paid; and, therefore, counts in the above forms were not applicable (Churchill v. Bertrand, 3 Q. B.; 2 G. & D. 548; see "DEED," "COVENANT," "PROFERT").

Pleas.] For what pleas are proper in an action of debt, or, covenant, see *post*, "DEBT," "COVENANT." In an action of *annuity* the deft. may plead *non concessit*, *riens in arrear*, or, a release of actions personal (Com. Dig. Annuity, F).

Where the objection is, that the requisites of the statute 55 Geo. III. c. 141, have not been complied with, the matter must be specially pleaded (Massey v. Manney, 4 Sc. 258; S. C. 3 Bing. N. C. 478); and care must be taken (Mestaver v. Briggs, 2 Dowl. 695) to show that the transaction was one within the statute, and therefore, if, the declaration does not show that the consideration was a pecuniary one the plea must (Horn v. Horn, 7 Ea.

529). Where the plea was, that no such memorial as the statute [*129] required was enrolled, and the replication* set out a memorial good on the face of it, a rejoinder alleging that the consideration was not truly stated in such memorial, was held bad, as a departure from the plea (Praed v. Cumberland (Duchess), 4 T. R. 585; affirmed in error, but, on another ground, 2 H. Bl. 280). But, this decision has been overruled, and it is now clear that the plea may either set out the memorial and thus show it to be defective, or aver it to be false (Darwin v. Lincoln, 5 B. & A. 444); and in this case it seems it should aver that no other memorial was enrolled (Simmons v. Hunt, 1 Marsh. 155), or may allege that no such memorial, as the statute required, was enrolled (Hicks v. Cracknell, 3 M. & W. 72).

To an action of debt for money had and received, the deft. pleaded that he had given, and that the plt. had accepted and received, in satisfaction, an indenture granting an annuity to the plt. Held, a good replication, that the annuity deed had not been enrolled under 53 Geo. III. c. 141; and that an action having been brought upon the annuity deed, the deft. had pleaded the non-enrolment, and that the plt. had thereupon elected that the said indenture should be null and void, and had entered a discontinuance in the action (Turner v. Brown, 3 C. B. 157). *Quere*, whether the 53 Geo. III. c. 141, applies to annuity bonds granted for a pre-existent debt (Marriage v. Marriage, 16 Law J. 244, C. P.; see Hall v. Luck, 1 Exch. 300).

Precedents.

Declaration in covenant on an annuity-deed, for arrears of annuity.

For that whereas, heretofore, to wit, on, &c., at, &c., by a certain indenture then made between the plt. of the one part, and the deft. of the other part (which said indenture, sealed with the seal of the deft., the plt. now brings into court, the date whereof is the day and year aforesaid), the deft., for the consideration there mentioned, did grant, &c. [*Here state, in the past tense, the grant of the annuity and the defendant's covenant to pay it, and proceed as follows:*] as by the said indenture, reference being thereunto had, will, amongst other things, more fully, and at large appear. And the plt. in fact saith, that after the making of the said indenture, and during the natural life of the said E. F., to wit, on, &c., a large sum of money, to wit, the sum of £—, of the said annuity, for one year and a quarter of a year, which expired on the day and year last aforesaid, then elapsed, became and was due and owing from the deft. to the plt., and still is in arrear and unpaid, contrary to the form and effect of the said indenture and of the covenant of the deft. so by him in that behalf made as aforesaid, * (and so, as in "COVENANT," see post,) an action hath accrued to the said plt., to demand and have of and from the said deft. the said sum of £—, being the said sum above demanded. Yet, &c. (*Conclusion as usual: see "DEBT."*)

This form down to the * will suffice for debt also, with the usual conclusion (see "DEBT"). See form of declaration in debt on the bond, stating condition and breach (2 Ch. P. 6th ed. 289).

Plea to the existence or sufficiency of the memorial.

[*First Plea after craving oyer, when necessary—Non est factum.*] And, for a further plea, the deft. saith, that the said indenture was made after the passing of a certain act of parliament, made and passed in the 53rd year of the reign of his late majesty king George the Third, and that the said annuity in the said indenture mentioned, was granted upon, and, for a pecuniary consideration, and the plt. further saith, that no memorial of the said indenture containing the names of all the witnesses thereto, and the date of the said indenture, and the names of all the parties thereto, or of the person for whose life the said annuity was granted, and of the person by whom the said annuity was to be beneficially received, or, of the pecuniary consideration for granting the said annuity, or how such consideration was paid, or the annual sum to be paid thereby, was enrolled in the High Court of Chancery, according to the directions of the said act of parliament, whereby the said *indenture in the declaration is null and void, and this the [*130] deft. is ready to verify. (Signature.)

See this form, 3 M. & W. 72; form of plea of payment on the same day, 2 Ch. Pl., 6th ed., 862; after the day, Ib. 863; payment in redemption of the annuity, Lane v. Drinkwater, 3 Dowl. 225; S. C. 1 C. M. & R. 602.

Replication that memorial was duly enrolled.

The plt., as to the plea, &c., says, that a memorial of the said indenture in the declaration mentioned was, within thirty days after the execution thereof, to wit, on, &c., duly enrolled in the High Court of Chancery, at Westminster, in the county of Middlesex, according to the directions of the said statute, which said memorial is as follows [*here set out the memorial verbatim*], as by the said memorial, now remaining duly enrolled in the said High Court of Chancery, more fully appears. And the plt. further says, that the said memorial did duly contain, and set forth, the day of the month, and year when the said indenture in the declaration mentioned bore date, and the names of all the parties, and of all the witnesses thereto, and of the person for whose life the said annuity was granted, and of the person by whom the same was to be beneficially received, and the pecuniary consideration, and how much consideration was paid for granting the same, and the annual sum to be paid in the form, and to the effect, as in, and by the said statute in that case made and provided, is required. And this the plt. is ready to verify by the said record, when, where, and in such manner as the court here shall order and direct (See this form, 3 M. & W. 72; 2 Moo. & Sc. 58; S. C. 9 Bing. 51. *The verification by the record is proper, Ib.*)

That grant was not for a pecuniary consideration.

That the said annuity was not granted for, or upon a pecuniary consideration, in manner and form as the deft. hath, by his said plea, alleged. And this the plt. prays may be inquired of by the country, &c. (2 Ch. Pl. 6th ed. 1098).

Rejoinder falsifying memorial.

That the said memorial in the said replication set forth contains divers false statements

and representations, touching and relating to certain matters and facts material and essential to the validity of the said annuity, and to the maintenance of this action, and especially in this, to wit, that the said memorial imports and represents that the consideration of, and for the said annuity, to wit, 600*l.* was paid in notes of the governor and company of the Bank of England, whereas, in truth, and in fact the said 600*l.* was not, nor, was any part thereof paid to the deft. in notes of the governor and company of the Bank of England, or, otherwise, howsoever in manner and form, as in the said replication, is alleged; and so the deft. again saith, that there never was any such memorial as by the said act of parliament is required to be enrolled in the said High Court of Chancery according to the directions of the said act, and of this the deft. puts himself upon the country, &c. (3 M. & W. 74).

Evidence for Plaintiff.

The evidence must, like other cases in action on specialties, depend on the plea pleaded.

On non est factum.] Plt. must be prepared to prove the execution of the deed as usual (see "DEED"), and what is in arrear. There does not seem any actual necessity for proving that the grantor, or, person on whose life the annuity is granted, is living (def't. not having denied it by pleading), though usual so to do. If, indeed, the action is on the bond, and breaches are suggested in pursuance of the 8 & 9 Will. III. such proof would be necessary. (See "DEED," "COVENANT.")

No Memorial, &c.] The presumption is, that the annuity-deed is valid, and has been duly memorialized; it is not, therefore, incumbent on the plt. to prove the due enrolment of the memorial, unless, indeed, def't. plead no memorial, &c., when plt. should be *prepared to support his replication by showing the enrolment within the proper time (Doe d. Griffin v. Mason, 3 Camp. 7). If def't. does not, in his rejoinder, deny the record of the enrolment, an examined copy of the enrolment, completely recorded, should be produced and proved (see *post*, "RECORD"). The date of the enrolment, indorsed by the clerk of the enrolments, is, it seems, conclusive evidence of the date (Rex v. Happer, 3 Pri. 495).

Other Issues.] Plt. should be prepared to support his replication. If the burden of proof lies on def't., plt. should be prepared to disprove the subject of such proof.

Damages.] Plt. should be prepared to prove the amount of the arrears due.

In Action to recover Money had and received, if annuity-deed be defective, see *post*, "MONEY HAD AND RECEIVED."

The receipt of the money must be proved, and it seems that the deeds should be produced and their execution proved, and that they were set aside by rule of court (2 Stark. Ev. 215, n.). But it would seem that the affidavits used in court, and the rule thereon, will prove plt.'s case.

Evidence for Defendant.

This must depend on the plea, or rejoinder, which def't. must be prepared to support (*post*, "PAYMENT," "USURY"). An annuity transaction is not, in general, affected by the usury laws, unless, it be very colourable ("USURY"). If def't. plead a defective memorial, he should be prepared to point out and prove the defect (Doe d. Griffin v. Mason, 3 Camp. 7).

ANSWER IN CHANCERY.

See "CHANCERY."

APOTHECARY AND SURGEON, ACTIONS BY AND AGAINST.

ACTIONS BY AND AGAINST.

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Of Plaintiff's being a Surgeon, p. 133.

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On General Issue, p. 135.

Form of Remedy and Pleadings.

Form of Remedy.] The form of remedy by an apothecary or surgeon, for his bill for medicines and attendance, is by action of assumpsit or debt (see "ASSUMPSIT," "WORK AND LABOUR").

An apothecary may sue for medicines, &c., supplied to a patient in London, although he has only a certificate of qualification from the Apothecaries' Company to practise in England, except the city of London; the 55 Geo. III. c. 194, s. 19, requiring an additional fee to be paid for a certificate to practise in London, being only a fiscal regulation for the benefit of the company (Young v. Geiger, 12 Jur. 983, C. P.; 6 Q. B. 541).

**Declaration.*] There is nothing peculiar relating to the form of the declaration. The plt. may recover under the common indebitatus count for work and labour, and materials (*post*, "WORK AND LABOUR"). But it is not unusual to employ a special indebitatus count, disclosing the nature of the work done. In such count, if the action be for a cure of a loathsome disease, the name of such disease should not be mentioned (Anon. 2 Wils. 20; see further, *post* "WORK AND LABOUR"). An apothecary may recover for both medicines and attendances if the united charges are reasonable (Morgan v. Hallen, 8 Ad. & E. 489). A physician may recover on an express contract, or if he contracts as a surgeon (Veitch v. Russell, 1 C. & M. 362; Little v. Oldacre, 1 C. & M. 370). If plt. abstain from sending in a bill in the lifetime of his patient in the expectation of a legacy, he may afterwards sue the executor (Baxter v. Gray, 4 Sc. N. R. 384).

Pleas.] The pleas are the same as in other actions of indebitatus assumpsit, or debt. It need not be specially pleaded that the plt. was not qualified to practise as an apothecary, that defence being admissible under the general issue (Morgan v. Raddock, 4 Dowl. 311; Sharpe v. Wagstaff, 3 M. & W. 521; S. C. 6 Dowl. 566; Shearwood v. Hay, 5 Ad. & E. 383).

Precedents.

Count for work and labour as an apothecary or surgeon and for medicines.

[*The commencement of the count is as post, "ASSUMPSIT," "DEBT," inserting the words,*] for the work and labour, care, diligence, journeys, and attendances of the plt., by him done, performed, given, and bestowed, as a [surgeon and] apothecary, at the request of the deft., in and about the healing, curing, and endeavouring to heal and cure the deft. [and divers other persons] of divers sicknesses, diseases, disorders, and maladies, under which they respectively laboured and languished, and also for divers medicines and other necessary things found and provided, administered, delivered, and applied by the plt. on those occasions, for the deft., and at his request, &c. (*Add account stated and breach. Conclude as post, "ASSUMPSIT."*)

Evidence for Plaintiff.

On General Issue.] The plt. must, on the general issue, prove in the ordinary way the work done and medicines supplied, and show that it was so done on the credit of the deft., or that the deft. is legally liable to pay (see as to liability of overseers for attendances on a pauper, *Tomlinson v. Bentall*, 5 B. & C. 738; *Gent v. Tomkins*, cited *ib.* 745; *Lamb v. Bunce*, 4 M. & S. 275; *Wing v. Mill*, 1 B. & A. 104); the reasonableness of the charges, and that he was duly qualified to act as an apothecary, according to 55 Geo. III. c. 194, or that the work was done by him in the capacity of a surgeon.

Proof of Plaintiff's Qualification.] By 55 Geo. III. c. 194, s. 21, explained and amended by 6 Geo. IV. c. 133, s. 5, it is enacted, that "no apothecary shall be allowed to recover any charges claimed by him in a court of law, unless he shall prove *at the trial* that he was *in practice prior to or on the 1st August*, or that he has obtained a "certificate," &c., to practise as such from the Apothecaries' Company, in the manner pointed out by the act, and by the 6 Geo. IV. c. 133, s. 5. If, therefore, the claim be made for business done as *an apothecary*, this proof must be given, even [*133] upon the general issue *and since the New Rules (see *supra*, "PLEAS"); because the proof of the practice or certificate is by the statute a part of the plt.'s case, and a condition precedent to his recovery (*Shearwood v. Hay*, 5 Ad. & E. 383; *Wagstaff v. Sharp*, 3 M. & W. 521). It is sufficient to produce a certificate to a person whose name is identical with that of the plt., and purporting to be under the seal of the Apothecaries' Company (*Simpson v. Dismore*, 8 M. & W. 47; 8 & 9 Vict. c. 113); *sed quære*, for the 8 & 9 Vict. c. 113, only applies to documents made evidence by statute, and the 6 Geo. IV. c. 133, which made the seal of such certificate evidence of its authority appears to have expired, s. 11 (see *Chadwick v. Bunning*, 1 N. & M. 306). The practice of an apothecary, as distinguished from that of a surgeon and a chemist, seems to be the prescribing or administering of medicine for complaints, not being merely external ailments and injuries to the limbs. It is the province of a surgeon to deal with the latter, and of a chemist to make up, prepare, and vend medicines prescribed by others, but not to prescribe or administer them (see *Allison v. Haydon*, 4 Bing. 619; *Apothecaries' Company v. Greenough*, 1 G. & D. 378; *Woodward v. Ball*, 6 C. & P. 578; *Apothecaries' Company v. Allen*, 1 N. & M. 413; *S. C.* 4 B. & Ad. 625), and the proper question for the jury, is, not whether the plt.

has *charged* as an apothecary, but whether in the particular case he *acted* as such (*Richmond v. Coles*, 1 Dowl. N. S. 560; S. C. 6 Jur. 238). If he did, not being qualified, he cannot recover even for the value of the medicines, or the phials which contained them (*Steed v. Henley*, 1 C. & P. 574; *Blogg v. Pinkers*, R. & M. 125; see *Chit. Contr. Index*), nor on a promissory note given for his bill (*Ib.*). But if the case were a surgical one, and the plt. was and acted therein as a surgeon, he may recover not only for his services, but also for medicines supplied as ancillary to such attendance (*Allison v. Haydon*, 4 Bing. 619; *Simpson v. Ralfe*, 4 Tyr. 525), and this, though he was at the time and practised as a physician, as well as a surgeon (*Battersby v. Lawrence*, 1 C. & M. 277).

To prove his qualification as an apothecary, the plt. must show either—1st. That he was in actual practice *as such* on the 1st of August, 1815; his having so practised before that time is not enough (*Apothecaries' Company v. Roby*, 1 D. & R. 564; S. C. 5 B. & A. 949). Nor is it sufficient that he then attended patients as an assistant to an apothecary (*Brown v. Robinson*, 1 C. & P. 264), nor that he was in the habit of curing certain local complaints, but had no shop, and had never made up prescriptions (*Thompson v. Lewis*, M. & M. 255; S. C. 3 C. & P. 483; *Apothecaries' Company v. Warburton*, 3 B. & A. 40); nor of course is it sufficient that he was in practice as a surgeon or accoucheur (*Woodward v. Ball*, 6 C. & P. 577). The statute does not apply to physicians, chemists, or druggists, or to the College of Surgeons (s. 28, 29). The act only applies to England and Wales, therefore a physician practising under a Scotch diploma is not within the act (*Apothecaries' Company v. Collins*, 4 B. & Ad. 604; *Collins v. Carnegie*, 1 Ad. & E. 695); and chemists who practise as apothecaries are not exempted from the act by s. 28 *semble* (*Apothecaries' Company v. Greenough*, 1 Q. B. 799). Merely administering medicines previous to the 1st of August, 1815, will not be sufficient to prove that the party acted as an apothecary, and incapacity to make up prescriptions will be cogent evidence to prove the negative (*Apothecaries' Company v. Warburton*, *supra*). An unqualified person dispensing medicines of his own advice is within the penalties of the act (*Apothecaries' Company v. Allen*, 4 B. & Ad. 625).

Or, 2ndly. A certificate of the Apothecaries' Company, authorizing him to practise. By 6 Geo. IV. c. 133, s. 7, the common seal *of the company is sufficient proof of the certificate, and that the person [*134] named in it is qualified to practise. If under the company's seal the authenticity of the seal must be shown (*Chadwick v. Bunning*, 2 C. & P. 106; 6 Geo. IV. c. 133, s. 7); if not, the signature of one or more of the examiners (*Walmsley v. Abbott*, 5 D. & R. 62; 3 B. & C. 218; S. C. 1 C. & P. 309). But since 8 & 9 Vict. c. 113, the certificate proves itself. A certificate of the Apothecaries' Company, purporting to bear the seal of that corporation, is a document which proves itself, and requires no authentication of the seal attached to it (*Bailey v. Langley*, 1 New P. C. 506, *Williams*; see *Law M. for Nov. 1846*). A general certificate, not confining the party to practise in the country, will entitle him to recover for business done in London, although he has only paid the price of the country certificate (*Chadwick v. Bunning*, *supra*). But it is not necessary to prove his previous apprenticeship (*Sherwin v. Smith*, 8 Moo. 30; 1 Bing. 204), nor his identity with the party named in the certificate (*Simpson v. Dismore*, 9 M. & W. 47; 1 Dowl. N. S. 357; S. C. 5 Jur. 1012). Debt for goods sold and delivered, work done and materials provided, and on account stated. The particulars of demand were for "medicines and attendances." At the trial the plt.'s assistant proved that they were surgeons, and that he had visited and dispensed medicines to the debt., and that on one occasion he had bled the

deft. : held, that *prima facie* the charges were charges in a medical case ; and that the plts. were therefore bound to prove that they were certificated as apothecaries, or that they had been in practice previous to the 1st of Aug. 1815 (Proud v. Mayall, 3 D. & L. 351, Q. B.).

Or, 3rdly. The plt. must bring himself within the provisions of the 6 Geo. IV. c. 113, s. 4, as a person who held while that statute was in force a commission or warrant as a surgeon or assistant surgeon in the army (Milbank v. Bryant, 6 Jur. 931 ; Steavenson v. Oliver, 8 M. & W. 234 ; 5 Jur. 1064).

Proof of Plaintiff being a Surgeon, &c.] By 3 Hen. VIII. c. 11, s. 1, no one shall act as a surgeon within the city of London, or, seven miles round, unless he be examined and licensed by the College of Surgeons, under the penalty of 5*l.* per month. But, notwithstanding this act, as it contains no prohibitory clause, it seems that a surgeon may maintain an action for his bill (Gremare v. Le Clerc Bois Valon, 2 Camp. 144 ; see Bensley v. Bignold, 5 B. & Ad. 340, &c. ; Holt, 528). But this seems to be overruled (see Cope v. Rowlands, 2 M. & W. 159). At all events such defence, if it be any, must now be specially pleaded, and the proof lies on the deft. (Gremare v. Le Clerc Bois Valon, *supra* ; see a form of plea, 3 Ch. Pl. 56, and see Little v. Oldacre, 1 C. & M. 370, n.) A surgeon not having a certificate from the Apothecaries' Company cannot charge for his attendance or administering medicine, except in cases within his own department, he cannot therefore recover for attending a patient in the typhus fever (Allison v. Haydon, 4 Bing. 619 ; and see Wagstaffe v. Sharpe, 3 M. & W. 525, n. a). If plt. be a surgeon and apothecary, he may, besides his charges for medicines, recover reasonable charges for attendances (Handey v. Harison, 4 C. & P. 110 ; Simpson v. Balfé, 4 Tyrw. 325 ; but see Towne v. Grisley, 3 C. & P. 581).

Proof of Reasonableness of Charges.] This must be proved as in ordinary cases by some person competent to speak thereon. There is not, as seems to have been formerly supposed (see per Best, C. J., in Towne v. Lady Gresley, 3 C. & P. 581), any rule of law which precludes an apothecary from charging both for medicines and attendance. It is for the jury to say what, under all the *circumstances, is a reasonable compensation [*135] for the plt.'s labour and skill (Morgan v. Hallen, 2 Jur. 591 ; 3 N. & P. 498 ; 8 Ad. & E. 489, S. C. ; see Handy v. Henson, 4 C. & P. 110 ; Gensham v. Germaine, 11 Moo. 1). Where the plaintiff, instead of putting a charge for his attendances, left a blank opposite such item, it was considered as evidence that he did not intend to make a charge for them (Tuson v. Batting, 3 Esp. 192). A surgeon who practises as a physician, having no diploma, cannot maintain an action for his fees (Lipscombe v. Holmes, 2 Campb. 441).

Evidence for Defendant.

On General Issue.] The deft. may on the general issue show that plt. was, or that his services were rendered in the character of a physician (Chorley v. Bolcot, 4 T. R. 317 ; Poucher v. Norman, 3 B. & C. 745 ; S. C. 5 D. & R. 649 ; Lipscombe v. Holmes, 2 Camp. 441) ; and this will be an answer to the action. But if a person subsequently promise a physician to pay him a certain sum for his services, he may be sued upon such promise (Veitch v. Russell, 1 C. & M. 362). And where a physician, who also practised as a surgeon, attended deft. in both capacities, he was held entitled

to be paid for any service performed in the latter character (*Battersby v. Lawrence*, 1 C. & M. 277). In an action by a surgeon, if deft. intend to avail himself of the fact of his being unlicensed, he must prove it (*Gremare v. Le Clerc Bois Valons*, 2 Campb. 144); and since the New Rules. Again, as the law implies an undertaking on the part of surgeons and apothecaries that they will exert a reasonable amount of skill (*Seare v. Prentice*, 8 Ea. 348), the deft. may show that he received no benefit, in consequence of plt.'s gross unskillfulness or carelessness (per Lord Kenyon, *Kannen v. McMullen*, Pea. 59; *Duffit v. James*, cited 7 Ea. 480; *Duncan v. Blundell*, 3 Star. 6; *Hill v. Featherstonehaugh*, 7 Bing. 569). But this is only in cases of gross negligence; and, if it appear that improper remedies or unfit medicines were administered under the advice of a physician, the surgeon or apothecary is, in all cases, entitled to recover (*Kannen v. McMullen*, Pea. 59). In the case of a medical man, if an operation, which might have been useful, have merely failed in the event, he is entitled to recover, but if it could have been in no event useful, he cannot recover (*Hill v. Featherstonehaugh*, 7 Bing. 574, per Alderson, J.). In cases where an *empiric* professes to cure disorders in a specified time by sovereign remedies and does not succeed in his cure, he cannot recover (*Hupe v. Phelps*, 2 Star. 480); but this does not apply to a regular practitioner (*Ib.*). Deft. may, of course, disprove the work done, or prove the unreasonableness of the charges, or account claimed.

ACTIONS AGAINST APOTHECARIES AND SURGEONS.

Form of Remedy and Pleadings, p. 135.

Evidence, p. 136.

Physician's Fees, p. 136.

[*Form of Remedy and Pleading.*] A surgeon or apothecary is liable, in assumpsit or case, for ignorance or unskillfulness, and for negligence in the exercise of his profession; as the law implies an undertaking or duty on their part to exercise due and reasonable skill, &c. (*Slater v. Baker*, 2 Wils. 359; *Seare v. Prentice*, 8 Ea. 348; B. N. P. 73). And the proper question for the jury is, whether the deft. exercised a fair, reasonable, and competent degree of skill (*Lamphier v. Phipos*, 8 C. & P. 475; *Hancke v. Hooper*, 7 C. & P. 81; *and see *Rex v. Long*, 4 C. & P. 398, 423). The action may be maintained, and, indeed must, in order [*136] to recover damages for the personal suffering he brought on the patient, and it is immaterial who employed the deft. or by whom he was to be paid (*Gladwell v. Steggall*, 8 Sc. 60; 5 B. N. C. 733; 3 Jur. 535, S. C.; *Pippin v. Shepherd*, 11 Pri. 400; See Ch. Contr. Index). A medical man is liable for gross negligence or unskillfulness, though he act gratuitously (*Hancke v. Hooper*, 7 C. & P. 81; *Shiell v. Blackburne*, 1 H. Bl. 158; see form of declaration, 7 C. & P. 81; 8 Sc. 60; Ch. Pl. by Pearson, 619). It is sufficient to aver that deft. was a surgeon, and "was retained and employed as such," without stating by whom, "for reward to him to treat and cure the plt., and that deft. entered upon the treatment," &c., without showing any undertaking by the deft., or averring in words that it was deft.'s duty to act skilfully, &c. (*Pippin v. Sheppard*, *supra*; *Gladwell v. Steggale*, 5 B. & C. 733; *Story v. Richardson*, 6 B. N. C. 130).

See a form of declaration for inducing plt. to purchase deft.'s practice as a surgeon, by misrepresenting the extent of business, Ch. Pl. by Pearson, 548.

Evidence.] Proof that deft. acted as a surgeon or apothecary will, if the

allegation be denied, be sufficient proof that he was so (see 1 N. R. 210; 2 Camp. 513; 2 Camp. 441; 4 T. R. 317). Plt. must on the general issue give evidence as to the nature of deft.'s treatment; and he should call persons of skill and experience to prove that the treatment of the deft. was unskilful and improper; and that the wound or complaint, or increased wound or complaint, of the plt. resulted from such improper and unskilful treatment. The damages should be proved by showing the length of time plt. has been ill, that he will never again have the use of a limb or part of his body as before the expense he has incurred, &c. The evidence for the deft. will consist in rebutting these proofs.

In an action against a person for practising as an apothecary without having obtained a certificate according to 55 Geo. III. c. 194, the proof of a certificate lies upon the deft. (Apothecaries' Comp. v. Bently, R. & M. 159).

Physician's Fees.

A physician cannot maintain an action for his fees (Chorley v. Bolcot, *supra*), or for travelling expenses (Veitch v. Russell, 3 Q. B. 928); unless there be a special contract (Veitch v. Russell, *supra*), and such contract must be proved by unambiguous evidence, and not by mere letters acknowledging "a debt," or an "account," or "demand," in general terms (Veitch v. Russell, *supra*). Vide ante, p. 131.

APPRENTICE.(a)

ACTION ON AN INDENTURE OF APPRENTICESHIP.

Right to Dismiss.] A person has a right to dismiss a servant for misconduct, but has no right to turn away an apprentice because he misbehaves; but the case of a young man seventeen years old, who, under a written agreement not under seal, is placed with a surgeon as "pupil and assistant," and with whom a premium is paid, is a case between apprenticeship and service; and if such a person on some occasions come home intoxicated, this alone will not justify the surgeon in dismissing him. But if [*137] the "pupil and assistant," by employing the shop-boy to compound medicines, occasion real danger to the surgeon's practice, this would justify the surgeon in dismissing him (Wise v. Wilson, 1 C. & K. 662).

Who liable on Deed.] A contract of apprenticeship must be by deed (see per Bailey, J., in Rex v. Annesley, 3 B. & A. 584); and the infant must be an executing party (Ib.; Rex v. Cromford, 8 Ea. 25; Rex v. Ripon, 9 East, 295); but no action upon the instrument lies against him (Gilbert v. Fletcher, Cro. C. 179; Ch. Contr. Index); though he cannot avoid it, during his minority (Rex v. Wigston, 5 D. & R. 339; S. C. 3 B. & C. 484). An action therefore for breach of the indenture can only be brought against the master on the one hand, and the father or other person binding himself for the infant or his representative on the other. Upon an indenture in the common form the latter is liable by virtue of the general clause at the foot, "each of the

(a) See 1 U. S. Dig. Tit. "Apprentice," p. 194; 1 Supp. U. S. Dig. p. 131; 1 Ann. Dig. p. 43; 2 Id. p. 25; 3 Id. p. 35.

said parties binds himself to the other," &c. (*Branch v. Edington*, 1 Doug. 500; *Cumming v. Hill*, 3 B. & A. 59).

The apprentice may, when he arrives at maturity, avoid the indenture and quit his master's service (*Ex parte Davis*, 5 T. R. 715); but the father remains liable on his covenant notwithstanding (*Cuming v. Hill*, 3 B. & A. 59). The apprenticeship may, however, be determined before that period—1st, by mutual consent of *all* the parties to it (*Rex v. Weddington*, Burr. S. C. 766; *ib.* 801; *Rex v. Harberton*, 1 T. R. 139); and this when carried out and acted upon puts an end to the contract, though the indenture be not in fact delivered up or cancelled (*Rex v. Harberton*, *supra*), but, as before observed, the infant cannot during his minority avoid the contract by his own act, nor will any arrangements for that purpose between him and his master, alone, avail to put an end to the apprenticeship, except under circumstances where such an arrangement is manifestly for the infant's benefit (see *Rex v. Mountsorrel*, 3 M. & S. 497). Hence if the apprentice quit his master's service with the intention of putting an end to the contract, as the master on the one hand may reclaim him (see *Gray v. Cookson*, 16 Ea. 13), so, on the other, if the apprentice return and offer his services, the master is bound to take him again (*Winstone v. Linn*, 2 D. & R. 465; S. C. 1 B. & C. 460; *Hughes v. Humphreys*, 9 D. & R. 715; S. C. 6 B. & C. 680); 2ndly, by the death of either party, the master or the apprentice (*Rex v. Clark*, Burr. S. C. 782); 3rdly, the bankruptcy of the master, and in this case the apprentice is discharged, though the fiat be afterwards, by a composition between the bankrupt and his creditors, annulled (6 Geo. IV. c. 16, s. 49; *Allen v. Coster*, 1 Bea. 274); and 4thly, by order of the justices at sessions (see stat. 5 Eliz. c. 4, s. 35; 20 Geo. II. c. 19, s. 3; 4 Geo. VI. c. 29; *East v. Pell*, 4 M. & W. 665).

See a form by an apprentice against his master to whom he had been assigned, for not instructing him, *Morris v. Cox*, 2 M. & Gr. 659.

Form of Remedy.

Covenant is the proper form of action.

Precedents.

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Declaration by master against the father for a breach by reason of the apprentice absentering himself.

[*Commence as in ordinary cases: see post, "COVENANT."*] For that, whereas, heretofore, to wit, on, &c., by a certain indenture of apprenticeship then made (one part whereof sealed with the seal of the deft., the plt. now brings into court here, the date whereof is the day and year aforesaid), one E. F., with the consent of the deft., his father and next friend, did put himself apprentice to the plt. to learn his art, trade, and mystery of a ———, and with him, after the manner of an apprentice, to serve from the date thereof until the full end and term of ——— years from thence next following, to be fully complete and ended, during which term it was thereby covenanted and agreed, that the said apprentice his said master should faithfully serve, his secrets keep, his lawful commands everywhere gladly do, and that he should not haunt taverns or play-houses, nor absent himself from his master's service day or night unlawfully, but in all things as a faithful apprentice should behave himself towards his said master, and all his, during the said term; and for the true performance by the said E. F. of all and every the covenants and agreements therein contained, on the part and behalf of the said E. F., to be performed and fulfilled, the deft. thereby bound himself unto the plt. [*This is the effect of the general clause, see supra*], as by the said indenture, reference being thereunto had, will (amongst other things) more fully appear, by virtue of which said indenture, the said E. F. afterwards, to wit, on the day and year aforesaid, entered, and was then received into the

service of the plt. as such apprentice as aforesaid, and remained and continued in such service, under and by virtue of such indenture, for a long space of time, to wit, from the day and year last aforesaid, until and upon the — day of —; and although the plt. has always, from the time of the making of the said indenture, hitherto well and truly performed, fulfilled, and kept all things therein mentioned and contained on his part and behalf to be performed, and fulfilled, and kept according to the tenor and effect, true intent, and meaning thereof, yet the said E. F. did not, nor would faithfully serve the plt., according to the tenor and effect, true intent, and meaning of the said indenture, but, on the contrary thereof, the said E. F., during the said term, to wit, on, &c., unlawfully absented himself, and has from thence hitherto remained, and continued absent from the service of the plt., contrary to the tenor and effect of the said indenture, and of the said covenant of the deft. in that behalf; and so the plt. says, that the deft. has not kept his said covenant, but has broken the same, to the plt.'s damage, of £—; and thereupon he brings his suit, &c.

Pleas.] See *post*, "COVENANT," and as to what matters must be specially pleaded. As to effect of *non est factum*, see *ib.*, plea that plts. were partners when apprentice deed was executed, and that they have since dissolved (*Lloyd v. Blackburn*, 9 M. & W. 363). See a plea of an illegal agreement to ante-date the indentures of a surgeon's apprentice in order to make it appear falsely that he had served five years (*Prole v. Wiggins*, 3 B. N. C. 230; see *Reg. v. Bannister*, 7 Ad. & E. 858). See a form of plea justifying moderate correction of an apprentice for disobedience, *Penn v. Ward*, 2 C. M. & R. 388.

Evidence.] See *post*, "COVENANT."

ACTION FOR ENTICING AWAY AN APRENTICE.

• See *post*, "MASTER AND SERVANT," "SEDUCTION."

Form of Remedy.] Against any person who entices away an apprentice, or who knowingly harbours him, the master may maintain an action on the case (*Reg. v. Daniel*, 1 Salk. 380; *Reg. v. Collingwood*, Raym. 1116; *Hail v. Aldridge*, Cowp. 54; *Hambleton v. Vere*, 2 Saun. 169; *Rex v. Edwards*, 7 T. R. 745); or he may waive the *tort, and sue in debt or assumpsit in the ordinary way, for the work and labour of the apprentice (*Foster v. Stewart*, 3 M. & S. 191; *Lightly v. Clouston*, 1 Taun. 112; *Eades v. Vandeput*, 5 Ea. 39, n.).

Declaration.] See forms, 2 Ch. Pl. 6th ed. 455, 456.

Evidence for Plaintiff.] If the apprenticeship be traversed, plt. should prove it by the indentures, which should be produced and proved in the usual way (see "DEED"). It should be proved deft. knew of the apprenticeship at the time of his enticing away or harbouring the apprentice (*Fores v. Wilson*, Pea. 55; *Pea. Ev.* 334; *Winsmore v. Greenbank*, Willes, 582). Slight evidence would suffice. If any express notice of it was given to deft., the same should be proved (see "NOTICE"). The mode of deft.'s causing the injury should, if possible, be proved; though this is not absolutely necessary. It will suffice to show the apprentice was enticed away or harboured by deft. The *damage* must be proved (*Eades v. Vandeput*, 5 Ea. 39; *Bird v. Randall*, Burr. 1352). The value of the services lost should be shown. The measure of damages is not to be ascertained at the actual loss plt. sustained at the time, but for the injury done by causing the apprentice to leave plt.'s employment (*Gunter v. Astor*, 4 Moo. 12). The apprentice, or his father, or party entering into the indenture, would, it should seem,

be a competent witness for either party, though sometimes a dangerous one.

ARBITRATION.

See *post*, "AWARD," and index, "ARBITRATOR."

ARREST.

See "MALICIOUS ARREST," "PROCESS."

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See "PUBLIC DOCUMENTS."

*ASSAULT AND BATTERY.(a)

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Assault and Battery.

What.] Any act of aggression upon the person of another, or any attempt to do a corporal hurt to another, under such circumstances as that the injury *might*, but for some casualty, have been inflicted, amounts in law to an assault, however slight the proposed *injury might be, as by [*141] holding up the fist, striking at another with a stick which does not touch him, or throwing any thing at one which misses him, or any act which shows an intention to do an injury (B. N. P. 15; Finch, 202; Genner v. Sparks, Salk. 79; Martin v. Shoppee, 3 C. & P. 373; Bac. Ab. Assault, A.; Stephens v. Myers, 4 C. & P. 349). But mere words of abuse and threats will not, nor will any mere attempt to hurt, unless accompanied with an intention to commit the harm (2 Keb. 545; 10 Mod. 187; Tuberville v. Savage, 1 Mod. 3; Griffin v. Parsons, 1 Selw. N. P. 27; Blake v. Barnard, 9 C. & P. 626; but see James v. Campbell, 5 C. & P. 372).

"It is not every threat where there is actually no personal violence that constitutes an assault, there must in all cases be the means of carrying the threat into effect; the question is whether the deft. was advancing in a threatening attitude to strike the chairman, so that his blow would have almost immediately reached the chairman if he had not been stopped then, though he was not near enough at the time to have struck him, yet if he were advancing with the intent, I think, it amounts to an assault in law; if he were so advancing, that within a second or two of time he would have reached the plt., it seems to me an assault in law" (per Tindal, C. J., Stephens v. Myers, *supra*). The animus is material in the case of an assault; therefore, if one half-draw his sword and say, "If it were not assize time I would run you through the body," held, that as the words negatived an intention to do violence, there was no assault (1 Mod. 3; Bac. Ab. Assault, A.; Blake v. Barnard, 9 C. & P. 626; Reg. v. St. George, 9 C. & P. 483; Williams v. Jones, Hardw. 301; Underwood v. Hewson, 1 Stra. 596). Giving a person into custody upon a charge before magistrates is not an assault in law (Reglin v. Nelham, 6 L. T. 455).

Battery.] Battery, which always includes an assault, is the actual infliction of an injury, and consists in any unlawful touching of the person of another, either by the aggressor or by any person or thing set in motion by him (1 Saun. 29 b, n.; 1b. 13 & 14, n. 3; Bull. N. P. 15; Cole v. Turner, 6 Mod. 149; S. C. Holt, 108; see Rawlins v. Till, 3 M. & W. 28). Thus, the spitting in another's face (Reg v. Coatesworth, 6 Mod. 172; S. C. 3 Salk. 19), cutting his hair (Forde v. Skinner, 4 C. & P. 239), or throwing water upon his person (Purcell v. Horn, 8 Ad. & E. 604; S. C. 4 N. & P. 564) is a battery. Where the deft. struck a horse so that it ran away and the rider fell, he was holden liable in an action of battery (Dodwell v. Burford, 1 Mod. 24; 1 Sid. 433). The liability is the same whether the injury was intentional or occasioned by the negligence of the deft. (Wakeman v. Robinson, 8 Moo. 63). The act need not be wilful to maintain the action, nor is the degree of violence material (3 East, 602; Bac. Ab. Assault, A.; Weaver v. Ward, Hob. 134). But where the injury is unavoidable, and deft.'s conduct is entirely without fault, no action will lie (Wakeman v. Robinson, *supra*); and this may be given in evidence under the general issue (see *post*). The party injured may proceed by indictment and action at the same time, and cannot be put to his election (Jones v. Clay, 1 B. & P. 191; Murphy v. Cadell, 2 ib. 137).

Bruises.] Bruises are where the skin is not broken.

Wounding.] Wounding is giving another a cut, or even a scratch, opening the flesh; or breaking the skin (1 Ch. Gen. Pr. 38; Moriarty v. Brooks, 6 C. & P. 684).

**Mayhem.*] Mayhem is the deprivation of a member proper for [*142] defence in fight, and which is not only an arm, leg, finger, eye, and a fore-tooth, but also some others, but not, as it has been said, a jaw-tooth, or the ear, or a nose, because they have been supposed to be of no use in fighting (3 Bl. C. 121).

By and against whom Action to be brought.] To recover damages for the personal suffering and annoyance, the action must be brought in the name of the party injured. But the husband may sue alone to recover any damages resulting to him for an assault on his wife, child or servant, such as the loss of service, of his wife's society, expenses to which he has been put, &c. (See *post*, "HUSBAND AND WIFE," "SEDUCTION.") Hence, in such cases, each party may sue—the one for the direct, the other for the consequential damage.

Not only the person by whose immediate agency the hurt was done may be sued, but also the person who commanded, directed, or caused it to be done, or who, being present, may be presumed from the circumstance to have assented (McLaughlin v. Prior, 4 Sc. N. R. 655; S. C. 6 Jur. 374; Roll. Ab. 555, V. pl. 2; Bro. Trespass, pl. 40; Scott v. Shepherd, 3 Wils. 403; S. C. 3 Black. 892); or, who, if it were done for his benefit, subsequently assented (Hull v. Pickersgill, 1 B. & B. 282; Wilson v. Barker, 1 N. & M. 409; S. C. 4 B. & Ad. 614).

Liability of Subordinate Officer for Orders of Superior.] In an action of trespass against the keeper of the queen's prison and his officers, for joint assaults, the officers are only liable for the part which each actually takes in the trespass complained of. Those are not liable at all who merely attend in obedience to the order of the superior, and witness the execution of his order by other officers. Where, in obedience to such orders, one set of defts.

assault the plt. and force him down stairs into a cab, and another set accompany the cab with the plt. to a certain place and back again, both sets of officers are not liable as for one entire trespass, but the plt. must proceed against one or other (*Herring v. Hudson*, 10 L. T. 287).

For injuries of this kind no action lies by or against the executors or administrators of the party doing or sustaining the injury (1 Saund. 216, a, n. 1), unless indeed the statute 3 & 4 Will. IV. c. 42, s 2, gives the husband, father, or, master a remedy against the personal representatives of the *tortfeasor*, as for a wrong to him in respect of his *personal* property.

Form of Remedy.] Trespass is the only form of action for an assault and battery where the action is brought by the party injured. But when it is brought for the consequential damages, as, where a husband sues for an assault on his wife, a father, or master for an assault on his child, or servant, the action may be either in *trespass*, or, *on the case* (*Chamberlain v. Hazlewood*, 5 M. & W. 515; 7 Dowl. 816; S. C. 3 Jur. 1079; see "TRESPASS," "CASE").

Limitation.] An action of *trespass* must be brought within *four* years; an action *on the case* within *six* years next after the cause of action accrued (21 Jac. I. c. 16, s. 3; see *Cook v. Sayer*, 2 Wils. 85; B. N. P. 128; *Macfadezn v. Olivant*, 6 Ea. 387; *Dyster v. Batty*, B. & A. 448).

Assault and false Imprisonment.] An assault *ex vi termini* excludes consent; therefore, a plea of leave and license to a declaration charging an assault is bad, as amounting to the general issue (*Christopherson v. Bare*, 12 Jur. 374; 17 Law J., Q. B. 109). *Quere*, if it can be pleaded to an action for imprisonment (Ib.).

Where a party, on being summoned to appear before two justices for an assault, appeared and pleaded "not guilty," and the prosecutor then withdrew his complaint, and the deft. was accordingly discharged: held, that this was a hearing and dismissal, which entitled the deft. to a certificate that the charge had been dismissed as not proved, under the 9 Geo. IV. c. 31, s. 27; and that a plea stating those facts, and that the certificate had been granted, set forth a good defence, under the 28th section, to an action of trespass for the same assault (*Tunnickliffe v. Tidd*, 17 Law J., M. C. 67, C. P.; 5 C. B. 553).

In trespass for false imprisonment, it appeared that plt. was given into custody by deft. on a charge of stealing, and was taken before a magistrate, who, after hearing the evidence of plt. in support of the charge, remanded him: held, that the remand being the act of the magistrate, deft. was only liable in damages for the trespass and imprisonment in taking plt. before the magistrate (*Lock v. Ashton*, 13 Jur. 167; 11 Law J., Q. B. 76).

In an action against a constable for wrongly taking a party into custody, the deft. relying on the 24 Geo. II. c. 44, s. 8, the judge left to the jury whether they believed that in acting as he did the constable *bona fide* intended to do his duty: held, right, and that it was unnecessary to ask them whether the facts which took place at the time were either such as to justify him in taking the plt. into custody, or reasonably to lead him to believe that in doing so he was acting in the discharge of his duty (*Gosden v. Elfick*; *Maynard v. Elfick*; *Vass v. Elfick*, 13 Jur. 989, Ex.).

A party is not liable in trespass for false imprisonment who, seeing a man in custody of a constable for a supposed offence, points out another as the real criminal, and does not direct the constable to take that party into custody (Ib.).

To an action of trespass for an assault, the deft. pleaded that he was possessed of a gig and horse, which were upon a public highway; that the plt. seized the horse and attempted to dispossess the deft. of the horse and gig, and was driving them away and dispossessing him of them, wherefore the deft. did defend his possession and resisted the plt.'s endeavour, and in doing so committed the trespass in question: held, that this plea was not supported by proof; that the plt., whose horse had been struck by the deft., seized the deft.'s horse, intending to hold it until his master should come up for the purpose of inquiring the deft.'s name (*Taylard v. Morris*, 18 Law J., Ex. 297).

A party who trespasses upon land, under a fair and reasonable supposition that he has a right to do the act complained of, is not liable to be apprehended under the 28th section of the Malicious Trespass Act, 7 & 8 Geo. IV. c. 30, by the owner of the property, although the latter have reason to suppose the party to be within the act (*Parrington v. Moore*, 2 Ex. 223).

The 24th sect. of stat. 7 & 8 Geo. IV. c. 30, is only applicable to cases in which the damage done to trees is less than 1s. (*Charter v. Greame*, 3 N. S. C. 382; 13 Jur. 208; 18 Law J., M. C. 73); *Semble*, that it was not intended to apply to injuries to trees (lb.). *Quære*, whether stat. 7 & 8 Geo. IV. c. 30, applies to malicious injuries done by a tenant to trees growing upon land in his occupation (lb.).

Form of Pleadings.

Declaration.] The observations that will be found *post*, "TRESPASS," will here apply. The venue, except when the action is brought against a magistrate, &c. (see *post*, "OFFICERS," *"JUSTICE OF THE PEACE"), may be laid in any county (*Mostyn v. Fabrigas*, Cowp. 161; 1 [*143] Saun. 74, n. 2; see *Glynn v. Houston*, 2 Sc. N. R. 548); but the deft. may change it on the common affidavit. If the declaration begins with a "whereas," it will be objectionable on special demurrer, as not containing a positive allegation of an assault (*Wildegoose v. Kellaway*, 2 Salk. 636; 2 Ch. Pl. 648). It should allege the assault to have been committed "*vi et armis*;" but the omission of these words can only be taken advantage of by special demurrer (4 & 5 Anne, c. 16, s. 1). The day of the assault should be stated, but the precise day is immaterial. That deft. on such a day, "and on divers other days," &c., *assaulted* plt. is good, and is the preferable form where there have been two assaults and one may be justified; but plt. cannot, on such a count, give evidence of more than a single act (*Burgess v. Frelove*, 2 B. & P. 425; see *Stante v. Prickett*, 1 Camp. 472). *Aliter* in trespass *quære clausum fregit*, or *de bonis asportatis* (B. N. P. 86; 1 Saun. 24, n. 1), or, *case* for an assault on plt.'s wife, &c. (*Macfadden v. Olivant*, 6 Ea. 387). That deft. on, &c., and on divers other days, &c. made *an assault*, is objectionable on special demurrer (*English v. Purser*, 6 Ea. 395; *Michell v. Neal*, Cowp. 828). Hence, if plt. complains of more than one assault, he should have a separate count for each. Where the declaration, containing but one count, alleged a single trespass, and that was justified, held, that plt. could not new assign (*Taylor v. Smith*, 7 Taun. 156; see *Chertley v. Barns*, 10 Ea. 73).

Statement of Injury.] Care should be taken to describe the injury, according to the facts of the case, and only such parts of the following precedents should be adopted as are applicable, and will be supported by the evidence to be adduced on the trial. Yet if the plt. prove any material allegation in the count, he will be entitled to a verdict *pro tanto*, though he fail in proving the residue (*R. T. Hardw.* 121; 2 Saun. 74 b.; see *Phillips v. Howgate*, 5 B. & A. 220; *Bush v. Parker*, 4 M. & Sc. 588; S. C. 1

Bing. N. C. 72). The *vi et armis* is necessary (2 Ch. Pl. 649). In an action by husband and wife, for the wife's suffering, care should be taken not to include any statement of an injury or damage to the husband only: as loss of service or expense (1 Ch. Pl. 434; *Dengate v. Gardiner*, 4 M. & W. 4); and so, in an action by the husband alone, for an assault on his wife, *per quod*, &c., care should be taken not to include any statement as to the personal sufferings of the wife (*Russell v. Corne*, 1 Salk. 119; Com. Dig. Pleader, 2 A, 1; *post*, "HUSBAND AND WIFE"). If only a liability to pay expenses have been incurred it should be so stated (see *Pritchett v. Boevy*, 1 C. & M. 775). The declaration should conclude with a *contra pacem*, but the omission must be taken advantage of by special demurrer (4 & 5 Anne, c. 16, s. 1). The words, "other wrongs," &c., should be inserted, and under them any circumstances of aggravation, or matters which cannot with decency be stated, may be given in evidence (B. N. P. 89; see *Huxley v. Berg*, 1 Stark. 98; *Lowden v. Goodrick*, Peake, 46); but any resulting damage, not being the natural and necessary consequence of the injury, must be specially alleged (*Petit v. Addington*, Peake, 62; B. N. P. 89; *Holt*, 699, 1 Stark. R. 98; 1 Ch. Pl. Index, Damages). In an action by husband and wife, the declaration should conclude to the damage of both (Com. Dig. Pleader, C, 84).

Defence.] The new rules of pleading contain no express provision to alter the effect of pleas in trespass for personal injuries. Inevitable accident over which plt. had no control, is a defence under not guilty. The deft. may plead in denial, or in justification, or excuse, of the assault, or both, but he cannot plead "leave and *license" (Comb. 218; B. N. P. [*144] 16). An assault *ex vi termini* excludes consent; therefore a plea of leave and license to a declaration charging an assault is bad as amounting to the general issue. *Quere*, if it can be pleaded to action for imprisonment (*Christopherson v. Bare*, 17 Law J. 109, Q. B.). A. let certain premises to B. by an agreement, which contained the usual clauses for payment of rent and for repairing the premises, and also a clause that, in case of non-payment of the rent or non-performance of the conditions, it should be lawful for A., without any demand, to enter upon and take possession of the premises, and expel B. therefrom without any legal process; and that in case of such entry, and of any action being brought for the same, the defendant might plead leave and license of B. to A. for the entry or trespasses complained of. In an action of trespass by B. against C. for breaking and entering, &c. and assaulting plt., C. pleaded leave and license. It appeared that rent being in arrear from B. to A., C., under a written order from A., had entered and forcibly expelled B. The foregoing agreement was given in evidence. Held, that the plea was sustained by the evidence. Held, also, that as the plt. had not new-assigned any excess, the assault was merely an aggravation of the principal trespass, and was covered by the plea (*Kavanagh v. Gudge*, 7 M. & G. 316). He may justify an assault to a necessary degree, in defence of his person by "*son assault demesne*" (see *Cockcroft v. Smith*, 2 Salk. 642; *Dale v. Wood*, 7 Moo. 33); or that of his wife, or a wife in defence of her husband (*Leeward v. Basilee*, 1 Ld. Raym. 62; 1 Salk. 407); a servant in defence of his master, but not a master in defence of his servant, because he may have an action *per quod servitium amisit* (Ib.); a parent in defence of his child, or a child in defence of his parent (3 Salk. 47). A master may also justify the moderate correction of his servant, apprentice, scholar, or child (Ib.) But a person cannot justify an assault (*i. e.* by a *fecit insultum*) in defence of his house, or his goods (*Leeward v. Basilee*, 1 Ld. Raym. 62), though he may justify

by *mollitur manus impôsuit*, in order to turn out an intruder from his house, or prevent a spoiling of his goods (Com. Dig. Pleader, 3 M. 16, 17), but not striking and knocking down plt. (Gregory v. Hill, 8 T. R. 299), nor an imprisonment (Reece v. Taylor, 4 N. & M. 470; Green v. Bartram, 4 C. & P. 308; Rose v. Wilson, 8 Moo. 362; S. C. 1 Bing. 353), unless the plt. being in the deft.'s house, assault the deft. after being requested to leave (Reece v. Taylor, 4 N. & M. 469; Bone v. Daw, 3 Ad. & E. 711); or commit a breach of the peace in the presence of the deft., or which he has reasonable ground to expect he will renew (Timothy v. Simpson, 1 C. M. & R. 757; Baynes v. Brewster, 2 Q. B. 375; Wooding v. Oxley, 9 C. & P. 1); and on no other ground will the mere fact of a party refusing to leave a house on request, justify giving him in charge to a policeman (Wheeler v. Whiting, 9 C. & P. 269; Wooding v. Oxley, *supra*).

A wounding cannot be justified in defence of possession (Gregory v. Hill, *supra*; Oakes v. Wood, 2 M. & W. 791), unless plt. attempt to enter with force, or assault the plt. or his family in attempting to remove him (Ib.) And if a party enter, or endeavour to enter a house, or close, or to take goods by force, he may be resisted by force, and deft. may allege that if any damage happened to plt. it was in defence of deft.'s possession (Weaver v. Bush, 8 T. R. 80). In such a case no request to depart, or desist need be given, but, otherwise, the plea must allege such request and refusal (Ib.; Tabay v. Reed, 1 C. & P. 6; Com. Dig. *ubi sup.*). Deft. cannot justify imprisoning plt. without showing that it was necessary in order to preserve the peace (Timothy v. Simpson, 1 C. M. & R. 757; Atkinson v. Warne, ib. 827; 3 Dowl. 483; Banes v. Brewster, 1 G. & D. 669; S. C. 6 Jur. 392; Ingle v. Bell, 1 M. & W. 516; Howell v. Jackson, *6 C. & P. 723; Cohen v. Huskisson, 2 M. & W. 477; S. C. 1 Jur. [*145] 559).

Where the trespass is the act of the deft., though it may be excused by involuntary accident owing to the act of the plt. it must be specially pleaded; therefore, if the plt. slipped off the pavement and got under the carriage, and was driven over by the deft., this was held not admissible under the general issue (Hale v. Fearnley, 3 Q. B. 919).

Deft. may also plead a judgment recovered for the same assault (Fritter v. Beal, 1 Salk. 11; S. C. 1 Raym. 339), either against himself, or, another co-trespasser (2 Lutw. 944; Broome v. Wooton, Yelv. 68; Day v. Porter, 2 M. & R. 151). And the certificate of a magistrate who has adjudicated on the case is by statute 9 Geo. IV. c. 3, ss. 27, 28, a good bar to an action for the same assault (see Skuse v. Davis, 7 Dowl. 774; 2 P. & D. 550; 10 Ad. & E. 635; S. C. 3 Jur. 1170; Harding v. King, 6 C. & P. 427; Anon. 1 B. & Ad. 382; Bennine v. Neck, 2 H. & W. 178; Reg. v. Robinson, 12 Ad. & E. 672; 4 P. & D. 391; S. C. 5 Nev. 244).

Assault and battery are excepted out of the statute 3 & 4 Will. IV. c. 42, s. 21, consequently the deft. cannot in this action pay money into court.

Pleas.] The new rules are silent as to pleas in actions for an assault and battery. The general issue denies the act itself, and that it amounts to a trespass, as well as the special damage, if any. In Williams v. Jones, Rep. Temp. Hardw. 301, his lordship says, "The party's intention must be considered, for people will sometimes, by way of joke, or, in friendship, clap a man on the back, and it would be ridiculous to say that in such a case a man must justify, and may not plead not guilty. In Gibbons v. Pepper, Raym. 38; Salk. 637; S. C. 4 Mod. 405, a plea that the deft.'s horse took fright and ran away, and that the plt. wrongfully continued in the way, and in consequence was run over against the will of the deft., was holden bad on

demurrer, as amounting to the general issue; for it went to show that it was not the deft.'s act which produced the injury (see per Denman, C. J., in *Boss v. Litton*, 5 C. & P. 409; *Goodman v. Taylor*, ib. 410).

But, except in actions against magistrates, &c. (see *post*, "OFFICERS," "JUSTICE OF THE PEACE"), any defence which admits the trespass complained of, and seeks to excuse, or, justify it, must be specially pleaded; such as inevitable accident (*Knapp v. Salsbury*, 2 Camp. 500; *Boss v. Litton*, *sup.*; *Pearcy v. Walter*, 6 C. & P. 232; *Wakeman v. Robinson*, 8 Moo. 63; S. C. 1 Bing. 213; Bac. Ab. Trespass, H); *son assault demesne* (1 Saun. 77, 296, n. 1); moderate correction (*Watson v. Christie*, 2 B. & P. 224), &c., &c., as well as matter in discharge, as accord and satisfaction, judgment recovered either against the deft., or, a co-trespasser (see *Boyce v. Bailiff*, 1 Camp. 60; *Day v. Porter*, 2 M. & R. 151; 2 Lutw. 944; *Broome v. Wootton*, Yelv. 68; 11 Co. 67).

The usual form of the general issue is, that the deft. is not guilty of "the said several trespasses, or any, or either of them;" but where to an action for assault, battery, and tearing plt.'s clothes, the deft. pleaded "not guilty of the said supposed *assault* in manner and form," it was held, after verdict, that the *modo et forma* denied the battery and tearing as well as the assault (*Weatherell v. Howard*, 3 Bing. 135; S. C. 10 Moo. 502).

Pleas in justification, or excuse must admit the trespass attempted to be justified (*Gibbon v. Pepper*, Raym. 38; S. C. 2 Salk. 637). But [*146] *a plea of *son assault demesne* sufficiently confesses the assault and battery by alleging that, *before the said time, when, &c.*, the plt. assaulted deft., and would have bruised and ill-treated him if he had not immediately defended himself, and that *if* any hurt, or damage happened to plt. it was occasioned by plt.'s assault and deft.'s defence (*Wise v. Hodsoll*, 3 P. & D. 510; 11 Ad. & E. 816; S. C. 4 Jur. 535). A wounding may be justified in self-defence, but in defence of the possession of property the plea must be only *molliter manus imposuit*, unless there be resistance, &c., on the plt.'s part (*Alderson v. Waistell*, 1 C. & K. 358). If a man be attacked he has a right to defend himself by striking blows in return, but not to revenge by subsequently striking an unnecessary blow (*Reg. v. Driscoll*, 1 C. & M. 214). Where there are several assaults, there should be a separate plea of *son assault demesne* to each count, if each assault be justified in self-defence. Declaration that deft. assaulted plt. and wrenched a stick from his hands, and with the said stick, and with his fists, gave the plt. blows. Plea as to assaulting the plt. with the stick, and with his fists, giving him blows, &c., *son assault demesne*. Held, after verdict, the plt. sufficiently justified the battery with the stick, as well as the assault (*Blunt v. Beaumont*, 2 C. M. & R. 412). So, a plea justifying in defence of possession against a forcible entry, must admit the trespass attempted to be justified (*Weaver v. Bush*, 8 T. R. 78). And a *molliter manus imposuit* is good to a common action of assault and battery, as it admits a battery in law (*C. Tem. Hardw.* 358; see *Smith v. Edge*, 6 T. R. 562; *Johnson v. Northwood*, 7 Taun. 689; S. C. 1 Moo., 420), but not to a charge of wounding (*Gregory v. Hill*, 8 T. R. 299). A necessary degree of beating, and hurting, and pulling about, may be justified under *molliter manus imposuit*, but if there were an actual resistance, and in consequence thereof, a wounding, or a greater degree of violence of the deft.'s part, than would otherwise have been justifiable, such facts should be stated (*Oakes v. Wood*, 3 M. & W. 151; *Reeve v. Taylor*, 4 N. & M. 470; *Bush v. Parker*, 1 B. N. C. 72). A plea justifying the principal trespass need not justify that which is merely matter of aggravation (*Taylor v. Cole*, cited 3 T. R. 297; 1 Saun. 28, n. 3; *Monprivatt v. Smith*, 2 Camp. 175; *Griffiths v. Dunnett*, 1 Sc. N. R. 836); for

if the plt. relies on that, he must new assign; otherwise where the additional matter alleged amounts to a substantive trespass (*Phillips v. Howgate*, 5 B. & A. 220; *Bush v. Parker*, 4 Moo. & Sc. 588; S. C. 1 Bing. N. C. 72; *Stammers v. Yearsley*, 10 Bing. 35). In justifying in defence of property it is sufficient to allege that the party was possessed, without setting forth the particulars of his title (*Johns v. Whitler*, 3 Wils. 71; *Weaver v. Bush*, 8 T. R. 78; *Gregory v. Hill*, ib. 299).

A plea which professes to justify several assaults and false imprisonments, laid in separate counts, must show distinct occasions upon which the deft. was justified in committing each particular trespass: *McCurdy v. Driscoll*, 1 C. & M. 618; where *Bayley, B.*, observed, There are six assaults, and four imprisonments laid in the declaration; the party justifying is bound to cover the whole. I see no reason which you give for assaulting him six times; you profess to justify four imprisonments, you should have shown that circumstances existed by which you had a right to imprison him, whereupon you imprisoned him once, and then that such and such circumstances occurred, whereby you had a right to imprison him a second time, and so throughout, but here you do not show any different occasions.

But, where to assault and imprisonment the plea *justified the arrest [*147] on a charge of felony, alleging resistance, wherefore deft. beat him; the justification was proved as to the arrest for felony, but the resistance was not: held, that the verdict was right, for as much of the plea as was necessary to cover the declaration was proved, and deft. need not prove what was unnecessarily alleged (*Atkinson v. Warne*, 1 C. M. & R. 827).

Declaration charged that deft., to wit, on 1st January, 1844, with force and arms "assaulted" plt., and "then," with great force, &c., seized and shook plt., and dragged him about, and struck him many blows, by means of which he was hurt and wounded, and was sick, &c., and so continued for a long time, to wit, one week, &c. Plea 2. That deft. was lawfully possessed of a close and a gate belonging to it, and plt., a little before the time, when, &c. with force and arms, and with a strong hand and against the will of deft., attempted to break open, and did then thereby unlawfully break open the gate, and in breach of the peace did thereby attempt forcibly to enter and unlawfully trespass upon the close, and would then unlawfully and forcibly, &c., have effected such attempt, if deft. had not defended his possession, whereupon deft. being in his close during the unlawful attempt, defended his possession, and resisted such attempt, and because he could not successfully resist without, in a slight degree, committing the trespasses, he did a little unavoidably, &c., commit the trespasses in the declaration, using no unnecessary force, which are the trespasses complained of. Plea 3. That deft. was lawfully possessed of a cow, being in a certain close, and plt., a little before the time when, &c., did, against the will of deft., endeavour to drive away and dispossess defendant of, and was driving away from the close, the cow, and dispossessing deft. of the same, and would then unlawfully, forcibly, and in breach of the peace, have driven away and dispossessed defendant of his said cow; wherefore deft., &c. (justifying as before *mutatis mutandis*.)

On demurrer to the replication, held, first, that the trespass on the part of the plt. being alleged by the pleas to be forcibly made, the justification was sufficient, though it was not alleged that the plt. had been requested to desist; secondly, that the pleas were not objectionable for omitting to show a good justification of the wounding; thirdly, that the third plea was not objectionable for omitting to show that the cow was on deft.'s close. Held, also, on special demurrer to the replication for duplicity, that the declaration showed only one trespass, committed on a single occasion, and therefore, that to the

above pleas the plt. could not reply both *de injuriâ* and also that defendant committed the trespasses in the declaration on other occasions than those in the pleas mentioned (*Polkinhorn v. Wright*, 8 Q. B. 97).

To a declaration of trespass *quare clausum fregit*, containing a count for an assault, the defts. pleaded, *inter alia*, *liberum tenementum* in J. W., and a justification, on that ground, of the trespass, and that because the plt. "was unlawfully in possession," the defts., as servants of J. W., and by his command, ejected her; and, in so doing, because she resisted, committed the assault. The plt. replied, that she was lawfully possessed, and was lawfully entitled to her possession as against the defts.; with a special traverse, that the plt. was unlawfully in possession or occupation. Held, on special demurrer to the replication, that the plea was substantially one of *liberum tenementum*, and therefore bad, as attempting to justify assault (*Roberts v. Taylor*, 3 Dow. & L. 1).

[*148] To trespass for assault and imprisonment the deft. pleaded, *secondly, to the assault, that he was possessed of a dwelling-house; that the plt. was making a noise and disturbance there; and that the deft. *mollitur manus imposuit* to turn him out; fourthly, to the assault and imprisonment, that the deft. was possessed of a tavern or ale-house, and that the plt. conducted himself in a rude and quarrelsome manner in it, and assaulted the deft. and others, and afterwards, and before, &c. remained standing in the street near the door of the house, using loud, menacing and disgusting language to the deft. and his family, who was within hearing, and by reason thereof many persons congregated about the house and made a riot and disturbance; and at the time when, &c., the plt. was causing persons to congregate in breach of the peace, whereupon the deft., after requesting him to go, gave him in charge to a police-officer.

To the second plea, the plt. replied, that the house was a common ale-house, and that the plt. was lawfully drinking there, wherefore he refused to depart; and that the deft. of his own wrong committed the trespasses. Held, on demurrer to this replication, that it was insufficient, as it must be taken to admit that the plt. was making a noise and disturbance, and was, in that case, no answer to the plea. Held also, on demurrer to the fourth plea, that it was good, as sufficiently showing matter amounting to a breach of the peace by the plt. (*Webster v. Watts*, 17 L. J. 73, Q. B.; 12 Jur. 243).

When the plea varies from the time laid in the declaration, it should conclude with a *quæ est eadem* (Com. Dig. Plead. E. 31; 2 Saun. 5 e, n. (p.); 1 Saun. 297); and this is sufficient, without a formal traverse. Indeed, if a traverse of any other time be added, it will be bad on special demurrer (*Hembro v. Bailey*, 1 C. & M. 204; *Cardwarden v. Watkins*, 7 Dowl. 484; S. C. 5 M. & W. 333).

Formerly it was not advisable to plead *son assault demesne*, or, any other plea of justification, specially, in actions for a trifling assault, if there was not satisfactory evidence to sustain it, for, the battery being admitted, plt. must get full costs, though he obtains less than 40s. (*Smith v. Edge*, 6 T. R. 562); but this is now otherwise (see *post*, section "Costs").

Replication, &c.] See *post*, "TRESPASS." Where the plea is untrue, and consists merely of matter in excuse, as *son assault demesne*, &c., the plea should reply *de injuriâ*, which puts in issue all the material allegations in the plea (see *Crogate's case*, 8 Co. 67 a; Com. Dig. Plead. F. 18; 3 M. 29; *Selby v. Bardons*, 3 B. & Ad. 2; *Piggott v. Kemp*, 1 C. & M. 197; S. C. 3 Tyr. 128; see also *Isaac v. Farrar*, 1 M. & W. 65; 4 S. C. Dowl. 750; *Griffin v. Yates*, 2 Sc. 845; S. C. 4 Dowl. 647; 2 B. N. C. 579; *Crisp v. Griffiths*, 2 C. M. & R. 159; S. C. 3 Dowl. 752; *Humphreys v. O'Connell*,

9 Dowl. 213; see *post*, "REPLICATION"). This replication suffices where title is alleged as matter of inducement (*Ib.* 2 Saun. 295, n. 1). But where the plea sets up as a substantial part of the defence a prior *interest* in land, &c., a title to chattels, matter of record, or authority from the plt., there the replication *de injuriâ* is bad (*Ib.*; Solly v. Neish, 2 C. M. & R. 355; S. C. 4 Dowl. 248; Purchill v. Salter, 1 Q. B. Rep. 197; 1 G. & D. 682; S. C. 5 Jur. 502). *Seem*, it must be specially demurred to (*Riley v. Parker*, 3 M. & W. 230; S. C. 6 Dowl. 375). The plt. however may, instead of replying *de injuriâ*, traverse the material allegations of the plea (*Sarten v. Robinson*, 2 D. N. S. 40).

*Where the plea is in substance true (see *Reece v. Taylor*, 4 N. & M. 470; *Phillips v. Howgate*, 5 B. & A. 220; *Timothy v.* [*149] *Simpson*, 1 C. M. & R. 757), and the plt.'s complaint is for *excess*, he should not reply *de injuriâ*, but should new assign (*Penn v. Ward*, 2 C. M. & R. 338; 4 Dowl. 215; 5 Tyr. 975; *Lambert v. Hodgson*, 8 Moo. 326; 1 Bing. 317; S. C. *Dale v. Wood*, 7 Moo. 33; *Oakes v. Wood*, 2 M. & W. 791; S. C. 3 M. & W. 150; *Weaver v. Bush*, 8 T. R. 78; see *Bone v. Daw*, 3 Ad. & E. 711; see *post*, "EVIDENCE FOR DEFENDANT," p. 155). He cannot do both (*Franks v. Morris*, 10 East, 81, n.; *Thomas v. Marsh*, 5 C. & P. 596; *Gisborne v. Wyatt*, 1 Gale, 35; 3 Dowl. 505; *Saund.* 300, b, d, n. 6; 1 Saund. 24, n. *Polkinghorn v. Wright*, 15 L. J. 70, Q. B.; *Worth v. Terrington*, 13 M. & W. 781; *Loweth v. Smith*, 12 M. & W. 582; and see *Page v. Hatchitt*, 15 L. J. 58, Q. B.) So where the plt. has a justification for doing that which the plea ascribes to him, and which is alleged as the excuse, he must reply specially (*Carth.* 281; *Sage v. Rochford* (*Earl*), 2 Bla. R. 1196; *Thomas v. Marsh*, 5 C. & P. 596). So where the action is brought, not for the assault, which the deft. has justified, but for another, the plt. should new assign (see *post*, "NEW ASSIGNMENT"); but he cannot do this where the declaration charges only a single act (*Taylor v. Smith*, 7 Taun. 156; *Cheasley v. Barnes*, 10 East, 73; *Stammers v. Yearsley*, 10 Bing. 35).

It was formerly necessary where the plea alleged matter which could not be properly included in the general traverse of *de injuriâ*, as a justification under process of a court of record, and the plt. did not wish to deny the process, to begin with a *protestando* of the writ, so that he might not be concluded by the admission in another action (see *ante*, "ADMISSION"); but since the rules of H. T. 4 Will. IV. which prohibit protestations, it is usual to admit expressly the writ, and reply *de injuriâ absque residuo causæ* to the rest of the plea.

Precedents.

Declaration for assault and battery, and injury to plt.'s clothes, stating the facts fully.

[Commencement as usual: "see TRESPASS."] For that the deft. on, &c. [and if the deft. assaulted plt. on more times than one, then say, and on divers days and times, between that day and the day of the commencement of this suit], with force and arms, &c., assaulted the plt., and then seized and laid hold of him, and with great force and violence pulled, shook, and dragged him about, and gave and struck the plt. a great many violent blows and strokes on divers parts of his body; and also, then with great force and violence, knocked, cast, and threw him down to and upon the ground, and then violently kicked him, and gave and struck him a great many other blows and strokes, and also, then with great force and violence, rent, tore, and damaged the clothes and wearing apparel, to wit, one coat, &c. [state the apparel injured], of the plt., of great value, to wit, of the value of £30, which the plt. then wore. By means of which said several premises, the plt. was greatly hurt, bruised, and wounded, and became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, for the space of six weeks, then next following [or if plt. is still labouring under the injury, say, to wit, from thence,

hitherto), whereby he was, during all that time, and still is, hindered and prevented from doing, following, and transacting his lawful affairs and business, and hath been obliged to lay out and expend a large sum of money, to wit, the sum of £100 [*state a sufficient sum*], in and about the curing and healing himself of his aforesaid wounds, sickness, and indisposition.

Second count for a common assault.

For that the deft., on the day and year aforesaid, with force and arms, made an assault upon the plt., and then beat, bruised, wounded, and ill-treated him.

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*Third count, for injury to plt.'s clothes.

For that the deft., on, &c., with force and arms, tore, damaged, spoiled, and destroyed divers goods and chattels of the said plt., to wit, one coat, &c., of a large value, to wit, of, &c.

By husband alone for battery of a wife.

For that the deft., on, &c., with force and arms, &c., made an assault on E. F., then and still being the wife of the plt., and then violently beat, kicked, bruised, and ill-treated her, insomuch that she, the said E. F., by means of the premises, then became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, hitherto, whereby the plt., during all that time, not only lost and was deprived of the comfort, benefit, and assistance of his said wife, in his domestic affairs, which he might and otherwise would have had, but thereby also, the plt. was then forced and obliged to pay, lay out, and expend, and hath necessarily paid, laid out, and expended divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—, in and about the endeavouring to heal and cure his said wife, of the sickness, soreness, lameness, and disorder aforesaid, occasioned as aforesaid; and other wrongs, &c., to the damage of the plt. of £—; and therefore he brings his suit, &c.

By a master or father for the battery of his servant or son.

For that the deft., on, &c., with force of arms, &c., made an assault on E. F., then and still being the son and servant [*or servant only*] of the plt., and then, beat, bruised, wounded, and ill-treated the said E. F., insomuch that, by means thereof, the said E. F. then became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all which time the plt. lost and was deprived of the service of his said son and servant [*or servant only*], and of all the benefit and advantage which might and would otherwise have arisen and accrued to him from such service.

Plea of *son assault demesne*.

General issue: post, "TRESPASS." And, for a further plea in this behalf [*if only part of the trespasses stated in declaration are justified, say*, as to the said assaulting, beating, &c., in the said declaration mentioned], the deft. says, that the plt. just before the said time when, &c., to wit, on the day and year aforesaid, with force and arms, made an assault upon the deft., and would then have beaten and ill-treated the deft., if he had not immediately defended himself against the plt. Wherefore the deft. did then defend himself against the plt., as he lawfully might, for the cause aforesaid; and, in so doing, did necessarily and unavoidably a little beat, wound, and ill-treat the plt., doing no unnecessary damage to the plt. on the occasion aforesaid. And so the deft. saith, that, if any hurt or damage then happened to the plt., the same was occasioned by the said assault so made by the plt. on him, the deft., and in the necessary defence of himself against the plt.; which are the supposed trespasses in the introductory part of this plea mentioned, and whereof the plt. hath above complained. And this the deft. is ready to verify.

Son assault in defence of a relative, &c.

Says, that the plt., just before the said time, when, &c., to wit, on the same day and year aforesaid, with force and arms, &c., made an assault upon E. F., then and there and still being the father of the deft., and would then have beaten and ill-treated the said E. F., if the deft. had not immediately defended the said E. F.; wherefore the deft. did then defend the said E. F. against the plt., as he lawfully might, for the cause aforesaid; and, in so doing, did necessarily and unavoidably commit the said supposed trespass in the said declaration mentioned, doing no unnecessary damage to the plt. on the occasion aforesaid. And so the deft. says, that if any hurt or damage then and there happened to the plt., the same was occasioned by the said assault so made by the plt. upon the said E. F., and in the necessary defence of him, the said E. F., against the plt.; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the plt. hath above thereof complained against him, the said deft. And this, &c. (*Conclude with a verification, as supra.*)

*Plea that A. B. was possessed of a shop; and *moliter manus* by the deft., as servant to A. B., to turn him out.

Says that one A. B., long before, and at the said time, when, &c., was, and still is, lawfully possessed of, a certain shop, with the appurtenances, situate, lying, and being, in the parish of, &c., in the county of, &c.; and, being so possessed thereof, the plt., at the said time, when, &c., with force and arms, &c., entered and came into the said shop of the said A. B., and there made a great noise, disturbance, and affray, in the said shop, and then and there greatly disturbed and disquieted the said A. B. in the peaceable and quiet possession, use, and occupation, of his said shop; and, thereupon, the deft., as the servant of the said A. B., and by his command, then, in the said shop, civilly requested the plt. to go and depart out of the said shop, and to cease her said noise and disturbance; which the plt. then and there refused to do, and still stayed and continued in the said shop, making and continuing such her said noise and disturbance therein, without the leave and license, and against the will, of the said A. B. Whereupon the deft., as the servant of the said A. B., and by his command, at the said time, when, &c., gently laid his hands upon the plt., in order to pull, push, put, and remove, the plt. from and out of the said shop; and was at the said time, when, &c., gently pulling, &c., the plt. from and out of the said shop, whereupon the said plt., being angry and in great wrath, then and there, with force and arms, &c., in the said shop, made an assault on the deft., and would then have beat, bruised, wounded, and ill-treated him, the deft., if he, the deft., had not immediately defended himself against the said plt.; whereupon the said deft. did then immediately defend himself against the said plt., as he lawfully might for the cause aforesaid: and so the deft. says, that if any mischief or damage happened to the plt., the same so happened unto her from the said assault by her made on the deft., and in the defence of him, the deft., in manner aforesaid, which are, &c., whereof, &c., and this, &c.

See a form of plea of expulsion from a police officer (*Collier v. Hicks*, 2 B. & Ad. 663); a public house (*Howell v. Jackson*, 6 C. & P. 723); a select vestry (*Dobson v. Fessey*, 7 Bing. 305); a church, for indecent behaviour (*Worth v. Terrington*, 13 M. & W. 781; *Hartley v. Cook*, 9 Bing. 728); a house, and when a tenant holds over (*Newland v. Harland*, 1 M. & Gr. 644; *Harvey v. Bridges*, 14 M. & W. 437; *Wright v. Burroughs*, 16 Law J. 16, C. P.); of deft.'s servant from his house, which he refused to leave (*Donaldson v. Williams*, 1 C. & M. 345); from a railway, for trespassing thereon (*Manning v. South Eastern Railway Company*, 12 M. & W. 237); to prevent forcible entry into a house (*Weaver v. Bush*, 8 T. R. 78); into a close (*Kingsbury v. Collins*, 4 Bing. 202); plea justifying an assault in defence of deft.'s sheep, which plt. attempted to take (*Alderson v. Waistell*, 1 C. & K. 358); *Polkington v. Wright*, 15 Law J. 70, Q. B.); in defence of possession of a steam-vessel (*Dean v. Hogg*, 6 C. & P. 64).

Replication *de Injuriâ*.

And as to the plea by the deft., above pleaded, the said plt. says, that the deft., at the same time, when, &c., of his own wrong, and *without the cause* in his said last-mentioned plea alleged, committed the said several trespasses in the introductory part of that plea mentioned, in manner and form as the plt. hath above complained. And this he prays may be inquired of by the country.

(This is applicable to each of the above special pleas. See 1 C. & M. 197.)

New assignment.

And, as to the plea of the deft. by him above pleaded, the said plt. says, that he brought his said action, not for the trespasses in the said second plea acknowledged to have been done, but for that the deft., heretofore, to wit, on the _____ day of _____, in the year of our Lord _____, with force and arms, upon another and different occasion, and for another and different purpose than in the said second plea mentioned, made another and different assault upon the plt. than the assault in the said second plea mentioned, and then beat, wounded, and ill-treated him in manner and form as the plt. hath above thereof complained, which said trespasses, above newly assigned, are other and different trespasses than the trespass in the said second plea acknowledged to have been done; and this the plt. is ready to verify. Wherefore, inasmuch as the said deft. hath not answered the said trespasses above newly assigned, the plt. prays judgment, and his damages by him sustained by reason of the committing thereof, to be adjudged to him, &c.

*Evidence for Plaintiff.

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Right to begin.] By a recent resolution of the judges the plt. has a right to begin in all actions for personal injuries, also in slander and libel, though

the general issue be not pleaded and the affirmative be on the deft. (Carter v. Jones, 6 C. & P. 64; Atkinson v. Warne, *ib.* 687).

Under the general issue the plt. must prove an assault or battery, (see *ante*, p. 145). Holding up a weapon at a man within reach is an assault (Garner v. Sparkes, 1 Salk. 79). So, riding after a person, and obliging him to run away to avoid being beaten (Martin v. Stroppee, 3 C. & P. 373); so, cutting the hair of a pauper against his will (Forde v. Skinner, 4 C. & P. 239); so, throwing a lighted squib at A., who, in self-defence, throws it from him, and it accidentally falls on B., is an assault on B. by the first thrower (Scott v. Shepherd, 2 W. Bl. 392); as to evidence of an assault, see *ante*, p. 140; as to evidence of a battery, wounding, &c., p. 140.

Extent of proof.] The plt. should prove as many distinct assaults as there are counts, and all the allegations contained therein, by going into the circumstances of his case at length, as to the manner in which the assault and battery were committed, the deft.'s conduct and expressions, the degree of violence used, and the extent of the injury. Any admission made by deft. of the assault should be proved (*ante*, "ADMISSIONS"). In an action of assault on plt.'s wife evidence of what she said immediately on receiving the hurt is admissible for him (Thompson v. Trevanion, Skin. 402). He cannot give in evidence a conviction on an indictment for the assault and battery (Jones v. White, 1 Str. 68). If, on an indictment for an assault, the deft. plead guilty, the record is said to be evidence against him in an action for damages for the same assault (1 Ph. Ev. 320); but Lord Tenterden, C. J., held the contrary at N. P. (2 Ph. Ev. 203). He is not, however, bound to prove the whole of the facts stated; deft. may be found guilty of an assault only, though an assault and battery be stated (4 Moo. 405; B. N. P. 94; Bro. Abr. Trespass, pl. 40).

In cases of variance between the allegations and the proof, the judge who tries the cause has power to amend (3 & 4 Will. IV. c. 42, s. 23), and this power is liberally exercised (see *ante*, INTRODUCTION). But he cannot add to, or, supply an omission in the declaration (John v. Currie, 6 C. & P. 618). Where the declaration stated that deft. struck plt.'s cow divers blows whereof she died, and it appeared that plt. to shorten her miseries put her to death, this was holden no variance (Hancock v. Southall, 4 D. & R. 202). Evidence to fix deft. with having sanctioned the act of postilions (see M'Laughlin v. Prior, 4 M. & Gr. 48).

Proof of time.] The day, or, place stated in the declaration is immaterial B. N. P. 86; Brownl. 233; Webb v. Turner, Str. 1095). But where the *issue is on *son assault* only, the deft. may prove any assault by [*153] the plt. before the date of the writ, and the plt. cannot resort to another time (Randle v. Webb, 1 Esp. 37); where the declaration charges assaults *diversis diebus*, and no new assignment, plt. cannot give in evidence more than one transaction (Burgess v. Frelove, 2 B. & P. 425; see Stante v. Pricket, 1 Campb. 473); *aliter* in trespass *quere clausum fregit*, &c. (*ante*, "TRESPASS"). But where the declaration stated that the deft., on divers days and times, between two specified days, assaulted the plt., he may prove any number of assaults within that period, or he may prove a single trespass at any time before action brought (B. N. P. 86; 1 Saund. 24, n.); and, after proving several assaults within the period mentioned, he might, perhaps, be permitted to prove others committed before that time, to show deft.'s malice (2 Ph. Ev. 194). If trespasses incapable of continuance be so charged, plt. may be confined at the trial to a single act (B. N. P. 86).

Several Assaults.] Where there are two counts, and deft. suffers judgment by default on one (*Compare v. Hicks*, 7 T. R. 727), or pleads a justification which is admitted by the replication (*Atkinson v. Matteson*, 1 T. R. 172; 1 Selw. N. P. Assault, &c.), and not guilty to the other, and plt. proves but one assault, the deft. is entitled to the verdict (*Ib.*): where there were several counts, and deft. pleaded that the assaults therein mentioned were one and the same, and plt. instead of demurring joined issue; it was held that he could not give evidence of more than one assault (*Gale v. Dalrymple*, R. & M. 118).

Several Defendants.] In an action against several, plt. must confine himself to the trespass in which all were implicated. He cannot recover for what was done by one, or, more, before, or, after the joint act (*Aaron v. Alexander*, 3 Campb. 36). But where one has suffered judgment by default, he need only give evidence to affect the rest, and it is for the jury to say whether the trespass proved is the same as that confessed (*Harris v. Butterly*, Cowp. 483). The plt. must confine himself to the case upon which he has proceeded. If where there is one count he has given evidence of an assault, he cannot waive that and go on to prove another (*Stante v. Prickett*, 1 Campb. 472); and if the action be brought against several for a joint trespass, committed at a particular time, he must confine himself to that time; and if all the defts. were not then concerned in the trespass committed at that time, the plt. cannot have recourse to a trespass committed at any other time, when some *only* of the defts. were concerned who were not engaged in the first transaction, for some of the defts. might thereby be subjected to damages for a trespass in which they had no concern (*Sedley v. Sutherland*, 3 Esp. 202); and so in an action against several, after proving a joint trespass, he cannot abandon that and go on with another case against some of the defts. though there were two counts in the declaration (*Tait v. Harris*, 6 C. & P. 73; 1 M. & Rob. 282; see *Wynne v. Anderson*, 3 C. & P. 596); but this is doubted by *Patteson, J.*, in *Hitchin v. Teale*, 2 M. & Rob. 30; on the other hand, where he has elected to proceed in a case against one he cannot go on as against him on a trespass affecting them all (*Hitchen v. Peale*, 2 M. & Rob. 30). But where plt. attempted to prove a joint trespass on a given day, and failing in that, proceeded to implicate all in another trespass on the following day; held, that he was at liberty to do so (*Roper v. Harper*, 5 Sc. 250; S. C. 4 Bing. N. C. 20). *Where plt. proves distinct and unconnected trespasses by different defts. he will be made to elect on which he will proceed be. [*154] for the deft. opens his case (*Howard v. Newton*, 2 M. & Rob. 509).

It is discretionary in the judge at what stage of the cause to direct a verdict for such of the defts. as are not implicated, and this discretion is regulated not merely by the fact that the plt.'s evidence has not affected them, but by the probability whether such evidence will arise before the case closes (*Sowell v. Champion*, 2 N. & P. 627; S. C. 6 Ad. & E. 407). And one against whom some *prima facie* case has been made has no right to have his case put separately to the jury, in order that he might be acquitted and become a witness for the rest (*Leach v. Wilkinson*, 1 M. & Rob. 537).

Under Special Plea.] Where deft. pleads specially, the plt. should be prepared with evidence to rebut the facts stated in deft.'s pleas: and he may give it in anticipation or not, but if not, he will be restricted in reply to such evidence as exactly answers the case set up by the deft. (*Pierpont v. Shap-*

land, 1 C. & P. 447). If plt. has replied specially, he must be prepared to prove the facts stated in the order of the replication. As an assignment admits the justification mentioned in the deft.'s plea, that assault is out of the question, and the plt. must go into evidence of the one set out in the new assignment, and produce his evidence as he would in support of a declaration.

Damages.] See *post*, "DAMAGES." Under the "*alia enormia*," the plt. may give in evidence, over and above what is alleged in the declaration, any circumstances of aggravation in the deft.'s conduct, accompanying the trespasses alleged, or matters which cannot with decency be stated (B. N. P. 89; *Huxley v. Berg*, 1 Stark. 98; *Bracegirdle v. Oxford*, 2 M. & S. 77). But not any distinct act which may itself be the subject of an action (see *Lowden v. Goodrick*, Peake, 46; B. N. P. 89; *Sippord v. Basset*, 1 Sid. 225; 2 Salk. 643). Therefore in trespass for false imprisonment the plt. cannot shew that he was stinted in his food or that he caught the gaol fever (*Lowden v. Goodrich*, Pea. Ca. 46; *Pittel v. Addington*, ib. 62), but he may prove intemperate language of the deft. (*Merest v. Harvey*, 5 Taunt.)

Special Damage.] Nor can the plt. give in evidence any consequential inquiry not being the natural, and as it were the necessary result of the trespass unless it be alleged in the declaration as special damage (see *Pettit v. Ardington*, Peake, 62; *Westwood v. Corne*, 1 Stark. 172). Nor even then if it be not the proximate, but remote consequence of the act (see *Boyce v. Bailiff*, 1 Camp. 57; *Langridge v. Levy*, 2 M. & W. 519; 4 M. & W. 337; *Winterbottom v. Wright*, 10 M. & W. 109). In an action by husband and wife, the jury cannot give damages for loss of service. Nor in an action by the husband alone for the wife's suffering. Nor damages for costs incurred in setting aside a warrant of attorney and subsequent process, under which the trespasses were committed (*Holloway v. Turner*, 6 Q. B. 928).

Evidence may be given of the circumstances which accompany and give a character to the trespass in order to enhance the damages (*Bracegirdle v. Oxford*, 2 M. & Sel. 79). Time and place, when and where the assault was committed, may frequently enhance the damages. *Thus it [*155] it is a greater insult to be beaten upon the Royal Exchange than in a private room (*Tulledge v. Wade*, 3 Wils. 19; see "TRESPASS, QUARE CLAUSUM FREGIT"). Heath, J., observed (in *Merest v. Harvey*, 3 Taunt. 442), "It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages." The putting on the record a special plea imputing felony, which is abandoned at the trial, may be urged in aggravation (*Warwick v. Foulkes*, 12 M. & W. 507). As to the proof of admissions by co-trespassers, *vide ante*, p. 75. Where there has been a *maihem* or wounding, the court may, upon view, increase the damages (*Cooke v. Beal*, Raym. 176; S. C. 3 Sal. 115). But, upon a motion to increase the damages *super visum vulneris*, it should be proved to be the same wound for which the damages were given, but the court will not allow fresh evidence to be adduced (B. N. P. 21). On a view of the party and examination of the surgeon *ore tenus* in court, the damages were increased from 11*l.* 14*s.* to 50*l.* (*Burton v. Baynes*, Barn. 153). But, where the judge who tries the cause is satisfied with the verdict, the court will not increase the damages (*Brown v. Seymour*, 1 Wils. 5). The damages may be assessed, not for the mere corporal injury, which in many cases may be very trifling; and the jury are not obliged to confine themselves to the mere pecuniary

loss, but may award exemplary damages in proportion to the malicious or insulting conduct of the deft. (see *Howard v. Crowther*, 8 M. & W. 601); and not only for the injury already sustained, but for all which the plt. is likely to sustain, since he cannot bring a second action (*Fetter v. Beal*, 1 Raym. 332, 692; 1 Salk. 41).

Where several Defendants.] In an action against two, or more, the jury cannot sever the damages, but must award one gross sum, although some be less culpable than others (*Hill v. Goodchild*, 5 Burr. 2790; *Brown v. Allen*, 4 Esp. 158; *Elliott v. Allen*, 1 C. B. 18). Such as they think the most culpable ought to pay (*Lowfield v. Bancroft*, Str. 910). The test of damage is the injury sustained, and not the act or motives, or the *most* or the *least* guilty of the defts. (*Clarke v. Newsom*, 1 Ex. 131). If damages are assessed against defts. separately, the judgment will be erroneous, but plt. will be allowed to set it aside and take judgment *de melioribus damnis* (*Mitchell v. Milbank*, 6 T. R. 199); or he may enter a *remittitur* for the excess (*Sabin v. Long*, 1 Wils. 30). Where, to a count for expulsion, A. pleaded not guilty, and B. and C. paid 20s. into court, and the plt. replied damages *ultra*, the jury were directed to find for plt. with nominal damages against A., if they thought 20s. sufficient, and in that case to find in favour of B. and C. (*Walker v. Walcott*, 8 C. & P. 352). One deft. against whom some *prima facie* case has been made out, has no right to have his case put separately to the jury, in order to his being acquitted and becoming a witness for the rest (*Leach v. Wilkinson*, 1 M. & R. 537). But plt. may be called upon to elect against which of the defts. he will go at the close of his case (*Davis v. Moseley*, 1 C. & C. 710; *Howard v. Newton*, 2 M. & Rob. 509); but this is discretionary with the judge (*White v. Hill*, 2 D. & L. 537; *Sewell v. Campion*, 6 Ad. & E. 407).

The deft. may give in evidence in mitigation of damages, any matter which is not inconsistent with his admissions on record, and which does itself amount to an answer to the action. But not that which, if pleaded, would have afforded a defence (*Speck v. Philips*, 7 Dowl. 470).

**Evidence for Defendant.*

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General Issue.] Under this plea deft. may give in evidence any matter denying the facts stated in the pleadings, showing that he was not the trespasser, and that no assault was committed. Matters of excuse, or in justification, cannot, as we have seen, be given in evidence under the general issue, but must be specially pleaded, unless in some actions against justices of the peace and other public officers (see "JUSTICES OF PEACE," "OFFICER," &c.). He may also give in evidence matters in mitigation of damages, which could not have been pleaded (3 Stark. Ev. 1460; Vin. Abr. Ev. I, b. pl. 16; 2 B. & P. 225, n.), as that the plt. gave provocation (see *Thomas v. Powell*, 7 C. & P. 807); but not that which, if pleaded, would have been a defence to the action (*Watson v. Christie*, 2 B. & P. 224; *Day v. Porter*, 2 M. & R. 151). So in trespass for false imprisonment against a private person, evidence of reasonable suspicion of the plt.'s having been guilty of the felony is admissible, on not guilty, in reduction of damages (*Chinn v. Morris*, R. & M. 424). So he may give evidence of expressions used by the plt. at the time, tending to create mutiny and disobedience, for every thing which passed at the time is part of the transaction on which the plt.'s action is founded, and he cannot therefore be surprised at the evidence (*Bingham v. Garnault*, 1 Esp. Dig. N. P. 337; B. N. P. 17). Where, in an action for assault and battery, and not guilty pleaded, evidence was offered that the

battery was given by way of punishment for misbehaviour on board the ship of which the deft. was captain, and it was insisted that the conduct of the deft., at the time of the assault, being necessarily in evidence, proved that misbehaviour, Lord Eldon, C. J., was of opinion, that, as there was no justification pleaded, the jury should give damages to the amount of the injury suffered, without lessening them on account of the circumstances under which it was inflicted; and the Court of Common Pleas were of opinion that this direction was right (*Watson v. Christie*, 2 B. & P. 224). A declaration in trespass charged that the defts. assaulted the plt., and took him into custody, and led him through and along divers public streets to a police office, and there detained him in custody. The deft. pleaded to a special plea, justifying the whole of the trespasses. The plt. new assigned, and to the new assignment the defts. pleaded not guilty. Held, upon these pleadings, that the question was, whether deft. had committed any other assault and imprisonment than that justified in the plea; and that even if the plt., after he had once been taken, had escaped from the custody of the defts., and been retaken and led to the police station, the whole being substantially one transaction, and the plt. having been taken to the police office once only, a nonsuit was right (*Newton v. The London, Brighton, and South Coast Railway Company*, 11 L. T. 85, Q. B.). In trespass for false imprisonment, under a charge of false pretences the deft. cannot cross-examine the plt.'s witnesses as to the character of the plt. or previous charges against him (*Bruning v. Butcher*, 2 M. & Rob. 374).

Plaintiff's first Assault.] If to this plea the plt. replies *de injuriâ* he puts the whole plea in issue, and the deft. will be bound to show that plt. committed the first assault, and that it was such as to justify the deft.'s self-defence (*Cockcroft v. Smith*, Salk. 642; see *Reece v. Taylor*, 4 N. & M. 470; 1 H. & W. 15; *Dale v. Wood*, 7 Moo. 33; *Moriarty v. Brooks*, 6 C. & P. 684; *Oakes v. Wood*, 3 *M. & W. 150; *Timothy v. Simpson*, 1 [*157] C. M. & R. 757). If deft. prove that the plt. lifted up his stick and offered to strike him, it is a sufficient assault to justify his striking the plt., and he need not wait to be actually struck (B. N. P. 18). It is not every assault that will justify every battery, and it is matter of evidence whether the assault was proportionable to the battery. Therefore if A. strike B., B. is not justified in drawing his sword, and cutting off A.'s hand (*Cook v. Beal*, 1 Ld. Raym. 177). But the plt. cannot upon the replication *de injuriâ* show that the deft.'s assault was excessive, or that his own previous assault was justifiable (*Penn v. Ward*, 2 C. M. & R. 338; *Dale v. Wood*, 7 Moo. 33; *R. v. Tebbart*, Skin. 387; see *Franks v. Morris*, 10 East, 81, n.; *Oakes v. Wood*, 3 M. & W. 150). Thus, where the plt. complained that the deft. beat, bruised, and wounded him, and the deft. pleaded *son assault demesne*, and plt. replied *de injuriâ*, and it appeared in evidence that the plt. meeting the deft., shook his stick at him, whereupon the deft. committed a violent assault upon the plt., and beat him, and on a verdict for deft. the court held, that if the deft. had assaulted the plt. more violently than was necessary for self-defence, the plt. should have replied it specially (*Dale v. Wood*, *supra*; *Oakes v. Wood*, *supra*). When plt. complained of an assault, and beating with a stick, and deft. pleaded *son assault demesne*. It was held that deft. was entitled to a verdict generally on proof of his plea, and that plt. was not entitled to damages merely because the plea did not expressly justify the beating, this being ground of special demurrer to the plea (*Blunt v. Beaumont*, 2 C. M. & R. 412). If *son assault demesne* be pleaded without the general issue, and the declaration confines the plt. to the proof of one assault only (*ante*, p. 156), the deft. may prove the plt.'s assault on

him to have taken place at any day before the action brought, and is not confined to that laid in the declaration; but this is not the case where the declaration comprises more than one assault, or when the general issue is pleaded with the justification of *son assault*, for then the deft. is bound to justify the assault proved (*Downes v. Skrymsher*, 1 Brownl. 233).

As to when the plt. should new assign see "NEW ASSIGNMENT." But it is not necessary to new assign where the plt. alleges and proves an assault and battery, and the plea alleges matter to justify both; the deft. must prove as much of his plea as will justify both (*Lamb v. Burnett*, 1 C. & J. 294). So, where plt. declared for imprisonment, and blows by the deft., who pleaded a justification of the imprisonment under process, and because the plt. conducted himself with violence when in custody, therefore, the deft. on *de injuriâ* must prove the plt.'s violence in order to justify his blows, and no new assignment was necessary (*Phillips v. Howgate*, 5 B. & A. 220). So, where the plt. alleges, and proves an assault, a turning out of the plt.'s house, and imprisonment, and the deft. pleaded not guilty, and justified the assault and removal by a *moliter manus imposuit*, and that because the plt. assaulted him, the deft. gave him in charge to a constable; held, that on proof of the imprisonment, the deft. must prove the assault by the plt. (*Reece v. Taylor*, 4 N. & M. 469). If there really were two assaults, one only of which the deft. can justify, and he pleads *son assault demesne*, the plt. should new assign, but if the declaration contain two counts, then there is no occasion for a new assignment, for as the deft. can only prove one justification, the plt. on proving two assaults must have a verdict (B. N. P. 17). Where there are two counts, and the deft. pleads not guilty and a justification, *and his justification alleges that the trespasses in [*158] both counts are one and the same, and the plt. replies *de injuriâ*, he will be allowed to prove one trespass only (*Gale v. Dalrymple*, R. & M. 118; *Gibson v. Hawkey*, R. & M. 121, n.). Where there are two counts, a new assignment may preclude the plt. from giving evidence of a trespass under each event (see *Atkinson v. Matteson*, 2 T. R. 172). * Where the plt. can justify his first assault, he must reply it specially, for it is not in issue under *de injuriâ* (*King v. Phippard*, Carth. 281; B. N. P. 18). Therefore he cannot, under this replication, show that the first assault was lawfully committed by him in enforcing a public right of way which def. prevented him from using (*Bird v. Jones*, 7 Q. B. 742; see *Griffin v. Parsons*, 2 Selw. N. P. 27, n.; *sed quære*).

Moderate Correction.] Under this plea deft. must prove that plt. was such servant, or apprentice. If there be any written contract of hiring between plt. and deft. the same should be produced, and proved in the usual way. If the justification be against an apprentice, the indenture of apprenticeship should be produced and proved. Evidence of the plt.'s faults must be adduced, which must be sufficient to warrant the assault in question (see *Newman v. Bennet*, 2 Ch. R. 195). In an action at the suit of a seaman for an assault, which deft. justified on account of disobedience, &c., if plt. was found guilty of it by a court martial, the sentence should be fully proved as well as pleaded, as an estoppel against plt.'s disputing the fact of disobedience, &c. (*Hannaford v. Hunn*, 2 C. & P. 148. The quality of the punishment, whether excessive or not, is not in issue under the replication of *de injuriâ* to this plea, the misconduct alone being in issue (*Penn v. Ward*, 2 C. M. & R. 338; 4 Dowl. 215; *Gale v. Dalrymple*, 1 C. & P. 381.) When plt. declared for assaulting and beating with fists and a rope, putting him in irons, &c.; justification as master of a ship, flogging and imprisoning

the plt. for mutiny and disobedience, *de injuriâ*; held, that plt. could not prove disproportionate punishment (*Lamb v. Burnett*, 1 C. & J. 294.)

Defence of Relative, Servant, &c.] The facts of relationship, or service, must be proved (see *post*, title, "SEDUCTION"). Also, that deft's interference was necessary for deft.

To preserve the Peace.] The facts stated in the plea must be fully proved, especially that the queen's peace was then being broken, or, about to be so.

Defence of Possession.] The deft. must prove that he was possessed of the premises in question, as by carrying on business, or living in the house (*Cro. Car.* 183). Where the plea alleged that deft was possessed of a *dwell-ing-house*, and it appeared that he was only a lodger therein, the variance was holden fatal (*Monks v. Dykes*, 4 M. & W. 567; 3 Jur. 125; see *Fenn v. Grafton*, 2 B. N. C. 617). There is no necessity for deft. to prove the title to the premises (*Piggott v. Kemp*, 1 C. & M. 197). He must also prove so many of the other material allegations as constitute a justification in law for the trespasses confessed by the plea (see *Timothy v. Simpson*, 1 C. M. & R. 757; *Reece v. Taylor*, 4 N. & M. 470; *Atkinson v. Warne*, 1 C. M. & R. 827; *S. C.* 3 Dowl. 483; *Coken v. Huskisson*, 2 M. & W. 477; *Howell v. Jackson*, 6 C. & P. 723; *Williams v. Jones*, 2 Str. 1049; *(*Green*

[*159] *v. Goddard*, 2 Salk. 641). Where the deft. pleads possession of a house, &c., and that plt. without his license entered and disturbed him; whereupon he requested the plt. to depart, and on refusal, *molliter*, &c., to turn him out. Replication *de injuriâ*, &c. The deft. must show his possession, the plt.'s entry and disturbance, the request to depart and the refusal. If plt. enter forcibly into deft.'s house, the latter may resist force by force without any previous request to depart, but the justification should not be *molliter manus*, &c., but he should plead specially that plt. with a strong hand endeavoured forcibly to break and enter the deft.'s close, whereupon the deft. resisted and opposed such entrance, &c., and that if any damage happened to the plt. it was in defence of the possession of the close (*Com. Dig.* pl. 3, M, 16, 17). Plt. declared for an assault, battery, and a dragging through a pond; deft. pleaded, 1st., not guilty; 2d., as to the assault and battery that the plt. was unlawfully in deft.'s close, &c. Held, that the latter plea did not justify the dragging through the pond, and that plt. was entitled to a verdict for so much, under not guilty, and need not new assign (*Bush v. Parker*, 1 N. C. 72). Trespass for assault and battery, ill-treating, and wounding with a truncheon: plea, 1st, not guilty; 2d, as to assault, battery, and ill-treating, a removal, because plt. was making a noise in deft.'s house. Replication, *de injuriâ*; held, that the wounding was not covered by this plea, and that the plt. was entitled to a verdict and damages for it without a new assignment, but that on the above replication he could not show that the deft. removed him for other and different reasons and motives than those alleged in the plea (*Oakes v. Wood*, 3 M. & W. 150). A plea justifying the removal of plt. from a boat in deft.'s possession is not proved by showing that the deft. was using it under a contract with the boat-owner for the exclusive use of it on a certain occasion, on which it was navigated by the servants of the owner (*Dean v. Hogg*, 10 Bing. 345). Deft. pleaded the removal of the plt. from deft.'s house of which he was lawfully possessed, and plt. replied *de injuriâ*; held, that the plea was not proved by showing a forcible entry by deft. into the house which plt. was wrongfully holding over, and a subsequent removal of the plt. (*Newton v. Harland*, 1 M. & G. 644;

sed quære, see *Browne v. Danson*, 12 Ad. & E. 624; *Harvey v. Bridges*, 14 M. & W. 437).

Under Process or Authority of Law.] Where the process is irregular only, and not void or set aside for irregularity, it may be pleaded, and the plt. cannot defeat the plea by proof of the irregularity (*Riddle v. Pakeman*, 2 C. M. & R. 30; see "TRESPASS"). Assault and imprisonment; plea, arrest on a charge of felony, and because plt. resisted deft. beat him; held, unnecessary to prove the resistance because the rest of the plea justified the alleged trespass (*Atkinson v. Warne*, 1 C. M. & R. 827). * Plea of justification under a *ca. sa.*; replication admitting the writ, *de injuriâ absque residuo causæ*; held, that plt. may show that deft. did not in fact act under the writ at all, but not that the arrest was a trespass *ab initio* in consequence of antecedent matter, as he had not replied specially (*Price v. Peek*, 1 N. C. 380).

Certificate under 9 Geo. IV. c. 31, s. 27.] A certificate of a summary conviction or dismissal by two justices on a complaint in respect of the same assault or battery must be specially pleaded. Where the plea stated the giving of a certificate "forthwith" (in the words of the statute), and the replication traversed the obtaining *such certificate *modo et* [*160] *forma*; held, that the obtaining forthwith was put in issue, and that a certificate obtained some months after dismissal did not support the plea; held, also, that the dismissal of the complaint as "not proved" was not in itself an answer independently of the certificate (*R. v. Robinson*, 13 Ad. & E. 672). Where a party, on being summoned to appear before two justices, for an assault, appeared, and pleaded "not guilty," and the prosecutor then withdrew his complaint, and the deft. was accordingly discharged: held, that this was a hearing and dismissal, which entitled the deft. to a certificate that the charge had been dismissed as not proved, under the 9 Geo. IV. c. 31, s. 27; and that a plea, stating those facts, and, that the certificate had been granted, set forth a good defence, under the 28th section, to an action of trespass for the same assault (*Tuncliffe v. Tedd*, 17 Law J. 176, C. P.; 10 Law T. 347).

ASSIGNEES.

See "BANKRUPTS," "COVENANT."

*ASSUMPSIT.(a)

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Nature of the Action.] The action of assumpsit, which originally belonged to the class of "actions of trespass on the case," but which since the Uniformity of Process Act (2 Will. IV. c. 39) has been treated as a distinct species of action *ex contractu*, under the name of an action "on promises," lies for the breach of any contract whatsoever, whether it be one implied by law from the acts and relationship of the parties, or one expressly made between them, so that it be not by deed, or matter of record. Hence, assumpsit may be maintained for the recovery of simple contract debts, and for the breach of any duty which the deft. has been legally liable to perform in favour of the plt., the law *implying in the one case a promise to pay, and in the other a promise to perform the particular act, as well as on [*163] special agreements, bills of exchange, bankers' cheques, promissory notes, and other contracts of this description (see Com. Dig. Action Ass.). Assumpsit lies for tolls (Com. Dig. Action Ass. H, 1; *Steward v. Baker*, 1 T. R. 616; *Exeter (Mayor) v. Truelett*, 2 Wils. 95; *Reading (Mayor) v. Clarke*, 4 B. & A. 286; *Falmouth (Earl) v. Penrose*, 6 B. & C. 385); for copyhold fines and dues (*Whitfield v. Hunt*, 2 Doug. 727); for money accruing due from deft. to plt. under the provisions of a statute (1 Saund. 37; B. N. P. 129; *Rann v. Green*, Cowp. 474; see *Tilson v. Warwick Gas Company*, 4 B. & C. 962). It lies for contribution to party walls (14 Geo. III. c. 78; *Peck v. Wood*, 5 T. R. 130; *Beardmore v. Fox*, 8 T. R. 214; see

Sangster v. Birkhead, 1 B. & P. 303; see 7 & 8 Vict. c. 84); and, upon an Irish or foreign judgment, though not upon a judgment of the Courts at Westminster (Harris v. Saunders, 4 B. & C. 411; see Reynolds v. Fenton, 3 C. B. 187). It lies upon a decree of the Court of Session of Scotland (Cowan v. Braidwood, Sco. N. R. 138); so against a deft. resident in this country, for costs awarded against him after appearance by a decree of the Court of Session in Scotland, in a suit for a divorce (Russell v. Smith, 9 M. & W. 810). Where the court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay, which may be enforced in this country (Russell v. Smith, *sup. per* Parke, B.). Assumpsit will not lie by the party against whom a *fi. fa.* has issued on a subsisting judgment, to recover the sum levied under it, on the ground that such judgment was signed on a warrant of attorney, which was obtained by fraud or duress (De Medina v. Grove, 15 Law J., 287, Q. B.); it lies on by-laws (see Felt-makers' Company v. Davis, 1 B. & P. 98); for money due on an award under an order of nisi prius (Bonner v. Charlton, 5 East, 139; see "AWARD" for legacies charged on land; Evans v. Jones, 2 Salk. 415; but see Webb v. Jiggs, 4 M. & S. 113; Braithwaite v. Skinner, 5 M. & W. 313; Wms. Exors. 1514, *et seq.*; *post*, "EXECUTORS"); and to recover a balance, however voluminous the account may be, and the plt. is not obliged to resort to the action of account (Tomkins v. Willshear, 5 Taunt. 431; S. C. 1 Marsh. 115; Com. Dig. Action Ass. A, 1). A. boarded and lodged in the house of his brother B., and assisted B. in his business; A. brought assumpsit for the services, and B. set off the board and lodging: held, that neither could claim, unless the jury were satisfied that the parties came together on the terms that they were to pay and be paid; but if that were not so, no *ex post facto* charge could be made on either side (Davies v. Davies, 9 C. & P. 87).

In some cases, therefore, *assumpsit* is a concurrent remedy with *debt*, it being a maxim that wherever *indebitatus assumpsit* lies, *debt* will lie; and as the rule which prohibits an action of *debt* against an executor or administrator (Berry v. Robinson, 1 N. R. 293) is now repealed by stat. 3 & 4 Will. IV. c. 42, it may be laid down that wherever an *indebitatus* count in *debt* is maintainable, the plt. may bring *assumpsit* upon the implied promise which the law raises from the existence of an antecedent debt (Reading (Mayor) v. Clark, 4 B. & A. 268); whether payable in money or goods (Falmouth (Earl) v. Penrose, 6 B. & C. 385). But for the recovery of money payable by instalments, where the whole debt is not due, *debt* does not lie, and *assumpsit* where the security is not by deed is the only remedy (Rudder v. Price, 1 H. Bl. 550; Cooke v. Whorwood, 2 Saund. 337; Peters v. Opie, 2 Saund. 350). It is also the only remedy upon a guarantee (Hard. [*164] 486; 1 Saund. 211 a; Urien v. Walters, 5 East, 10; *2 Saund. 62 b); so it is the only remedy where a simple contract creates a collateral liability, as for the payment of a debt of a third person (Hard. 486; Purslow v. Bailey, 2 Ld. Raym. 1040; and upon a bill of exchange or promissory note, except as between payee and acceptor, or indorsee and his immediate indorser, in which cases the plt. may sue in *debt* or *assumpsit* (Hatch v. Trages, 11 Ad. & E. 702; Watson v. Kightley, *ib.*; Watkins v. Wake, 7 M. & W. 488; S. C. 9 Dowl. 402; Powell v. Ancell, 9 Dowl. 893; S. C. 3 Sc. N. R. 444; Sison v. Redman, 4 Sc. N. R. 429; 1 Dowl. N. S. 493; S. C. 6 Jur. 283; Lewin v. Edwards, 9 M. & W. 720; 1 Dowl. N. S. 639; S. C. 6 Jur. 401; see *post*, "BILLS OF EXCHANGE"). *Assumpsit* lies on an indemnity (Goddard v. Vanderheyden, 3 Wils. 262; see Tayler v. Higgins, 3 East, 169; Toussaint v. Martinnant, 2 T. R. 105; Cowell v. Edwards, 2 B. & P. 268); on a contract to serve and employ (see Hall

v. Heightman, 2 East, 145; Martyn v. Hind, Cowp. 437); to perform works (Elsee v. Gatewood, 5 T. R. 143).

There is in practice an advantage in suing in *debt*, inasmuch as the judgment, is in most cases final in the first instance; whereas a judgment, by default, or demurrer, &c., in *assumpsit*, is interlocutory only, and the plt. must execute a writ of inquiry, except in cases where a rule to compute can be obtained (see Arch. Pr. Index). Debt however, on the statute of Edw. VI., for tithes, and debt for foreign money are not final (2 Saund. 107 a, n. b).

When or not sustainable where higher Security given.] Where a party has different securities, of different descriptions, for the same debt or demand, and from the same person, the action must be on that of the higher nature, unless, indeed, such security had been taken as a collateral and additional one, or it be void (2 Leon. 110; White v. Cuyler, 6 T. R. 176; 5 Dowl. 234; Drake v. Mitchell, 3 East, 251). Assumpsit cannot be maintained where the contract is by deed or matter of record, as for rent reserved by lease, under seal (Aley, 29; Hob. 284; Com. Dig. Action Ass. A. 1, C; Acton v. Symmond, Cro. Car. 415). Thus, where the master of plt.'s ship entered into a charter-party, under seal, for delivery of goods to dest., at a stipulated price, it was held that plt. could not sue in assumpsit for the freight, but that his remedy was by covenant on the charter-party (Shack v. Anthony, 1 M. & S. 573; Moorson v. Romer, 2 M. & S. 303; Atty v. Parish, 1 N. R. 104; see Tilson v. Warwick Gas Light Company, 4 B. & C. 962; but see Edwards v. Bates, 2 D. & L. 395; recognising Atty v. Parish); and, where a surety took from his principal a bond of indemnity, and afterwards, being called on to pay his principal's debt, sued him in assumpsit, as for money paid, it was held that the action would not lie, but that he must sue on the bond (Toussaint v. Martineaux, 2 T. R. 104); and, where a tenant had underlet a part of the premises by deed, and the ground-landlord distrained on the under-tenant, it was held, that the latter could not sue his lessor as upon an implied promise to indemnify him (Schlenker v. Moxsy, 3 B. & C. 792; see English v. Blundell, 8 C. & P. 332). In such case the existence of an express contract is held to exclude an implied assumpsit. So, if a contract by deed be entered into after, and in substitution of a parol contract, the latter is merged in the former, and assumpsit can no longer be maintained (Drake v. Mitchell, 3 East, 259). *Aliter*, where the latter is given as a *collateral* security, and not in substitution (Twopenny v. Young, 3 B. & C. 208; S. C. 5 D. & R. 259; Drake v. Mitchell, *supra*); or, where it is inoperative or void, as where given by an infant for necessities (1 Ch. Pl. *118, and cases cited); or, by a person who had [*165] previously become bankrupt, the original simple contract remains (B. N. P. 182; 1 Saund. 295, n. 1). Where a warrant of attorney given to secure an annuity had been set aside for want of proper enrolment, it was held, that the grantor might maintain assumpsit to recover back the consideration money, though the annuity had been secured by a bond and covenant which had not been set aside (Scurfield v. Gowland, 6 Ea. 241; see *ante*, "ANNUITY"). So, where neither security had been set aside, but the grantor had treated them as void (Waters v. Mansell, 4 Taunt. 56; Scurfield v. Gowland, 6 East, 241); so, where a new contract by parol had been superinduced upon a contract by deed, if it be not inconsistent with the terms of the latter, assumpsit will lie (White v. Parkin, 12 Ea. 578; Heard v. Wadham, 1 East, 630; Burn v. Miller, 4 Taunt. 748). If there be an agreement by deed to let a house, by words not amounting to an actual demise, assumpsit for use and occupation lies (Elliot v. Rogers, 4 Esp. 59; see Kirkland v. Pounsett, 2 Taunt. 145; Dunk v. Hunter, 5 B. & A. 322). It

lies for the use and occupation of a water-course (*Davis v. Morgan*, 4 B. & C. 8); the taking a security by deed, on usurious terms for money previously lent, and not affected by usury, would not bar an action of assumpsit for money lent (1 Saund. 295, n. 1; see "USURY").

And assumpsit will lie where there has been a new contract, in respect of a *new consideration* to pay a debt or perform a contract under seal (*White v. Parkin*, 12 Ea. 578); as, on a promise by the debtor to pay an assignee of a bond in consideration of forbearance (1 Saund. 210, n. 1; *Martin v. Burn*, 2 Nev. & P. 297; S. C. 7 Ad. & E. 19); or, by a third person, to pay the original creditor (*Anon. Cowp. 129*; *Russell v. Huddock*, 1 Lev. 188; see *Lewis v. Davison*, 4 M. & W. 654); or, on a promise to the husband to pay the arrears of a rent-charge, due to the wife in her lifetime, though the rent was secured by deed (*Anon. 1 Leon. 293*, cited in *Moorsom v. Kymer*, 2 M. & S. 309; *Flight v. Creesden*, Cro. Car. 8); but, a promise by the deft. to pay a judgment debt in consideration that the plt. would stay execution, is *nudum pactum* (*Anon. Cowp. 129*). Where a deft. granted and assigned by indenture certain demised premises to the plt., who having been distrained for rent in arrear to the superior landlord before the assignment, brought assumpsit to recover money paid under the distress, and relied upon deft.'s express promise to re-pay it; held, that as covenant would lie on the covenant implied in the word "grant," assumpsit would not lie on any implied contract to indemnify plt., nor on the express promise, it not being founded on a new consideration (*Baber v. Harris*, 9 Ad. & E. 532; see *Gwynne v. Davy*, 1 M. & G. 857; *Harris v. Goodwin*, 9 Dowl. 409; *West v. Blakeway*, 9 Dowl. 846). But if money be lent, and a mortgage deed be afterwards executed to secure the re-payment, but which contains no covenant to pay the mortgage money, the mortgagee may sue for money lent (*Bates v. Asten*, 12 Law J. N. S., Q. B., 160). So, on a balance between partners, if one *expressly promise* to pay it, assumpsit lies, though they have covenanted to account (*Foster v. Allanson*, 2 T. R. 483; *White v. Parkin*, cited in 12 Ea. 582). And, if the binding be not mutual, as, where parties contract by deed, and plt. signs, but the deft. does not execute the deed, it will be no bar, but he may sue in assumpsit (*Sunderland v. Lishnan*, 3 Esp. 42). And, where a husband *covenanted* with a trustee to pay his wife a certain separate allowance, but neglected payment, it was held, that the trustee might recover in assumpsit for necessities supplied, on the common-law obligation (*Nurse v. Craig*, 2 N. R. [*166] 148), **Mansfield, C. J., dissent.*; as, he thought "the specific covenant excluded a ground in law for supporting an assumpsit on the presumed assent of the husband" (Ib. 160); and, where a *feme covert* contracted with a servant, by deed, but without authority from the husband, it was held the law would imply a contract on the part of the husband to pay the servant for the work done (*White v. Cuyler*, 6 T. R. 176).

In Cases of Tort.] Frequently where deft. has been guilty of a tortious act, plt. may waive the tort and sue in assumpsit or debt. Where there has been an express contract, the party injured may sustain assumpsit though the breach amount to a trespass (*Dicken v. Clifton*, 2 Wils. 321; *Mast v. Goodson*, 3 Wils. 354; see *Smith v. White*, 2 B. N. C. 218; but see *Burchell v. Hornsby*, 1 Camp. 360; *Birch v. Wright*, 1 T. R. 386). Where deft. has wrongfully taken or appropriated plt.'s goods, and received the money for them, plt. may sue for the money had and received to his use (*Edmeads v. Newman*, 1 B. & C. 418; S. C. 2 D. & R. 568; see *Longchamp v. Henry*, 1 Doug. 137; *Hill v. Perrott*, 3 Taunt. 274). So, where he has, under colour of office, extorted from plt. illegal fees (*Morgan v.*

Palmer, 2 B. & C. 735; S. C. 4 D. & R. 283; Dew v. Parsons, 2 B. & A. 562); so the right to an office is frequently tried in an action of assumpsit, to recover the fees received by the deft. therein (Com. Dig. Action Ass. A 1; Baxter v. Dodsworth, 6 T. R. 681; Rex v. Chester, 1 T. R. 396; Green v. Hewitt, Pea. 182; Kitchen v. Campbell, 3 Wils. 304; Lindon v. Hooper, Cowp. 419; Gill v. Kymer, 5 Moo. 525; Edmeads v. Newman, 1 B. & C. 418; Morgan v. Palmer, 2 B. & C. 729; Roland v. Hall, 1 Sco. 539; Spry v. Emperor, 6 M. & W. 639; see *post*, "MONEY HAD AND RECEIVED"); and we have seen that plt. may sue another, who has enticed away his apprentice, in an action of assumpsit for his earnings (see *post*, *ib.*). But it has been held that assumpsit will not lie to recover back money paid for the release of cattle distrained, *damage feasant*, though the distress were wrongful (Lindon v. Hooper, Cowp. 414; Shipwick v. Blanchard, 6 T. R. 298; see Marshall v. Hopkins, 15 East, 309; and see Couwne v. Garment, 2 Sco. 276); nor for use and occupation against a person who holds adversely, as the Courts will not try a title to land in this form of action (see Birch v. Wright, 1 T. R. 378; see Money Penny v. Bristow, 2 R. & M. 117). But assumpsit lies for stallage against a person who enters plt.'s market, and erects a stall without leave (Newport (Mayor) v. Saunders, 3 B. & Ad. 411). It lies for the price of goods which deft., by fraud, induced the plt. to sell to an insolvent person, the benefit of which he obtained himself (Hill v. Perrott, 3 Taunt. 274; Abbotts v. Barry, 5 Moo. 98; Edmeads v. Newman, 1 B. & C. 418); and where the goods of a trader after his bankruptcy are taken in execution, or otherwise tortiously disposed of, without the concurrence of the assignees, they may sue in assumpsit if the goods have been sold (Russell v. Bell, 10 M. & W. 340); but they *must*, if they have recognised the wrongful sale and waived the original tort (Brewer v. Sparrow, 7 B. & C. 310). It lies to recover money paid, or goods delivered by way of fraudulent preference (see Brittle v. Hodson, 4 T. R. 211; Edmeads v. Newman, *supra*). It lies to recover back rents tortiously received (Bayter v. Dodsworth, 6 T. R. 683; Lindon v. Hooper, Cowp. 414). Wherever a common-law duty results from the employment of a person in a particular character, and he is guilty of a breach of that duty, he may be sued in assumpsit upon the implied contract, or in an action upon the case. Hence assumpsit lies against a carrier *for the loss of goods. Against attorneys, [*167] surgeons, &c., for negligence; or the plt. may sue in case (see these heads respectively). Where goods are obtained under a fraudulent contract, giving the purchaser a specified credit, although the vendor may disaffirm the contract, and maintain trover before the expiration of the credit, yet he cannot, during the prescribed period, maintain assumpsit for goods sold (Ferguson v. Carrington, 9 C. & P. 59). Where a party who had worked into his neighbour's land, and dug coal, which he sold, retaining the proceeds, and died intestate; held, that assumpsit lay against his administrator for the price of the coals, independently of the statute 3 & 4 Will. IV. c. 42, s. 2, and was not affected thereby (Powell v. Rees, 7 Ad. & E. 426). Where the ground of action is assumpsit, declaring in tort will not render one liable who would not have been so on his promise (Green v. Greenbank, 2 Mar. 485; Brotherton v. Wood, 3 B. & B. 62; see Lee v. Shore, 1 B. & C. 94).

When preferable to sue in Case.] As by suing in assumpsit the deft. is let in to plead a set-off, or the law of mutual credit in the case of bankruptcy, a plea in abatement for nonjoinder, &c., which he cannot do in an action on the case (see Sutton v. Clarke, 6 Taunt. 29; Ansell v. Waterhouse, 6 M. & S. 385; Max v. Roberts, 2 M. & R. 454: *quære*, as to pleading in abate-

ment, where the action, though framed in tort, is founded on a contract (Weall v. King, 12 East, 452; Govett v. Radnidge, 3 East, 62); it is often desirable to sue in *case*, or *trover*, rather than in *assumpsit* (see Smith v. Hodson, 4 T. R. 211; Hunter v. Princess, 10 East, 378; Thomason v. Frere, 10 East, 418; Fair v. M'Iver, 16 East, 130). Another reason is that, generally speaking, a misjoinder of defts. in *tort* does not vitiate, as one may be acquitted and the other found guilty (Govett v. Radnidge, *supra*; Breshould v. Wood, 3 B. & B. 54; Pozzi v. Shipton, 1 P. & D. 4); and one of two parties jointly interested may sue alone (Bloxam v. Hubbard, 5 Ea. 407; Addison v. Overend, 6 T. R. 766; Sedgworth v. Overend, 7 T. R. 279).

By and against whom Action to be brought.] As the proper parties to sue and be sued will be found pointed out under the various titles, descriptive of the nature of the action, or the character of the party suing (see "GOODS SOLD AND DELIVERED," "MONEY HAD AND RECEIVED," "ATTORNEYS," "CARRIERS," "EXECUTORS," &c. &c.), it will only be necessary here to state the general rules on the subject, which are applicable to this form of action, it being assumed that there is a complete and perfect contract capable of being enforced by some person. See as to contracts in general and what consideration is sufficient to support an assumpsit, Ch. Contr.; Selw. N. P., Assumpsit; 1 Ch. Pl. Plaintiffs).

Plaintiffs.] 1st. The general rule is that the action *must* be brought in the name of the party who has the *legal* interest in the contract; *i. e.* from whom the consideration either actually or in contemplation of law moved. Thus, where a person farmed the tolls of a turnpike under a written contract by which he engaged to pay the rent to the treasurer of the commissioners, it was held, that the treasurer could not sue for the rent, but that the action should be brought by the commissioners (Pigot v. Thompson, 3 B. & P. 147; see also Evans v. Evans, 3 Ad. & E. 132). So, where plt. declared that an agreement was made between him and defendant that J. L., plt.'s son, should espouse C., deft.'s kinswoman, and that in consideration that the plt. agreed to assure to C. lands of the value of 10*l.* per annum *for her joint-
[*168] ure, deft. assured to plt. that he would give J. L. upon her marriage with C. 200*l.*, the court arrested the judgment, on the ground that the legal interest and cause of action vested in J. L. (Level v. Hawes, Cro. Eliz. 619; see Dutton v. Poole, 1 Vent. 318; 2 Lev. 210; affirmed on error, T. Raym. 302; Rippon v. Norton, Cro. Eliz. 849, 881; Martyn v. Hind, Doug. 142). So, where the declaration stated that one P. was indebted to plt., and in consideration thereof, and that plt. at deft.'s request, had undertaken to work for deft. and leave the amount of his earnings in deft.'s hands for the purpose, deft. promised to pay plt. his debt, the judgment was arrested, the plt. being a *stranger* to the consideration (Price v. Euston, 4 B. & Ad. 433; Crow v. Rogers, 1 St. 592). See 2 Saund. 137 *d.*, n. *b.*; Carnegie v. Waugh, 2 D. & R. 277; see Garratt v. Handley, 4 B. & C. 664; Sargent v. Morris, 3 B. & A. 280). As to the case of a promise to A. for the benefit of B., and an action brought by B., there the promise must be laid as having been made to B., and the promise actually made to A. may be given in evidence to support the declaration (Feltmakers' Company v. Davis, 1 B. & B. 101, *per* Eyre, C. J.).

Where the Interest has been assigned.] The assignee of a chose in action cannot, in general, sue in his own name on a contract assigned to him, but must proceed in the name of the assignor; or, if dead, his personal representative (Splidt v. Bowles, 10 East, 281; Muster v. Miller, 4 T. R. 340;

Johnson v. Collings, 1 East, 104; Bally v. Wells, 3 Wils. 27; 1 Saund. 210, 153, 154; Canham v. Rust, 2 Moo. 164; Seddon v. Senate, 13 East, 73; Wake v. Tinkler, 16 East, 36; Fairlie v. Denton, 8 B. & C. 395; see Hewell v. M'ivers, 4 T. R. 690; Heath v. Hale, 4 Taunt. 326; Jeffrey v. M'Taggart, 6 M. & S. 126; Sidaway v. Hay, 4 D. & R. 669; see "COMPOSITION"). Where the assignor of a chose in action has become bankrupt, the action must be in his name (Carpenter v. Marnell, 3 B. & P. 40; Winch v. Keeley, 1 T. R. 619; Chambers v. Page, 3 B. & A. 697). And if, after a charter-party, the owner assign and then become bankrupt, he should sue (Splidt v. Bowles, *supra*; Merrison v. Parsons, 2 Taunt. 407). But if an express promise, or contract to pay the debt or perform the contract, be made to the assignee of the chose in action, in consideration of forbearance, or in respect of any other new consideration, the assignee may declare upon such (1 Saund. 210, n. 1; Innes v. Dunlop, 8 T. R. 595; Price v. Seaman, 4 B. & C. 525). But, under the bankrupt and insolvent laws, the assignee may sue (see these titles). So the assignee of a judgment by confession, in Ireland, may sue in his own name (O'Callaghan v. Thomond, 3 Taunt. 82). Where A. owes B. 100*l.*, and B. owes C. 100*l.*, and the three meet, and it is agreed between them that A. shall pay C. the 100*l.*, B.'s debt is extinguished, and C. may recover that sum against A. (per Buller, in Tattock v. Harris, 3 T. R. 180; Wilson v. Coupland, 5 B. & A. 228; Israel v. Douglas, 1 H. Bl. 239; Hodgson v. Anderson, 3 B. & C. 855; Wharton v. Walker, 4 B. & C. 166; Fairlie v. Denton, 8 B. & C. 395; Crowfoot v. Gurney, 9 Bing. 372; Belcher v. Oldfield, 6 B. N. C. 101; Tibbetts v. George, 5 Ad. & E. 101; Smith v. Smith, 2 Car. & M. 231). But an express agreement between all the parties, that A. should become C.'s debtor, must be proved (Wharton v. Walker, *supra*; Fairlie v. Denton, *supra*); and it must appear that A.'s debt to B. was ascertained and fixed (Fairlie v. Denton, *supra*); and it seems necessary, in order to enable the plt. C. to sue A., that the debt originally due to him the plt., from B., should be **extinguished* by the new ar- [*169] rangement (Cuxon v. Chadley, 5 B. & C. 591; Wharton v. Walker, *supra*; see Ward v. Evans, 2 Ld. Raym. 928); and it is not extinguished, unless there be an express agreement, by the plt. to accept the debt, only as his debtor, entered into between all the parties (Wilson v. Coupland, *supra*; Cuxon v. Chadley, *supra*; Wharton v. Walker, *supra*). What is not such an extinguishment of a debt due to two partners dissolving partnership, as will render the remaining partner only the creditor, see Biggs v. Fellows, 3 B. & C. 402. Where the liability of one partner is substituted for that of a firm, on a dissolution, there must be an express promise and agreement, so as to give a clear right of action against the one (Thomas v. Shillibeer, 1 M. & W. 124). These promises need not be in writing (Hodgson v. Anderson, 3 B. & C. 842; Crowfoot v. Gurney, 9 Bing. 372; Andrews v. Smith, 2 C. M. & R. 627; see Eastwood v. Kenyon, 2 P. & D. 276; see "MONEY HAD AND RECEIVED").

Several Plaintiffs.] Where the legal interest in the contract is vested in several persons jointly, all must be joined as co-plts. (Thimblethorpe v. Hardesty, 7 Mod. 116; Roles v. Yates, Yelv. 177; Jones v. Robinson, 10 Jur. 933; 17 Law J. 36, Exch.; see Eccleston v. Clipsham, 1 Saund. 153, n.; Anderson v. Martindale, 1 East, 497; Townsend v. Neale, 2 Camp. 190; James v. Emery, 5 Pri. 529; Hatsall v. Griffith, 4 Tyrw. 487; see also Chanter v. Leese, M. & W. 698); and one may use the names of the others on tendering an indemnity (Savill v. Roberts, 1 Ld. Raym. 380; Chambers v. Donaldson, 9 East, 471; Mountstephen v. Brooke, 1 Chit. Rep. 390). Thus, where two persons being bail to an action, employed an attorney to

render the deft., it was held, that one alone could not sue the attorney for negligence (*Hill v. Tucker*, 1 Taunt. 7, and see *Rol. Abr.* 31, pl. 9). So, where two sureties, being sued to judgment, borrowed, on their *joint* credit, a sum of money to pay it off, they were held capable of maintaining a joint action against the principal for money paid (*Osborne v. Harper*, 5 East, 225); though if each had paid his proportion out of his own pocket, each must have sued separately (*Brand v. Boulcott*, 3 B. & P. 235; see *Graham v. Robertson*, 2 T. R. 282); and where three persons, joint owners of a ship, having determined on a sale, two of them employed a broker to sell, who received the price, and paid those two their proportions; it was held, that the plt. the third owner, could not sue him alone for his proportion, but that the action should be brought in the names of the three (*Halsall v. Gilpin*, 4 Tyrw. 487). It would have been otherwise, as the court observed, if each had separately employed the deft. to sell his share (and see *Smith v. Hunt*, 2 Chit. Rep. 142). Upon the same principle it was held, that one of three co-parceners could not sue an agent who had continued after the ancestor's death to receive the rents, for his proportion thereof, but that all should have joined in the action (*Decharmes v. Hornood*, 10 Bing. 526; and see *Co. Litt.* 198, a, b). And where deft. entered into a guarantee with a member of a banking firm, for securing repayment of money about to be advanced to a third person, it appearing that the money was advanced by the firm, and not by the individual member; held, that the latter could not sue alone on the guarantee (*Garrett v. Handley*, 3 B. & C. 462; *sed quære* this case; see *Garret v. Handley*, 4 B. & C. 664; *Alexander v. Barker*, 2 Tyrw. 140; see also *Lane v. Drinkwater*, 1 C. M. & R. 599; *Byrne v. Fitzhugh*, ib. 613, n.). Where A. and B. declared in assumpsit that their several cattle had been distrained, and that deft., in consideration of 10*l.* paid to him by the plts., [*170] *promised to procure the cattle to be returned to them by such a day, and that he had not done so; held, that the action was properly brought (*Rol. Abr.* 31, pl. 9; 2 Saund. 116 a, n.). If one of several bankers lend money to a third person, all the members of the firm may join in an action to recover it (*Alexander v. Barker*, p. 168). So, where the mayor of a borough entered into an agreement on behalf of himself, and the rest of the burgesses and commonalty, for the sale of corporate property, it was held, that he could not in his own name maintain an action against the purchaser for breach of contract (*Bowen v. Morris*, 2 Taunt. 374). In an action for goods sold by the directors of a company a director who has become bankrupt, and ceased to act, must be joined as plt.) (*Phelps v. Lyle*, 10 Ad. & E. 113); but not if, by the terms of the deed constituting the company, he ceased to be a director by his bankruptcy (*Phelps v. Lyle*, *supra*). If a third person collude with one partner of a firm to injure the other partners, the latter may, omitting the colluding partner, sue the third person so colluding (*Longman v. Pole*, 1 M. & M. 223).

But there may be cases where the employment of an agent may be several as well as joint, or cases of a subsequent severance, so as to entitle one partner to sue for his share, *semble* (*Halsell v. Griffiths*, 4 Tyrw. 488, n. a, b, c, and cases cited, *Break v. Douglas*, 4 Tyrw. 489). A declaration in assumpsit alleged that, in consideration that plt. and W. D. would sell and assign to the deft. a certain co-partnership business, &c., the defendant promised the plaintiff to pay him all the money that he had advanced in respect of the co-partnership, and also promised the plt. and W. D. that he would discharge all the debts due from them as such co-partners, and all liabilities to which they were subject as such. The declaration, after averring performance by the plt. and W. D., averred that the plt. had at the time of making the promise advanced a certain sum in respect of the co-partnership, and for which

the co-partnership was at the time of the promise accountable to him; and laid as a breach the non-payment by the deft. to the plt. of that sum: held, good on motion in arrest of judgment (*Jones v. Robinson*, p. 168).

2d. Where, however, an express contract is made by one person, as the agent of another, the action for the breach of such contract may be brought either in the name of the agent, or in that of the principal (See *per cur.* in *Cothay v. Fennell*, 10 B. & C. 671; *Skinner v. Stocks*, 4 B. & A. 437; *Garrett v. Handley*, 4 B. & C. 664; *Alexander v. Barker*, 2 Tyrw. 140; but see *Bowen v. Morris*, 2 Taunt. 374; *Garrett v. Handley*, 3 B. & C. 460); provided, however, that the agent is dealt with as a contracting party, for where he acts, and is treated in the transaction as a mere servant, he cannot sue in his own name (see *Evans v. Evans*, 3 Ad. & E. 132). Where the plt. made a written contract for the sale of goods, in which he described himself as the agent of A., and the buyer accepted and paid the price of a portion of the goods, and had then notice that the plt. was himself the real principal in the transaction, and not an agent of A.: held, that the plt. might sue in his own name for the non-acceptance of and non-payment of the residue of the goods (*Rayner v. Grote*, 15 M. & W. 359; 16 Law J. 79, Ex.). As to the right of the principal to interfere as against the agent, see "AGENT," "PRINCIPAL AND AGENT." Hence, on a policy of insurance, either the agent who effected the policy or the person interested may sue (see *post*, "INSURANCE"). And an auctioneer (*Williams v. Millington*, 1 H. Bl. 81), factor, or *del credere* commission agent, may sue in his own name for the price of goods sold by him on account of his employer (see *Morris v. Cleasby*, 1 M. & S. 581).

*So, where the master of a ship delivers goods under a bill of lading, which makes them deliverable "on payment of freight," he [*171] may sue for such freight (see "FREIGHT"); so where the bill of lading specifies "demurrage," he may also sue for such demurrage (*Jesson v. Solly*, 4 Taunt. 52), the acceptance of the goods under such circumstances raising an implied contract with the master; but otherwise he cannot sue, as he has no legal interest therein (*Brouncker v. Scott*, 4 Taunt. 1).

Where by a lease not under seal, the guardians of an infant demised his lands, and the lessee undertook to pay the rent to the guardians, or to any other person duly authorized to receive the same, "for behoof" of the infant; it was held that the latter on coming of age might sue for the rent, though it would have been otherwise had the instrument been under seal (*Fitzmaurice v. Waugh*, 3 D. & R. 273; *Carnegie v. Waugh*, 2 D. & R. 277). And hence it was said by Buller, J. (in *Marchington v. Vernon*, 1 B. & P. 101, n.), that if a person make a promise to another for the benefit of a third, that third person may sue upon it.

So, where there is an express contract by one person in his own name, but on behalf of himself and others, the action may be brought by all, or by himself only. Hence, where three mercantile houses agreed to be jointly interested in certain goods, but that one of them should purchase in his own name, and he did so, it was held that all three might join in an action against the vendor for a breach of the contract, though the actual purchaser might have sued alone (*Cothay v. Fennell*, 10 B. & C. 673; *S. P. Skinner v. Stocks*, 4 B. & A. 437). But it would have been otherwise, had the agreement been made subsequently to the purchase (see *Young v. Hunter*, 4 Taunt. 582). And where one of the joint owners of a ship, placed in his banker's hands certain warrants of the East India Company for payment of freight, with directions to receive the proceeds, and place them to his private account, which was done, and after the death of the depositor the surviving part owners sued the bankers for this money; held,

that they could not maintain the action, there being no privity of contract between them and the defts. (*Sims v. Bond*, 5 B. & A. 389; see *Lucas v. De La Cour*, 1 M. & S. 249; *Robson v. Drummond*, 2 B. & Ad. 303; *Pinto v. Santos*, 5 Taunt. 447; S. C. 1 Marsh. 132).

On this ground, a dormant partner in a firm may be joined with the other partners in an action on a partnership contract, or the latter may sue alone (see *post* "PARTNERS"): and where the deft. had received from the plts., as the trustees of an assurance company, the amount of a policy, executed by the plts. under seal, which was afterwards discovered to be void on account of fraud; it was held, that the plts. might recover back the money without joining the other members (*Lefevre v. Boyle*, 3 B. & Ad. 877).

But the parties may stipulate that the action may be brought in the name of a particular person (see *Feltmakers' Company v. Davis*, 1 B. & P. 98; *Reidenhurst v. Bates*, 3 Bing. 463; *Davies v. Hawkins*, 3 M. & S. 488; and see "PARTNERS"; but see *Patrie v. Bury*, 3 B. & C. 353). Where A. and B. carried on business as attorneys in co-partnership, and deft. employed them in that capacity; and it appeared that, by the agreement under which A. and B. entered into business together, B. was to receive annually out of the profits a certain sum, but he was not to be in any manner liable for losses, and was to have a lien on the profits for any loss he might sustain by reason of his liability: held, that they, as partners, properly joined in an action for work and labour, for the money when recovered [*172] would *be the joint property until the division took place (*Bond v. Pittard*, 3 M. & W. 357).

The rule above-mentioned applies equally to a contract in writing as to parol contracts, whether it be such as is required by statute to be in writing or not, provided it be not a contract under seal (*Higgins v. Senior*, 8 M. & W. 844). Where, by an agreement in writing, *inter partes*, A. and B. contracted to employ D. in their business as type-founders for a certain term; it was held, that C., a dormant partner with A. and B., might be sued jointly with them for a breach of such contract, though not named in it, on the ground that where the contract is not under seal evidence is in all cases admissible to show who the real parties are (*Beckham v. Drake*, 9 M. & W. 79, affirmed in error, overruling *Beckham v. Knight*, 5 Sco. 619; S. C. 4 B. N. C. 293; see *Bateman v. Phillips*, 15 Ea. 272; *post*, "DEFENDANT"). Where, however, the contract is under seal, none but the parties thereto can sue or be sued upon it. Hence, where by indenture, between B. of the one part and C. of the other, C. covenanted to pay a sum of money to A. who was not a party; it was held, that A. could not sue thereon (*Salter v. Kedgley*, Carth. 77; *South (Lord) v. Brown*, 6 B. & C. 718); though it was expressed, on the face of the deed, that B. entered into the contract as A.'s agent (*Berkley v. Hardy*, 5 B. & C. 355). So if A. covenant to pay B. a sum of money for the use of C. the action must be brought by B., and C. cannot sue thereon (*Offley v. Ward*, 1 Lev. 235; see 3 B. & P. 149, n). If one covenant with A. and B. to pay an annuity to A., this vests a joint legal interest in A. and B.; although the former is to derive the sole benefit (*Anderson v. Martindale*, 1 East, 497; *Withers v. Bircham*, 3 B. & C. 256; and *post*, "COVENANT," "BOND").

If the action be brought in the name of the wrong person, or, if there be a misjoinder, or nonjoinder of a necessary party, as co-plt. the objection may be taken on the general issue, or if it appear on the record by demurrer, motion in arrest of judgment, or writ of error (1 Saund. 291 f; *Slingby's case*, 5 Co. 18 b; 2 Saund. 115; see *Cameron v. Reynolds*, Cowp. 407; see as to action by Assignees, Executors, &c., these titles respectively).

The omission of the christian names of persons in pleading a written

contract, unless it be excused by averment, is ground of special demurrer (*Gatty v. Field*, 15 Law J. 407; *Applemans v. Blanche*, 14 M. & W. 154; see *Esdaile v. McClean*, 15 M. & W. 277; *Smith v. Bale*, 15 Law J., 413, Q. B.; *Levy v. Webb*, 15 Law J., 407, Q. B.; *Langdale v. McClean*, 10 Jur. 642; *Tigar v. Gordon*, 9 M. & W. 347; *Nash v. Collier*, 17 Law J. 91, C. P.). Where a surviving partner sued upon a contract made with himself and his deceased partner, without stating that he was survivor, he was nonsuited (*Fell v. Douglas*, 1 B. & A. 374; see *Latch v. Wedlake*, 3 P. & D. 499). So, where a contract for the sale of goods, which was made with three persons, was stated to be made with two; held fatal, though the correct quantity which the two were to have was stated (*Parish v. Burwood*, 5 Esp. 33; *Everett v. Tindall*, 5 Esp. 169). So, where the agreement was stated to be made between the plt. &c., when there were other parties, from whom the consideration for deft.'s promise moved (*Chanter v. Leese*, in error, 5 M. & W. 698).

The declaration alleged that in consideration that the plt. and W. D. would sell to the deft. their business, the deft. promised the plt. to pay him all the money he had advanced in respect of the co-partnership, and for which the co-partnership was accountable to the plt. Averment, performance by the plt. and W. D., and that the plt., at the time of the promise, had advanced a sum of money in respect of the co-partnership, and for which it was at the time of the promises accountable to him; breach, the non-payment of that sum by the deft.: held, a sufficient consideration to entitle the plt. to sue alone (*Jones v. Robinson*, 1 Exch. 454; 17 Jaw J. Exch. 36).

Defendants.] The action must be brought against the person who made the contract, either by himself or his agent (*Young v. Brandeer*, 8 East, 10; see *Frazer v. Marsh*, 13 East, 238; *McIvor v. Humble*, 16 East, 169). As before observed, where there is an *express contract, whether by parol or in writing, so that it be not under seal, it is competent for the other party to show that the [*173] person who actually entered into the contract did so as the agent of another, and to bring his action against the principal. Thus, where a broker buys or sells goods, the action for non-delivery or non-acceptance may be brought against his principal, though the name of the latter does not appear in the contract, and was not mentioned in the transaction (*Trueman v. Loder*, 3 P. & D. 267; *S. C.* 11 Ad. & E. 589; *Whitehead v. Tuckett*, 15 Ea. 400; *Wilson v. Hart*, 7 Taunt. 295; *Higgins v. Senior*, 8 M. & W. 840). So, where goods have been sold and delivered to a person as the real purchaser, and it afterwards becomes known that he was only an agent, the seller may at all times resort to the principal for the price (*Paterson v. Gandasequi*, 15 Ea. 62; *Smith's Leading Cases*). Hence, where a bankrupt carried on the business in his own name, but for the benefit of his creditors under the authority of the assignee; it was held, that the latter was liable for goods supplied to the bankrupt in the way of trade (*Kinder v. Howarth*, 2 Stark. 354). So, where the purchaser was known at the time of the sale to be acting as his agent, but it was not known for whom, the principal was holden liable (*Thompson v. Davenport*, 9 B. & C. 78). But if the principal be known at the time of the sale, and the seller notwithstanding debit the agent, he cannot afterwards proceed against the principal (*Addison v. Gandasequi*, 4 Taunt. 574; see *Paterson v. Gandasequi*, *supra*; *Thompson v. Davenport*, *supra*). Except in cases where the principal for the purpose of fraud procured the goods to be sold on the agent's credit. In such cases the principal remains liable (*Wilson v. Hart*, 7 Taunt. 295; *Hill v. Perrott*, 3 Taunt. 274). And in the former cases if the principal has before notice (see

Powell v. Nelson, cited 15 East, 65), and in the due course of business (see Waring v. Favenc, 1 Camp. 85), paid or otherwise settled with his agent, he is no longer liable (see Thompson v. Davenport, 9 B. & C. 78; Wyatt v. Headfort (Marquis), 3 East, 17, n.); and the agent is not liable for the non-performance of the contract, even for a deceitful warranty, if he had authority from his principal to make the contract (Paterson v. Gandasequi, *supra*; M'Brain v. Fortune, 3 Camp. 317; Hartop v. Jenkes, 2 M. & S. 428; Bowen v. Morris, 2 Taunt. 387; Johnson v. Ogilby, 3 P. Wms. 278; Pochin v. Pawley, 1 Bla. R. 670; Pond v. Underwood, 2 Ld. Raym. 1210, and cases cited in 1 Ch. Pl. 40, n. g). If an attorney, "for and on behalf of his client, and as his agent," promise to pay money, he is not liable if he had authority (Hartop v. Jenkes, 2 M. & S. 438). Where a trader after an act of bankruptcy, employed an auctioneer to sell goods, who sent him the proceeds by the hands of the debt., it was decided that the assignee could not sue the debt. for the money (Coles v. Wright, 4 Taunt. 198; Coles v. Robins, 3 Camp. 183; White v. Bartlet, 9 Bing. 378; but see Stephens v. Elwall, 4 M. & S. 259). On sale of premises by auction, the memorandum of agreement to purchase and sell was signed by the auctioneer, as agent for the purchasers, and the vendor's attorney "as agent for S. S.;" held, that the deposit money could not be recovered from the attorney, as he was not a stakeholder, but merely the vendor's agent, and payment of the deposit to him was payment to the vendor (Bamford v. Shuttleworth, 11 Ad. & E. 926; see "AGENT," "PRINCIPAL AND AGENT," "ATTORNEY").

On the same principle, a dormant partner may be joined with the ostensible partners in actions on partnership contracts; and it makes no difference that the contract is in writing, or that it was required so to be by [*174] the Statute of Frauds (Trueman v. Loder, 3 P. & D. 267; *S. C. 11 Ad. & E. 589), if it be not a contract by deed. Where by agreement between A. and B., described therein as co-partners of the one part, and C. of the other, A. and B. engaged to employ C. for a certain period in the way of their trade: it was held, that D., a dormant partner in the firm, might be sued jointly with A. and B. in an action for a breach of this contract (Beckham v. Drake, 9 M. & W. 79, affirmed in error, overruling Beckham v. Knight, 5 Sc. 619; S. C. 4 B. N. C. 243; see "PARTNERS"). If one of the parties originally bound be dead, he need not be noticed in the declaration, and the survivors may be sued as the parties primarily liable (Richards v. Heather, 1 B. & A. 29; Calder v. Rutherford, 3 B. & B. 302). Where a promise is so framed that it does not confer a remedy against the contractors jointly, but each is separately liable for his own acts, each must be separately sued; but where it appears upon the instrument that the promise by two contractors was intended to be joint, it may be so treated, although the promise was in terms several only (Lee v. Nixon, 3 Nev. & M. 441).

On the other hand, the action may be brought against the party by whom the contract was in fact made, though he were but an agent, unless it appears *thereby*, if it writing, or from the circumstances if by parol, that he was dealt with and treated in the transaction merely as an agent, and that no credit was given to him. Thus, if a broker enter into a contract for the sale of goods on behalf of his principal, and sign the bought-note or invoice in his own name, without describing himself as agent, the purchaser may sue him personally on the contract for not delivering them, though he knew that def. was only an agent and who the principal was (Higgins v. Senior, 8 M. & W. 834; Jones v. Littledale, 6 Ad. & E. 486; 1 Nev. & P. 677; Magee v. Atkinson, 2 M. & W. 440; see Bowen v. Morris, 2 Taunt. 374; Spittle v. Lavender, *supra*); for though evidence is admissible to *charge* a third

party, which is in effect only showing that such party contracted in a name not his own, and therefore the principal may be sued on a contract made by the agent in his own name, yet to allow evidence in *discharge* of the agent would be to contradict a written document by parol testimony (Ib.; Story on Agency, s. 269, 270). If an agent act as principal, and do not disclose the principal, or declare that he acts as agent at the time of making a verbal contract, and credit be given expressly to him, he will be personally responsible (M'Brain v. Fortune, *supra*; Paterson v. Gandasequi, *supra*; Hanson v. Robendeau, Pea. 120; Mabeath v. Handimand, 1 T. R. 181; George v. Clagett, 7 T. R. 359; Simon v. Motivos, Burr. 1921). So, where an auctioneer sold goods without disclosing the name of his principal, it was held, that the purchaser was entitled to look to him personally for the completion of the contract, and that he was liable to an action for not delivering them in due time (Hanson v. Roberdeau, Pea. 120; see *post*, "AUCTIONEER"). And, on the other hand, where a clerk bought goods for his master, but did not inform the purchaser that he was a clerk for whom he purchased, he was holden personally liable for the price (Seaber v. Hawkes, 5 M. & P. 549). And where defts. entered into an agreement by which they, "as solicitors" for a third party, undertook to pay certain moneys to the plt. they were holden personally liable (Burrell v. Jones, 3 B. & A. 47; see also Kennedy v. Goreia, 3 D. & R. 503; Norton v. Herron, 1 C. & P. 643; Redhead v. Cator, 1 Stark. 14). But where, in a similar case, the principal added at the foot of the agreement, "I hereby sanction this agreement, and approve of A. B. having signed the same on my behalf," this was held conclusive that the agent did not intend to become *personally [*175] liable; and in an action against him the plt. was nonsuited (Spittle v. Lavender, 2 B. & B. 452). Where the deft., by a written agreement expressed to be made "by himself on behalf of A. B. of the one part, and plt. of the other," stipulated that he the deft. would execute to the plt. a lease of premises, which it was proved belonged to A. B.; held, personally liable, and there is no difference between deeds and parol agreements (Norton v. Herron, Ry. & M. 229). So the defts. were held personally liable on a written undertaking, that "they, as solicitors to the assignees," &c., undertook to pay the rent (Burrell v. Jones, 3 B. & A. 47; Iveson v. Coninton, 1 B. & C. 160). The deft. a merchant residing at St. P., carried on business in London through H., who had no capital or credit, and was known to represent the deft., though H.'s name was always used. The deft. gave notice to H. that he purposed to cease employing him, after which H. contracted with deft. to sell him tallow, and H.'s name was used as before; H. intended to contract on his own account, but plt. did not know this, and believed that H. represented the deft. as usual. The contract was made by a broker acting for both parties. He signed bought and sold notes, the former beginning, "bought for J." (plt.), and the latter, "sold for H. to my principals." Held, deft. was liable for the non-delivery (Truman v. Loder, 11 Ad. & E. 589).

Spittle v. Lavender, p. 173, illustrates the general rule, that where the person contracting is known to be, and is treated as the agent of another party who is known as the principal, he cannot be made personally liable, unless he exceeded his authority and thereby discharged his principal, or unless he expressly agreed to be responsible (see Owen v. Gooch, 2 Esp. 567; Thomas v. Edwards, 2 M. & W. 215). Hence an attorney is not liable for the expenses of a witness whom he subpoenaed on behalf of his client (Robins v. Bridge, 3 M. & W. 214); nor a solicitor in bankruptcy cases for the assignees' bill (Hartopp v. Jukes, 2 M. & S. 438); nor the governor of a fort or colony for stores or ammunition supplied on behalf of the government

(Macbeath v. Haldimand, 1 T. R. 172; Unwin v. Wolsely, ib. 674; see Thompson v. Pearce, 1 B. & B. 25; Cunningham v. Collier, 4 Doug. 233); nor is the colonel of a troop liable as such for forage supplied to the troop (Rice v. Chute, 1 Ea. 579; Myrtle v. Beaver, ib. 135). Nor is the secretary at war liable to a retired clerk at the War Office for his retired allowance, although he received such allowance in his official character (Chidley v. Palmerston (Lord), 3 B. & B. 275). But an attorney, who, in the course of a cause or matter, employs another attorney as his agent, is by the usage of business personally liable to pay him (Saull v. Whittington, 2 B. & C. 11; see Foster v. Blakelock, 5 B. & C. 328; see "ATTORNEY"). On the same ground the master of a ship, as well as the owner, is personally liable for repairs (Rich v. Coe, Cowp. 639); and a broker, who purchases for a foreign principal, for the price (see Eyre, C. J., 1 B. & P. 368; 9 B. & C. 78; 15 Ea. 62).

The registered owner of a ship is the party who, besides the master, is *prima facie* liable for stores provided, or repairs done, (Treheller v. Rowe, 11 East, 435; Stokes v. Carne, 2 Camp. 340; Webster v. Seekamp, 4 B. & A. 352); but if it be shown that another person is beneficially entitled to and receives the profits (Young v. Brander, 8 East, 10); or that credit was given to another, this implied contract does not arise. So where goods are shipped in, or stores supplied to a chartered vessel, the action for non-delivery of the one, and for the price of the other, should be brought against the charterer, and not the owner (James v. Jones, 3 Esp. 27; see Frazer v. Marsh, 13 East, 238). And the mortgagee *of a ship is not liable for wages

[*176] or repairs, where the party claiming the debt was employed by the mortgagor, expressly giving him credit (Annett v. Carstairs, 3 Camp. 354; Briggs v. Wilkinson, 7 B. & C. 30; Cox v. Reid, Ry. & M., N. P. C. 199; Harrington v. Fry, 2 Bing. 179). The master of a ship has authority by law to pledge the credit of his owner, resident in England, for money advanced to the master in an English port, when the owner has no agent there or near, and the advance of money is requisite for the prosecution of the voyage (Arthur v. Barton, 6 M. & W. 138); and he has also authority to obtain supplies of goods in a foreign port for the necessary use of the ship, on the credit of the owners, independently of express stipulation in the charter-party (Weston v. Wright, 7 M. & W. 396; see Rich v. Cox, Cowp. 639; Westerdell v. Dale, 7 T. R. 312; Abb. Sh., by Shee, Sergt.); and the master, or the owners, may be sued upon the bill of lading, or generally, for the loss of goods, unless there be an express contract with the owners (Boson v. Sandford, Carth. 58; Bac. Ab. Actions, B).

It seems a policy-broker alone can be sued for the premiums of insurance (1 Marsh. In. 204).

Where an agent does not pursue his authority, or so far exceeds it as to discharge his principal, or where he acts under an authority which he knows the principal has no right to give, he is personally responsible (Fenn v. Harrison, 3 T. R. 761; Mertens v. Winington, 1 Esp. 112; Johnson v. Ogilby, 3 P. Wms. 279; Eaton v. Bell, 5 B. & A. 34; Bowen v. Morris, 2 Taunt. 386; Ex parte Bennett, 10 Ves. 400; Buller v. Harrison, Cowp. 565; Sadler v. Evans, 4 Burr. 1984; B. N. P. 133; Pond v. Underwood, 2 Ld. Raym. 1210; Greenway v. Hurd, 4 T. R. 558; Cary v. Webster, 1 Stra. 480; Snowden v. Davis, 1 Taunt. 359; Bowen v. Morris, *supra*; see "AGENT," "PRINCIPAL AND AGENT").

Where a person has received money, as agent of another who had no right thereto, and has not paid it over, an action lies against the agent to recover the money, and the mere passing of such money in account with the principal, or making a rest without any new credit given to him, fresh bills accepted, or further sums advanced to the principal in consequence of it, is not

equivalent to the payment of the money to the principal (*Cox v. Prentice*, 3 M. & S. 344; *Buller v. Harrison*, Cowp. 565; *Cary v. Webster*, *supra*; *Edwards v. Hoddings*, 5 Taunt. 815). But in general, if the money be paid over before notice to retain it, the agent is not liable, unless his receipt of the money was obviously illegal, and his authority was wholly void (1 Ch. Pl. 42, and cases cited, n. d., e.). Where a debtor of plt. transmitted a sum of money to deft., who admitted having received it, and being afterwards informed that it was meant to be paid to the plt., said that he would so pay it; these statements were communicated to plt. by deft.'s authority: held, that on his failing to pay, plt. might sue him, and that deft. could not allege a want of consideration moving from plt. to himself (*Lily v. Hayes*, 5 Ad. & E. 448). When plt. sold goods to B., taking his acceptances for the price, and sent them to the deft. as B.'s agent, who consigned them to his partners abroad for sale; whilst the acceptances were running, plt. doubted B.'s solvency, and required farther security; it was then agreed between plt. B. and the deft., that B. should write and deliver to the deft. a letter authorizing him, out of any remittances he might receive against the net proceeds of the above consignment, to pay the acceptances as they became due if not honoured by him, B., previously to the receipt of such net proceeds; the letter was delivered to deft., and he consented thereto. Before the bills were due B. became bankrupt, and deft., having received the net proceeds *of the goods, refused to pay any part thereof to the plt., but handed [*177.] them over to B.'s assignees: held, that plt. was entitled to recover the amount of the acceptances from deft. in an action for money had and received, this being an appropriation irrevocable, except by consent of all parties, for which the existing debt, although not then payable, was a good consideration (*Walker v. Rostron*, 9 M. & W. 411). A. being a deft. in an action brought by B., paid the debt and costs to his own country attorney for transmission to B., the attorney sent a cheque exceeding the amount to his own town agent directing him to pay the debt and costs out of it. The agent acknowledged the receipt by letter to the country attorney, promising to apply the money as directed, but he retained it in reduction of a debt due to him from the attorney; held, that there was no sufficient privity to support an action for money had and received by A. against the agent (*Cobb v. Becke*, 6 Q. B. 930; see further, "MONEY HAD AND RECEIVED").

Where goods are supplied to, or work done for, a joint-stock trading or other company associated for profit, the action may be brought against all the directors, though some of them only gave the order (*Doubleday v. Muskett*, 7 Bing. 110); and this, though the project failed before the company was completely organized (*Ib.*). And where such company has commenced its operations every shareholder, who has become a complete partner, is liable to be sued for debts properly incurred by the company in carrying on its affairs after such party became such partner, though he was not known to be a partner at the time the credit was given, and though it was stated in the prospectus that the company was to purchase for cash, and no debt was to be incurred (*Hawken v. Bourne*, 8 M. & W. 703). And every person who by interference or otherwise holds himself out as a partner is liable, though he parted with his shares before the company was completely formed (*Perring v. Hone*, 4 Bing. 28; *Ellis v. Schniveck*, 5 Bing. 521; see *Bourne v. Tredwen*, 9 B. & C. 632; *S. C.* 4 M. & R. 512; *Dickinson v. Valpy*, 10 B. & C. 128; *Braithwaite v. Schofield*, 9 B. & C. 401). So, where a company commences business before the prescribed number of shares is subscribed for, every subscriber who authorises the directors so to proceed becomes liable, as much as if the company was completely formed (*Tredwen v. Bourne*, 6 M. & W. 461; *Steigenberger v. Carr*, 3 Sc. N. R. 466). But in such case it must be shown

that the deft. knew of and sanctioned their so proceeding (Pilchford v. Davis, 5 M. & W. 2; S. C. 3 Jur. 408; Fox v. Clifton, 6 Bing. 776; 4 M. & P. 676; 9 Bing. 115; S. C. 2 Moo. & S. 146); but he is not liable for goods ordered before he became a partner (Whitehead v. Barron, 2 M. & R. 248; see "PUBLIC COMPANIES").

But, with regard to other associations, as charitable institutions, clubs, &c. the rule is different; and, in order to charge any person other than the one who actually entered into the contract, or gave the order, it must be shown affirmatively that he gave authority so to do. Hence, the members of a club were holden not liable for work done or goods supplied by the order of the committee, the rules giving no authority to the committee to deal on credit, and the defts. not being shown to have authorized it (Fleming v. Hector, 2 M. & W. 172; see Adams v. Rippon, 2 M. & W. 172). Nor are even committee-men, who were not present when the orders were given, liable without proof of authority (Todd v. Emly, 7 M. & W. 427; 8 M. & W. 505). But where deft. who was one of a committee for managing the affairs of a hospital, supported by voluntary contributions, frequently attended their meet-

ings, at which accounts were audited, and cheques signed, *he was [*178] holden liable for bread furnished to the hospital during that period, though it did not appear who had given the orders (Burls v. Smith, 7 Bing. 705; Delawrey v. Strickland, 2 Stark. 416; see *post*, "PARTNERS"). *A fortiori*, the person who hath actually given the order is liable, unless it appear that he acted, and was treated only as an agent, and that credit was given to another. Where a person, as agent of an election committee, opened a public house for the voters of the candidate, and was afterwards sued for the value of the refreshments, it was held, that if plt. supplied them on a mere speculation that the candidate, or some other person would, as a matter of honour, pay for them, no contract was created with any one; but that if he looked to be paid for them as a matter of right, then the person who gave the order was *prima facie* liable, but if plt. showed that he was employed by another, and that the latter was not acting as agent for a third person, then the latter would be liable though he did not intend to pledge his personal responsibility (Thomas v. Edwards, 2 M. & W. 215); and, where churchwardens, in pursuance of a resolution of vestry, gave orders for the repairs of a church, they were holden personally liable, though the parishioners who signed the resolution were not (Lancaster v. Tucker, 1 Bing. 201; S. P. Same v. Frewer, 2 Bing. 361; Sprött v. Powell, 3 Bing. 478); and where goods were ordered by one of two overseers for the supply of the poor, both are *prima facie* liable (Eden v. Tischmaish, 1 Ad. & E. 691; Malkin v. Vickerstaff, 1 B. & A. 89).

The action on bills of exchange and promissory notes cannot be brought against any other than the party whose name appears thereon as the drawer, acceptor, &c., though it be known that such party drew or accepted only as agent, if it does not so appear on the face of the instrument (Leadbitter v. Farrow, 5 M. & S. 345; Sowerby v. Butcher, 2 C. & M. 368); and where a person accepts a bill, as by procuration, for the drawee, having no authority to do so, neither can be sued on the bill, but the former is liable to an action on the case for the fraud (Polhill v. Walker, 3 B. & Ad. 114, see Wilson v. Barthruf, 2 M. & W. 863); so, if a bill be drawn on and accepted by one partner, in his own name, the others cannot be sued on it (Emly v. Lye, 15 East, 7); except where the business was carried on in the name of such partner only, and then an action may be brought against all the parties composing the firm (Carolina Bank case, 8 B. & C. 427; see *post*, "BILLS OF EXCHANGE").

When the contract is several as well as joint, the plt. may proceed jointly

or separately, though the interest be joint (1 Ch. Pl. 50; see *Lilley v. Hedges*, 1 Stra. 553; *Envys v. Dennithorne*, 2 Burr. 1197; *Brown v. Wootton*, Cro. Jac. 73; 5 Co. R. 86; *Claxon v. Swift*, 3 Mod. 87); and where the debt or demand is considerable, it is advisable to proceed separately, see 1 Ch. Pl. 51.

Where the Interest has been assigned, or the Credit changed.] In general, an action for the breach of a mere personal contract cannot be brought against an assignee; the action must be brought against the original party (see *Bally v. Wells*, 3 Wils. 27; *Saville v. Robertson*, 4 T. R. 720; see *ante*, "PLAINTIFFS;" 1 Ch. Pl. 54); but there may be a change of credit by agreement between the parties, so as to transfer the liability from the original contracting parties (1 Ch. Pl. 54, and n. p). Thus, where the plts. were creditors to T. and the defts. debtors to T., and they all agreed that the defts. should pay to the plts. the debt due from them to T.; held, that the plts. were entitled to recover (*Wilson v. Coupland*, 2 B. & A. 228), but T., must be discharged from all liability, otherwise the action will not *lie (*Hodgson v. Anderson*, 3 B. & C. 855; *Wharton v. Walker*, 4 B. [*179] & C. 166; *Wilson v. Coupland*, *supra*; *Fairlie v. Denton*, 8 B. & C. 395). See instances of a new firm adopting a debt of an old firm, and thereby becoming liable (1 Mont. Bank. L. 619; *Weston v. Barton*, 4 Taunt. 673; *Bodenham v. Purchas*, 2 B. & A. 39; *Hart v. Alexander*, 2 M. & W. 484; see further, 1 Ch. Pl. 54; *post*, "PARTNERS").

Joinder of Defendants.] As a general rule, *all* the contracting parties should be made co-defts., or the deft. may plead in abatement (see *ante*, "ABATEMENT"), but cannot treat the omission as a material variance at the trial on the general issue (*Mountstephen v. Brooke*, 1 B. & A. 224). But the right of pleading in abatement is greatly restricted by statute 4 & 5 Anne, c. 16, s. 11 and 3 & 4 Will. IV. c. 42, s. 8, the first of which requires an affidavit, that the plea is true, and the second an affidavit, stating the residence of the omitted party, which must be within the jurisdiction of the court (see "ABATEMENT"); and if this be omitted the deft. will be chargeable with the whole debt, and he cannot object on the general issue, as a variance, that a bill or note stated to be made by deft. was in fact made by him and others (*Mountstephen v. Brooke*, 1 B. & A. 224; *Wilson v. Reddall*, Gow, R. 161); and as the plea in abatement must mention *all* the co-contracting parties whom the plt. has not sued, so as to give him a better writ (*Godson v. Good*, 6 Taunt. 587; S. C. 2 Mar. 299), otherwise the plt. may safely take issue upon it; it follows, that if either of the parties happen to be out of the jurisdiction, the plt. may select which, or as many as he pleases. If either be a certificated bankrupt or discharged insolvent, the plt. may and should omit him (3 & 4 Will. IV. c. 42, s. 10), provided of course that the cause of action is one which is barred by the certificate or discharge. In actions against common carriers, mail contractors, and stage-coach proprietors, a plea in abatement for nonjoinder is inadmissible (1 Will. IV. c. 68, s. 5); and, though a dormant partner *may* be joined in an action with the other partners, yet the latter, if sued alone, cannot plead the nonjoinder in abatement (*Mullett v. Hook*, M. & M. 88; *Baldrey v. Ritchie*, 1 Stark. 338; *De Manfort v. Saunders*, 1 B. & Ad. 398; see "PARTNERS"). Formerly, if one of the contracting parties was an infant, or *feme covert*, he could not properly be sued (*Chandler v. Parkes*, 3 Esp. 76; *Jaffray v. Frebain*, 5 Esp. 47); but this appears to have been altered by the effect of the pleading rules (see *Lush's Pr.* 78); at all events, plt. may safely omit such party, and if the nonjoinder be pleaded, reply the infancy or coverture (*Burgess v. Merrell*, 4 Taunt. 468; see 1 Ch. Pl. 52). Where, in assumpsit for work

and labour against several defts., one the wife of another, the declaration alleged promises by the *deft.*, and *deft.* pleaded in abatement the nonjoinder of other parties; after verdict for the *plt.*, the court refused to arrest the judgment, as it did not appear that the promise was not made before marriage (*France v. White*, 1 Sco. N. R. 604; 1 Man. & G. 731); but the declaration would be bad on special demurrer (*France v. White*, *supra*, per Maule, J.; see *Nurse v. Wills*, 4 B. & A. 739). But if it expressly appear upon the face of the declaration, or some other pleading of the *plt.*, that the omitted party is *still living*, as well as that he jointly contracted, in that case the *deft.* may demur, or move in arrest of judgment, or bring error (1 Saund. 291 b, &c. n. 4; 154, n. 1; *Scott v. Godwin*, 1 B. & P. 73; but see *Churchill v. Gardner*, 7 Taunt. 596; *South v. Tanner*, 2 Taunt. 254; see 1 Ch. Pl. 54).

On the other hand, the joinder of too many persons as co-defts. is fatal on *non assumpsit*, or, if the objection appear on record, by *demurrer, [*180] arrest of judgment, or writ of error (*Mansell v. Burrigge*, 7 T. R. 352); and, though all but one suffer judgment, and that one deny the contract, the *plt.* must prove a joint-contract by all, in like manner as if all had joined in the plea (*Shirreff v. Wilks*, 1 Ea. 52; see *Porter v. Harris*, 1 Lev. 63; *Hanney v. Smith*, 3 T. R. 662; *Robeson v. Ganderton*, 9 C. & P. 476; see *Jacques v. Whitcombe*, 1 Esp. 363; *Coope v. Eyre*, 1 H. Bl. 37; *Powell v. Layton*, 2 N. R. 365; *Max v. Roberts*, 2 N. R. 454; *Neale v. King*, 12 East, 454; *Burton v. Hanson*, 2 Taunt. 49; *Cooper v. Whitehouse*, 6 C. & P. 545). The court will not permit the striking out the names of one or more defts. to cure the defect (*Cooper v. Whitehouse*, *supra*).

Where there is any doubt as to the propriety of joining a party, the safer course is to sue in the first instance those only against whom the *plt.* is certain of succeeding; and, if they plead in abatement, to commence a fresh action, including the omitted parties. Then, it will be incumbent on the defts. in the first action, at their peril, to prove that the new parties are jointly liable with them (3 & 4 Will. IV. c. 42, s. 10). If *deft.* plead in abatement the non-joinder of a party, and it should turn out that there are other joint-contractors not named in the plea, the *deft.* will not succeed thereon (*Godson v. Good*, 6 Taunt. 587; *Abbott v. Smith*, 2 Bl. R. 951; see *Hill v. White*, 6 B. N. C. 23). See, as to cases where some of the contracting parties are discharged by the Statute of Limitations, *post*, "STATUTE OF LIMITATIONS."

When, however, the *plt.* finds that he has misjoined a party, he may obtain a rule or order to amend the proceedings, by striking out the name of such party on payment of his costs (*Palmer v. Beall*, 9 Dowl. 529). This has been allowed even after verdict, and a new trial granted. Lastly, a certificated bankrupt may plead his certificate to an action for the price of goods wrongfully sold by him, which he could not do if the *plt.* sued in trover (*Parkes v. Norton*, 6 T. R. 695; *Utterton v. Vernon*, 3 T. R. 539, per Buller, J.).

Form of Pleadings.

With respect to the title of the court and term, the venue and usual commencement of declaration, see *post*, "DECLARATION."

Declaration.] The declaration in this action must invariably disclose the consideration upon which the contract was founded; the contract itself, whether express or implied, and the breach thereof, and damages (Bac. Abr. Assumpsit, F); and whether the contract be express, or implied, or in writing, or by parol, the declaration is the same: always stating a specific

contract, which may be proved in evidence, by showing a contract, either express or implied.

1. *Common Counts.*] The form of the declaration is either common or special.

In general, the common or *indebitatus* counts are applicable only to the recovery of debts, and where a common action of debt might have been sustained (Hard's case, Salk. 23). Wherever the terms of a special agreement have been performed, so as to leave a mere simple debt or duty between the parties, plt. may proceed on the common count (Stone v. Rogers, 2 M. & W. 448; see Irving v. Veitch, 3 M. & W. 111, per Parke, B.). No action of *indebitatus assumpsit*, or upon a *quantum meruit* can be brought, for any thing done under a special agreement which remains open (Gordon v. Martin, Fitz-Gib. 303; Hall v. Heightman, 2 East, 145; Cutler v. Powell, 6 T. R. 320; Sinclair v. Bowles, see 2 Smith, Leading Cases, n. 10; see also Ellis v. Hamlin, 3 Taunt. 52; R. v. Whittlebury, 6 T. R. 467; Spain v. Arnott, 2 Stark. 256; Turner v. Robinson, 6 C. & P. 16; *Ridgway v. Hungerford Market Company, 3 Ad. & E. 171; Jesse v. Roy, 1 [*181] C. M. & R. 342; Sinclair v. Bowles, 9 B. & C. 92). Assumpsit for work and labour, and materials. It appeared that the plt. repaired three chandeliers for deft., and that 5*l.* was a reasonable price for the work and materials; but it also appeared that the plt., when he accepted the job, expressly agreed to make them complete for the 10*l.*, which he had failed in doing. Park, J., nonsuited the plt., with leave to move to enter a verdict for 5*l.*, which was refused, as the contract was entire, and the plt. not having completed his part had no right to recover anything (Sinclair v. Bowles, *supra*); but see Roberts v. Havelock, 3 B. & Ad. 404, where there was also a specific contract to do work, but when a portion of it was done plt. demanded payment for what he had already done and refused to finish the job without, and then sued in *indebitatus assumpsit*; held, that plt. was entitled to recover, for there was nothing in the case that amounted to a contract to do the whole repairs and make no demand until they were completed (see this case discussed in 2 Smith's L. Ca. 12; this case was distinguished from Sinclair v. Bowles, on the ground that there the contract was for a specific sum; see also Withers v. Reynolds, 2 B. & Ad. 882; see "ATTORNEY"). But where the terms of the special agreement have been performed on the one side, and nothing remains to be done upon the other but a money payment, that may be enforced by an action of *indebitatus assumpsit* (Cooke v. Munstone, 1 B. & P. 354; B. N. P. 139; Alcorne v. Westbrooke, 1 Wils. 117; Clutterbuck v. Coffin, 3 Man. & G. 842; see Bianchi v. Nash, 1 M. & W. 545; Grissell v. Robinson, 3 B. N. C. 10, per Tindal, C. J.). The nonperformance of a stipulation, not being a condition precedent to repayment, is no objection to *indebitatus assumpsit* for money lent (Scott v. Parker, 1 Q. B. 810). Where goods have been supplied or work done under a special agreement, but not in conformity therewith, compensation may be enforced by this form of action, the deft. having retained and enjoyed the benefit of that which was done (Farnsworth v. Gerrard, 1 Camp. 38; Read v. Rann, 10 B. & C. 440, per Parke, B.; recognized in Broad v. Thomas, 7 Bing. 99; see this subject discussed and all the cases collected in Cutter v. Powell, 2 Smith's L. Ca. n. 13; see Denew v. Daverell, 3 Camp. 451; also Bracy v. Carter, 12 Ad. & E. 373; Nicholls v. Wilson, 11 M. & W. 107; Hill v. Featherstonehaugh, 7 Bing. 569; Shaw v. Arden, 9 Bing. 287; Gill v. Laugher, 1 Tyr. 124; Huntley v. Bulwer, 6 B. N. C. 111; see where plt. may put an end to a special contract, and sue for what has been done under it; Withers v. Reynolds, 2 B. & Ad. 882; Planché v. Colburn, 8 Bing. 14;

Franklin v. Miller, 4 Ad. & E. 599; see Lines v. Rees, reported 2 Smith's L. Ca. 18; see Robson v. Drummond, 2 B. & Ad. 303; Palmer v. Temple, 9 Ad. & E. 508; Amor v. Fearon, 9 Ad. & E. 550). If a contract involve personal confidence, the death of the party confided in, rendering its performance impossible will terminate the contract, otherwise not (see Wentworth v. Cock, 10 Ad. & E. 42: as to what will justify the rescission of a contract, see Withers v. Reynolds, *supra*; Fillieul v. Armstrong, 7 Ad. & E. 557; Freeman v. Taylor, 8 Bing. 124; Franklyn v. Miller, *supra*; Fitt v. Cassanett, 4 Man. & G. 898; and see Ch. Contr.).

Where a servant has contracted to serve for a certain time at certain wages, and his master has turned him away before that period in consequence of his misconduct, he is entitled to no wages, for his faithful service is a condition precedent to his right to recover (Turner v. Robinson, 5 B. &

Ad. 789; Callo v. Brouncker, 4 C. & P. 518; Spain v. *Arnott, [*182] 2 Stark. 256; Amor v. Fearon, 9 Ad. & E. 548; Turner v. Mason, 14 M. & W. 116). But if the master wrongfully dismiss

him, he may immediately bring a special action for the breach of contract; or he may treat the contract as rescinded, and may sue on a *quantum meruit*; or he may wait till the end of the period for which he was hired, and may then, perhaps, sue for his whole wages in *indebitatus assumpsit* (Pagani v. Gandolfi, 2 C. & P. 370; Blanché v. Colburn, *supra*; Orchard v. Horner, 3 C. & P. 349; Gundell v. Pontigny, 4 Camp. 375; and see Collins v. Price, 5 Bing. 134, and Smith v. Kingsford, 3 Sco. 279; but see Smith v. Haward, 7 Ad. & E. 544; see also Eardly v. Price, 2 N. R. 333, overruled by Fewings v. Tisdal, 11 Jur. 977; see Bloxham v. Waggstaff, 5 Jur. 845). Where the contract of yearly service is put an end to by consent in the middle of a quarter, there is no implied contract to pay *pro rata*; but a new agreement to pay for the broken part of the year's service may be inferred from circumstances, which should therefore be submitted to the jury (Lamburn v. Cruden, 2 Man. & G. 253; and see Thomas v. Williams, 1 Ad. & E. 685). Although there may be a special contract, yet if a part of the work have not been included therein, but is performed at deft.'s request, the price of it may be recovered in this form of action, but the contract, if in writing, must be produced, that it may appear how much was extra, and if it be not stamped the plt. will be nonsuited (see "STAMPS"). In *assumpsit* for the price, and the setting up of, "a 14-horse power steam-engine," "the last instalment to be paid two months after its completion," it appeared that the engine was of less power than that mentioned in the contract, and improvements and alterations were made by plt. from time to time till the action was brought: held, 1. That common counts would lie. 2. That the term "completion" did not apply to the mere making of improvements and alterations. 3. That the degree of power of the engine was a material part of the contract (Parsons v. Saxter, 2 Car. & Kir. 266, Erle, J.)

The form of the count is the same in *assumpsit* as in debt (see *post*); but in *assumpsit* a promise to pay must be alleged, which promise is implied by law, from the relationship of debtor and creditor. Hence, *indebitatus assumpsit* does not lie on a bill of exchange by payee against the acceptor, nor on a promissory note, guarantee, or wager (Borcy v. Castlereag, Ld. Raym. 69; Com. Dig. Act. Ass. A 2); for, there is an express contract which creates the debt, and that contract must be declared on specially. But *indebitatus assumpsit* lies on an Irish (Vaughan v. Plunkett, 3 Taunt. 85; Harris v. Saunders, 4 B. & C. 411; see Guinness v. Carroll, 1 B. & Ad. 459) or foreign judgment (Plaislow v. Van Uxem, Doug. 513); though not on a judgment of the courts at Westminster, as that is matter of record. And where work has been done or services performed under a written agree-

ment, *indebitatus assumpsit* for work and labour lies (see *post*, "WORK AND LABOUR"). So, it lies for use and occupation, though the deft. hold under a written agreement, if it were not under seal (see *post*, "USE AND OCCUPATION"). When the amount of a bill of exchange, may be recovered on the common counts, see *post*, "BILLS OF EXCHANGE."

Where, in *indebitatus assumpsit*, the plt. by his declaration claims one sum for work, &c., money paid and had and received, the whole forms only one count (*McGregor v. Graves*, 3 Ex. 34; 18 Law J. 109). Where, therefore, the latter part of the declaration was bad for not alleging that the money was paid, &c., at the request of the deft.: held, after a general verdict for the plt., that the defect in the declaration was no ground for arresting the judgment (*Ib.*).

Form of Count.] The form of an *indebitatus* count is now given by Rule of Court (see "FORMS," *post*). The *quantum valebat* and *quantum meruit* counts are abolished. There is, it will be observed, no prefatory inducement. They state, that deft. was, *on a certain day*, indebted to plt. *in a certain sum*, for (a given consideration); and that, in consideration thereof, he promised to *pay it on request. No *venue* should be [*183] inserted in the body of the count (*R. G. H. 4 Will. IV. pl. 8*). The precise date is immaterial, though, if no time be stated, the count will be demurable (*Ring v. Roxborough*, 2 C. & J. 418; but, as the plt. cannot give in evidence any demand accruing *after* the day mentioned, it is usual and proper to allege the day *before* the date of the writ when the action is between the contracting parties; where it is brought by or against an executor, or by an assignee, &c., the day before the death, bankruptcy, &c. The precise amount is also immaterial. It must be stated for what cause the debt or duty became due, in order that it may appear to the court to be matter whereon an *assumpsit* may be founded, or wherein the deft. may demur, or move in arrest of judgment (*Rooke v. Rooke*, Cro. Jac. 206; *Foster v. Smith*, Cro. Car. 31). But a very general statement suffices; as for goods then sold and delivered, without specifying what they were: and recent decisions show, that the word "then," or any statement of time in this part of the count is unnecessary (*Webb v. Baker*, 7 Ad. & E. 81; *Lane v. Thelwall*, 1 M. & W. 140; *Derligner v. Fenna*, 7 M. & W. 439; S. C. 9 Dowl. 244; *Leaf v. Lees*, 4 M. & W. 579; S. C. 7 Dowl. 189); even in a count upon an account stated (*Bingley v. Durham*, 1 P. & D. 58; S. C. Ad. & E. 775; *Leaf v. Lees*, *supra*, *semble*, overruling *Ferguson v. Mitchell*, 2 C. M. & R. 687). It is in most cases, except in counts for money had and received, and in an account stated, essential to aver, that the consideration arose at the deft.'s request, and the omission of these words, where necessary, would be fatal (*Hayes v. Waner*, 2 Str. 933; 1 Saund. 264; Cro. Jac. 18); though such request may, in some cases, be implied in evidence (see "MONEY LENT," &c.; 1 Saund. 264, n. 1; *Durnford v. Messiter*, 5 M. & S. 446; *Friche v. Poole*, 9 B. & C. 543). Several debts due in respect of different contracts not under seal, of the same or a different nature as demands for work and debts for goods, moneys lent, &c., may be included in one count of this description, and the plt. will succeed *pro tanto*, though he only prove one of such contracts (2 Saund. 122, n. 2). If one of the subject-matters be improperly stated, the deft. should not demur to the whole, but only to the insufficient part of the count or declaration (*Ring v. Roxbrough*, *supra*). Under an *indebitatus* count the plt. may recover what may be due to him, although no specific price or sum was agreed upon (2 Saund. 122 a, n. 2).

Promise.] The statement of a promise to pay is essential, and the want of it is objectionable on special, and perhaps even on general demurrer, or in arrest of judgment (see *Lee v. Welch*, 2 Str. 793; *Com. Dig. Act. Ass. H*; *Harding v. Hibel*, 4 Tyrw. 314; *Hayter v. Moat*, 5 Dowl. 298; *S. C.* 2 M. & W. 56; *Head v. Baldrey*, 2 N. & P. 217; but see *Griffith v. Roxborough*, 2 M. & W. 734; *Starke v. Cheeseman*, 1 Ld. Raym. 538; *Wegerslofe v. Keene*, 1 Stra. 224). Where a count stated an agreement between plt. and deflt., but omitted the mutual promises, the court held that an agreement was a promise (*Mountford v. Horton*, 2 N. R. 62; see *Corbett v. Packington*, 6 B. & C. 268). No distinction exists between pleading an implied promise and an express one (1 Ch. Pl. 309; see *Starke v. Cheeseman*, *supra*; *Anon.* 6 Mod. 131; *Kinder v. Paris*, 2 H. Bl. 563, n. a); and it should be alleged to have been made *after* the debt accrued, and on a day prior to the commencement of the action; but, where the day mentioned was one subsequent to the date of the writ, the Court refused to arrest the judgment (*Arnold v. Arnold*, 3 Sc. 547; 5 Dowl. 203; 3 B. N. C. 81).

The usual allegation is, that "afterwards, to wit, on the day and [*184] year aforesaid, deflt. promised." In strict form, the promise should be stated to have been made to the *plt.*, but these words are not material in an *indebitatus* count, as it there appears that the consideration moved from the plt. (*Com. Dig. Act. Ass. A*, 5; *Jones v. Owen*, 5 Ad. & E. 222; *Banks v. Camp*, 9 Bing. 604; *S. C.* 2 M. & Sc. 734); otherwise the objection would be fatal (*Price v. Easton*, 1 N. & M. 303; *S. C.* 4 B. & Ad. 433). The form states the promise, under a "whereas" (see *Ring v. Roxburgh*, 2 C. & J. 418); but the omission of this word is not a ground of demurrer (*Com. Dig. Act. Ass. H*; see *Shepherd v. Goshen*, 4 Jur. 578). Where, (after stating a former agreement for the sale of goods by the deflt. to plt., at a certain rate or price per pound, to be paid in a manner then stipulated between them, the goods to be delivered by the deflts. to the plts. at a time which had elapsed before making the promise thereafter mentioned, but which goods had not been delivered) the declaration stated a new contract, that, in consideration the plt. would still receive and pay for the goods at the rate or price and in manner aforesaid deflt. promised to deliver the same within such reasonable time as aforesaid, held, too general, and bad on special demurrer (*Andrews v. Whithead*, 13 East, 102; see *Reading (Mayor) v. Clarke*, 4 B. & A. 268; but see *Royle v. Bagshaw*, *Cro. Eliz.* 149; *Com. Dig. Ass. H*, 3). Lastly, the promise upon an *indebitatus* count should be, to pay "on request." A promise to pay at a future time, unless some new consideration be shown, is bad on general demurrer (*Hopkins v. Logan*, 5 M. & W. 241; 7 Dowl. 360; but see *Davies v. Wilkinson*, 2 P. & D. 256; see *Roscorla v. Thomas*, 2 G. & D. 508; 6 Jur. 929). The day of the promise is immaterial in general (*Arnold v. Arnold*, 3 B. N. C. 81).

Breach.] The breach must be co-extensive with the promise, but a general allegation that the deflt. "has not paid any of the said moneys," suffices; though there is a count on a bill of exchange, as well as the common counts (*Turner v. Denman*, 4 Tyr. 313); and, a breach in this form was held good, in an action by executors laying the promise to the testator, the objection being, that it should have averred non-payment to the testator in his lifetime, and to the plts. since his decease (*Debenham v. Chambers*, 3 M. & W. 126; *S. C.* 6 Dowl. 101). In an action by assignees in that character a breach that the deflt. did not pay the plts., without alleging *as* assignees, is sufficient on special demurrer, and indeed proper and preferable, (*Cobbett v.*

Cockrane, 8 Bing. 17). The R. G. T. 4 Will. IV. prescribes a concise form of breach of one or more *indebitatus* counts (see *post*).

Damages.] The damages should be stated at an amount sufficient to cover the plt.'s demand, as the jury cannot give more.

Special Counts.] Wherever the action is brought for the non-performance of a contract, either express or implied, as distinguished from an action for the recovery of a debt, the declaration must be special, and must set out the contract, and the particular breach which is complained of. In many instances, it is advisable to declare specially; as in actions against agents for not accounting for goods, or the proceeds of goods, entrusted to them; or for not using due care in selling: though declaring specially for unliquidated damages will exclude a tender or set-off, or even the defence of bankruptcy (see *Colson v. Welsh*, 1 Esp. R. 380; *Hardcastle v. Netherwood*, 5 B. & A. 93; *Hutchinson v. Reid*, 3 Camp. 329). But, it seems, if on such count the plt. prove a cause of action, which is *also proveable upon the common counts as a debt, the set-off is not excluded (*Birch v.* [*185] *Dessyster*, 4 Camp. 385).

Where the declaration contained one special, and several general counts; and to the former deft. pleaded several special pleas, and to the latter the general issue; and plt. entered a *nolle prosequi* as to the special count, and joined issue on the plea to the others: held, that he was entitled to recover on the general counts, although the matters proved might have been given in evidence and investigated on the special count and the pleas thereto (*Hayward v. Kain*, 1 M. & M. 311). A. sells goods to B., to be paid for partly in cash, and the residue in bills at intervals of three months each. The payment of the money and the delivery of the bills do not constitute a condition, so as to entitle A., upon non-payment of the money and non-delivery of the bills, to sue as for goods sold and delivered, without waiting the expiration of the credit. Nor can such action be maintained for the amount of the stipulated cash payment. A.'s remedy is by special action on the express contract (*Paul v. Dod*, 2 C. & B. 800).

Several Counts.] The first count stated that in consideration of the plt. having at the deft.'s request contracted to sell H. certain shares, of which deft. was registered holder, deft. promised to deliver to plt. all new shares allotted in respect of the shares so sold, as long as deft. continued to be registered holder, and to indemnify against all loss in respect of breach of former promise. Breach, that certain shares were allotted to deft. which he would not deliver, and that by reason thereof plt. was obliged to lay out money in the purchase of other similar shares, in order to fulfil his own contract. Held, that such a count might be joined with one for money paid (*Simpson v. Rand*, 5 D. & L. 389.)

Inducement.] In special counts it is frequently necessary, in order to render the statement of the contract intelligible, to commence the same by a prefatory statement, which is called *inducement*. The matter of such inducement may, indeed, be stated in any part of the declaration, but it will be found most advisable to state it preparatory to the contract itself, or any other matter (see *Taverner v. Little*, 5 B. N. C. 678; *Lewis v. Alcock*, 3 M. & W. 188). But where a variety of facts preceded the contract, and are so connected with it that the statement of them is necessary to render the count intelligible, it is better to adopt a formal inducement in the begin-

ning (*Dartnell v. Howard*, 4 B. & C. 345). Thus, in assumpsit for not performing an award, the declaration states, that there were differences between the parties, before it states the submission and promise to perform the award (*post*, "AWARD"). And so, on a contract to pay money upon a consideration of forbearance, the debt forborne and proceedings stayed should be stated (*Jones v. Ashburnham*, 4 Ea. 455; *Marshall v. Buckenshaw*, 1 N. R. 172). So, in actions against persons whose character or situations create certain liabilities, as actions against wharfingers, carriers, coach-owners, attorneys, captain of a ship, innkeepers, &c., it is usual, and proper to state, by way of inducement, that they were employed in those characters (*Powell v. Layton*, 2 N. R. 365; *Max v. Roberts*, 12 Ea. 94; *Bretherton v. Wood*, 3 B. & B. 4; *Pozzi v. Shipton*, 1 P. & D. 4; *Dartnell v. Howard*, 4 B. & C. 345; *S. C. 6 D. & R. 438*). If no such allegation be contained in the declaration, the debt cannot be charged thereon for a breach of duty which results only from the particular character which he held, and in reference to which he was retained (*Dartnell v. Howard*, *supra*); but, when the consideration and promise explain themselves, without reference to any collateral matter, no inducement need be stated; as in actions on policies of insurance, bills of exchange, foreign judgments, &c.

Mere matter of inducement need not be stated with such precision and certainty, as matter which constitutes the true substance or gist of the action itself. But it must be stated with a certainty sufficient to explain the contract, and certainty to a common intent is enough, especially if it be matter of an executed or past consideration (*Com. Dig. Pleader, C, 31, 43, E, 10, 18*; *Gwinnet v. Phillips*, 3 T. R. 646, per Buller, J.; *Andrews v. Whitehead*, 13 East, 116; *Biggs v. Ballingham*, Cro. Eliz. 715; *Steph. 328, 409*; *Coxe v. Jennings*, *Yelv. 17). Thus, where an agreement with a

[*186] third person is stated only as inducement to the debt's promise, which is the gist of the action, it is sufficient to state such agreement, without certainty of name, place, or person (*Coxe v. Jennings*, *supra*). So, in declaring on a promise to pay money, in consideration of the forbearance of a preceding debt, though some cause of action must be alleged, it is not necessary to state the particular cause or subject-matter of the debt, or the time when, or place where, it was contracted (*Woollaston v. Webb*, Hob. 18). In an action against a carrier for the loss of goods, the usual inducement as to the delivery of the goods to him, need not contain an exact description of such goods (2 Saund. 74 a). In declaring on a parol submission to an award, it does not seem necessary to state the cause of dispute (2 Saund. 61 h, n. 1). But where the inducement disclosing a past consideration also professes to state some matter material to be ascertained with certainty it must be stated with precision and accuracy (*Andrews v. Whitehead*, *supra*); therefore where, in assumpsit for not accepting a lease, the inducement charged that the plt. was possessed of the premises for a certain term ending on a day named, and the proof showed that he had only a shorter term; held, a fatal variance (*Routledge v. Grant*, 4 Bing. 653; see *Carrick v. Blgrave*, 1 B. & B. 536).

Inducement should be according to its Legal Effect.] The matter of the inducement should be stated in the substance, according to the legal effect, and substantially agree with the facts of the case (*Winter v. White*, 3 Moo. 673, 695). It should not be stated merely as a matter of description, for fear of a variance, as it is a rule that allegations of substance must be substantially proved, but allegations of description literally (*Stoddart v. Palmer*,

3 B. & C. 4; S. C. 4 D. & R. 624; see *Bevan v. Jones*, 4 B. & C. 403). Where, in assumpsit for not indemnifying plt., in consequence of his having become bail for A. in an action at the suit of B., it was stated that B. (in Mich. Term, 58 Geo. III.) recovered of plt., the judgment given in evidence was in Hilary Term, it was held that this was no variance, as it was not matter of description, but an allegation in substance, that the judgment had been obtained before the commencement of the action (*Phillips v. Shaw*, 4 B. & C. 435; and see *Stoddart v. Palmer*, 3 B. & C. 2; S. C. 4 D. & R. 624; *post*, "CASE"). On the other hand, in an action on a promise to pay the costs of an action, in consideration of plt.'s staying the proceedings therein, the court in which the action was depending must be accurately described (*Impey v. Taylor*, 3 M. & S. 166).

Must be proved strictly, if stated as Part of Contract.] If the inducement be so stated as to constitute a part of the contract itself, it must be proved strictly, in the same way as the contract should be proved: so, where the price of goods was stated in matter of inducement, and the declaration afterwards, stating the contract itself, and the price of those goods referred to the price stated in the inducement, which was not the real one, it was held a fatal variance (*Andrews v. Whitehead*, 13 Ea. 102).

When Inducement need not be strictly proved.] In all cases, care should be taken not to insert any more than is absolutely necessary; for, though an immaterial averment, which is wholly impertinent, and may be rejected as surplusage, need not be proved (*Winn v. White*, 2 Bla. 840; *Bristow v. Wright*, Doug. 667; *Bromfield v. Jones*, 4 B. & C. 380; *Peppin v. Solomons*, 5 T. R. 498; **Turner v. Eyles*, 3 B. & P. 463; *Bourne v. Diggles*, 3 Chit. Rep. 311); yet, if it by the statement becomes [*187] relevant to the action, or, is so mixed up with a material averment that it cannot be readily separated therefrom, and rejected as surplusage, the plt. will be compelled to prove it *substantially*; and, if it be stated as matter of *description*, he will be bound to prove it *literally* (see 1 Ch. Pl., 6th ed. 298; *Williams v. Allison*, 2 East, 446; *Stoddart v. Palmer*, 3 B. & C. 4; 4 D. & R. 624; see further, as to what is a variance, *post*, and the different titles, *Peppin v. Solomons*, 5 T. R. 498; *Gwinnett v. Phillips*, *supra*). Thus, in an action against an attorney for negligence, in not proceeding to judgment in due time against a prisoner, whereby she escaped, and the declaration averred that such prisoner *was indebted to plt.* on promises, &c., and that plt. retained debt. for the recovery of the debt, but it appeared on the trial that the averment was not true, as it was proved that the prisoner was a married woman, and therefore was incapable of contracting a debt, the plt. was nonsuited; though, had the declaration been framed to meet the question, plt. might perhaps have recovered (*Lee v. Ayrton*, Pea. 119; *Gunter v. Cleyton*, 2 Lev. 85; *Alexander v. Maccauley*, 4 T. R. 611). And even material matter laid in an inducement need not be proved precisely as alleged when stated under a *videlicet*; thus, where in an action to recover from debt, a debt due from a third person which debt. promised to pay in consideration of forbearance, the sum was stated, in the inducement under a *videlicet*, to be 26l. 13s. 6d., and was described as a balance of a larger sum, and the statement of the contract referred to the sum so alleged in the inducement to be due, but only 26l. was due as the balance; held immaterial (*Bracey v. Freeman*, 2 Moo. 114; *Carrick v. Blagrove*, *supra*).

By the operation of the pleading rules (H. T. 4 Will. IV.) the *inducement* is in all cases admitted, unless it be specially traversed by the debt.'s plea,

the plea of *non assumpsit* denying only the *contract* alleged (see *Dakes v. Gostling*, 3 Dowl. 619; *Frankum v. Falmouth*, 3 Nev. & M. 330; *post*).

The Contract.] Next to the inducement, where an inducement is necessary, follows the statement of the contract itself, which may be considered as consisting of two parts, viz. the consideration and the promise, and these it is necessary to state fully and correctly, or the plt. will fail, unless the judge exercise the powers of amendment under the statute 3 & 4 Will. IV. c. 42 (see *ante*, "AMENDMENT").

1. The whole of the consideration must be stated (see per Lord Ellenborough, *Clarke v. Gray*, 6 East, 568; *Miles v. Sheward*, 8 East, 7; *King v. Robinson*, Cro. Eliz. 79; *Leeds v. Burrows*, 12 East, 1; *Andrews v. Whitehead*, 13 East, 102). Where in *assumpsit*, on the warranty of a horse, the declaration described the transaction as a sale of one horse, and it appeared that two horses had been sold at an entire price, and upon a joint warranty, the variance was holden fatal, as the purchase of the two horses constituted the consideration for the warranty (*Symonds v. Carr*, 1 Campb. 361). So, where in an action by an outgoing against an incoming tenant, the declaration alleged that in consideration that plt. would relinquish to the deft. certain hay, the deft. promised to pay so much as certain valuers mentioned should appraise it at, and it was proved to be part of the agreement, that the appraisers were also to estimate the value of repairs for gates and fences, which the plt. was to make good, the variance was holden fatal (*Leeds v. Burrows*, 12 East, 1; see 1 Leon. 300; *Simms v. Westcott*, Cro. Eliz.

147; *White v. Milton*, 2 B. & P. 716). So, where it was part of [*188] the agreement between landlord and tenant *that the landlord was to keep the premises insured, and to rebuild in case of fire, a declaration against the tenant for not repairing was holden defective for want of including these terms as part of the consideration, and the plt. nonsuited (*Beech v. White*, 4 P. & D. 399; 12 Ad. & E. 668; S. C. 5 Jur. 116). And where the consideration for a warranty was alleged to be the purchase of a horse for 55*l.*, and it appeared in evidence that in certain events the defts. was to return part of the price, the plt. was nonsuited for want of this qualification being stated (*Blyth v. Bampton*, 3 Bing. 472; see *Hands v. Burton*, 9 East, 349; *Vansandau v. Burt*, 5 B. & A. 44). And if any part of the consideration be shown to have failed, the plt. will be nonsuited (*Head v. Baldrey*, 2 Nev. & P. 217). And it is also imperative that the consideration stated should be proved to the extent alleged; and in general, when the consideration proved falls short of that stated in the declaration, as the foundation for the promise, the variance will be equally fatal as when the proof exceeds the statement. A declaration by husband and wife and a third person stated that, by an agreement between the plts. and deft., the plts. agreed to let to deft. certain lands, that deft. became tenant, and stated mutual promises, the agreement proved was made by an agent on behalf of the wife and the third party only, but it appeared that the husband had subsequently received rent from the tenant; held, that to support the above allegation it ought to be proved that the husband was a contractor *ab initio*, and as that did not appear the variance was fatal (*Saunderson v. Griffiths*, 5 B. & C. 939). 1. An indorsement, written and signed after the agreement to which it was annexed, purported to guaranty the performance of the covenants and conditions of that agreement, but there was evidence to show that the guarantee was from the first agreed on between the parties: held, that the agreement and subsequent indorsement formed but one entire contract, and that therefore the latter did not require a separate consideration. 2. It being part of the agreement that the plt. should pay the first instalment of a certain sum on a given

day: held, that a verbal agreement to postpone the day was sufficient (*Coldham v. Showler*, 2 Car. & Kir. 261).

A bankrupt took certain premises under lease, which provided that any greenhouse erected by him should belong to him, and not to his lessor. He afterwards transferred to the defendant, by a verbal contract, the lease in question, a greenhouse erected by him, together with the furniture and plants therein, of all which the defendant took possession: held, in an action by the plts., as assignees of the bankrupt, to recover the price thereof, that they were entitled to recover the value of the furniture and plants, but not of the greenhouse, as the contract was entire, and no valid assignment of the lease had been made to the deft. (*Sleddon v. Cruikshank*, 16 Law J. 61, Exch.).

But where part of the consideration is frivolous or insufficient, viz., such as, if it stood alone, would not support an *assumpsit*, that part need not be stated, or, if stated, it will not vitiate if the residue is good (Com. Dig. Action, Assumpsit, B. 13; *Crisp v. Gamel*, Cro. Jac. 127; *King v. Sears*, 2 C. M. & R. 48; *Ring v. Roxbrough*, 2 C. & J. 418; R. & P. 147; see *Saunderson v. Griffith*, 5 B. & C. 909); otherwise, where part of the consideration is the doing an unlawful act (Com. Dig. *ubi supra*; *Featherstone v. Hutchinson*, Cro. Eliz. 199; *Rawson's case*, 4 Leon. 3; *Morris v. Chapman*, Jon. 24). See *Norton v. Simmes*, Hob. 14; *Newman v. Newman*, 4 M. & S. 69; as to distinction between illegality at common law and by statute.

So, where the action is brought on an agreement containing a *variety of stipulations on both sides, it is not necessary, or proper, [*189] to set out the whole. It is sufficient to state so much of any contract, consisting of several distinct parts and collateral provisions, as contains the entire consideration for the act, and the entire act, which is to be done in virtue of such consideration (*Clarke v. Gray*, 6 East, 569; *Tempest v. Rawling*, 13 East, 18; *Ward v. Smith*, 11 Price, 19). Where the declaration averred that by a certain agreement plt. and deft. did, "amongst other things," agree, &c.; held, that the omission to set out the whole was no ground of nonsuit; but that it would have been a fatal variance had it appeared that those parts of the agreement not set out amounted to conditions precedent (*Clarke v. Morrell*, 2 Sc. N. R. 17; 1 M. & G. 841; S. C. 9 Dowl. 461; see also *Kemble v. Miles*, 2 Sc. N. R. 121; 1 M. & G. 757; S. C. 9 Dowl. 446).

In actions on bills of exchange, bankers' cheques, and promissory notes, instruments which of themselves import consideration, it suffices merely to set out the instrument, without showing on what account it was given, even though the consideration appears on the face of the document (*Coombs v. Ingram*, 4 D. & R. 211; see "BILLS OF EXCHANGE"). So, in an action on a foreign judgment. But a declaration on a guarantee, or, other collateral contract, must show a sufficient legal consideration (see *post*, "GUARANTEE").

2. The consideration must be stated with such convenient particularity that the court may see it is such an one as can be enforced, and upon which the jury can assess damages. Therefore, in an action for not delivering goods purchased, an allegation that the defts. had agreed to deliver them "at a certain rate or price per pound, to be paid in a manner then and there fixed and stipulated between the plt. and the deft." was holden bad in demurrer for not specifying the price, for the damages would be estimated by the difference between their actual value and the price agreed upon (*Andrews v. Whitehead*, 13 East, 102). But in a similar case, held sufficient after, verdict (*Ward v. Harris*, 2 B. & P. 265). And yet the price, if mentioned under a *videlicet*, need not have been precisely proved (*Ib.*). And where the agreement was alleged to have been to deliver the goods at a reasonable price, and the proof was that they were to be delivered at from 24s. to 26s.

it was held as a specific price was not agreed on, the allegation was sufficient (Laing v. Fidgeon, 6 Taunt. 108). On the other hand, in actions against carriers for loss of goods, against attorneys, &c., for negligence, it is sufficient to say, that they undertook, &c., "for reasonable reward," without stating any amount, as in these cases the amount of damages has no reference to the quantum of reward (2 Ch. Pl. 303, 307; see Andrew v. Whitehead, 13 East, 114, n.; Bayley v. Tucker, 3 N. R. 458; Whitehead v. Greetham, 2 Bing. 464); and it seems it will not amount to a variance if it appear by the evidence that a specific sum was agreed upon (Bayley v. Tucker, 2 N. R. 458). So, in a declaration on a contract to restore plt.'s goods in consideration of his giving the deft. two warrants of attorney, it is not necessary to set out the warrants of attorney (Radford v. Smith, 6 Dowl. 381; S. C. 3 M. & W. 254; Dalston v. Janson, 3 Ld. Raym. 115). In actions upon contracts to pay the debt of another, the time of forbearance must be stated (Fish v. Richardson, Cro. Jac. 47; 1 Rol. Abr. 24, pl. 33), and the amount of the debt forborne; but the nature of the debt need not be stated, nor will the sum alleged be material, if stated under a *videlicet* (Bray v. Freeman, 8 Taunt. 197; S. C. 2 Moo. 114).

A declaration in *assumpsit* alleged, that while certain differences were pending between the plt. and deft. respecting some claims of *the [*190] plt., to deduction from a sum of 29,700*l.* to which the deft. was entitled, it was agreed between them by deed that that sum should be paid to trustees for the benefit of the deft., and the matters in difference referred to arbitration, the costs to abide the event. The declaration then stated, that the parties afterwards, with the consent of the arbitrator, agreed, that, on the immediate payment of 200*l.* by the deft. to the plt., in full satisfaction of his claims, the reference should cease, and each party pay his own costs; and alleged, as a breach, the non-payment by the deft. of this sum of 200*l.*; held, that the action was maintainable, as there was a sufficient consideration for the new promise, and that it was not like the case of an accord without satisfaction (Smyth v. Holmes, 10 Jur. 862, Exch.). An agreement, by which, in consideration that the prosecutor of an indictment preferred against certain persons for an assault and riot would not proceed further on the indictment, the defts. promised to pay him a sum of money, is illegal, although the prosecutor forbore to give evidence on the indictment with the knowledge and assent of the court before which the indictment was pending. In all offences which involve damages to an injured party, and for which he may maintain an action, he may, notwithstanding they are also of a public nature, settle his private damage in any way he may think fit; but a compromise of an assault, coupled with riot, is not legal (Keir v. Leeman, in error, 15 Law J. 194, M. C.). A. made an agreement with the plts. to serve them at all times, during the term of seven years, as a crown-glass maker, and that he would not, during the said term, work for any other person, at any other glass-house or other place of business, without the license of the plts.; that, during any depression of trade, he should be paid a moiety of his wages; that if he should be sick, the plts. should be at liberty to employ any other persons in his stead, without paying him any wages; that the plts. should pay him certain wages as long as he should continue and be employed as a crown-glass maker, and 8*l.* per annum, in lieu of house-rent and firing; and that they should have the option of dismissing him from their service on giving him a month's notice: held, that this contract showed an undertaking on the part of the plts. to employ A.; that it contained a good consideration; and that was not void on the alleged ground of its being in restraint of trade (Pilkington v. Scott, 15 Law J., 329, Exch.).

The consideration is, in the language of pleading, either *executed* or *executory*, viz. something *already done* or *to be done* by the plt. It is not, as a

general rule, necessary to state an *executed* consideration with so much precision as an *executory* one with reference to time and place, nor as to quantity, quality, value, &c. (see *Andrews v. Whitehead*, *sup.* Steph. 328, 409; 1 Ch. Pl. 302). It must, however, be alleged that the *executed* consideration arose at the deft.'s request (1 Saund. 264, n. 1; *Hayes v. Warren*, 2 Str. 933; *Hunt v. Bate*, Dyer, 272; see *per Parke, B.*, in *King v. Sears*, 2 C. M. & R. 53; *Thornton v. Jenyns*, 1 Sc. N. R. 52); though such request may in some cases be implied in evidence. Thus, where deft. has derived benefit from the consideration, and has afterwards made an express promise to the plt., or has recognised the plt.'s acts, and it is only necessary in cases of executed consideration to state that the consideration for the deft.'s promise moved at his request (*King v. Sears*, 2 C. M. & R. 48; 1 Saund. 264, n. 1; as to the value of an executed consideration, see *post*). Where the plt. has performed his part of the contract he has the option of stating it either as an *executed* or *executory* consideration (see *Shuter v. Horlock*, 1 Bing. 34; *Payne v. Wilson*, 7 B. & C. 423, and *infra*; see Ch. Contr. [*191] 62). On an executed consideration the law implies a promise to pay immediately on request, so, such consideration will not support a promise to pay in future (*Hopkins v. Logan*, 5 M. & W. 241; 7 Dowl. 366).

When the consideration is stated as *executory*, a greater degree of certainty is required (1 Saund. 264, n. 1); and plt. must aver a performance before action, or a readiness and willingness to perform, which must be alleged with proper certainty as to time, &c. (B. N. P., 146 a; *Ring v. Roxbrough*, 2 C. & J. 418; see *post*, p. 201). There is an advantage with reference to the new pleading rules in stating the contract as an *executory* one, because then the performance must be specially denied, otherwise it will stand admitted (*Gibson v. Harris*, 8 C. & P. 378; whereas, if it be alleged as *executed*, *non assumpsit* puts in issue the performance as well as the contract (Ch. Contr. 63)).

Declaration in *assumpsit* stated that in consideration of the plt.'s agreeing to stay proceedings in an action against B., the deft. promised to pay the amount, upon a certain event. Averment, that the plt. did stay proceedings; that the event happened, but that deft. did not pay. At the trial, the plt. proved the following agreement, in writing:—"In consideration of the plt.'s having agreed to stay proceedings against B., I hereby undertake to pay the sum," &c.: held, that the contract was an executory contract, a continuing agreement to stay proceedings, and therefore that there was no variance (*Tanner v. Moore*, 15 Law J. 391, Q. B.). Where the father of an illegitimate child, in order to prevent the mother from applying to the magistrates for an order in bastardy, promised to pay her 2s. 6d. per week for the child, and the time for going before the magistrate had expired before action brought without any application having been made: held, that *indebitatus assumpsit* lay at the suit of the mother against the father for the child's maintenance, the consideration, which was originally executory, having been executed (*Linegar v. Hodd*, 17 Law J. 106, C. P.).

In the case of a continuing consideration the declaration generally states that in consideration that the deft. had become, and was tenant to, the plt. of certain land, &c., he undertook during the continuance of the tenancy to use the premises in a tenant-like manner, &c., averring a continuance of the tenancy and breach (*Pawley v. Walker*, 5 T. R. 373; *Mussen v. Price*, 4 East, 150; 1 Ch. Pl. 304). But the promise must not be stated to be more extensive than the law would support (*Brown v. Crump*, 6 Taunt. 300; *Granger v. Collins*, 6 M. & W. 400).

3. The contract may be stated either according to the fact, or according to its legal effect. Hence the omission of matters which, though forming

part of the actual consideration, were idle or void, and therefore had no legal operation, does not vitiate (*supra*). Where the declaration alleged that in consideration that the plt., at the request of deft., *had* shipped on board deft.'s vessel certain goods, deft. undertook to carry them safely, and it appeared that the contract was made *before* the wheat was shipped, the court held, that upon the receipt of the goods, in pursuance of the previous contract, a duty arose to deal with them accordingly, and an implied promise to perform that duty, and that the plt. might therefore declare upon that promise as made upon an *executed* consideration, or upon the contract as an *executory* one, with an averment that he did afterwards ship the goods (*Stueta v. Horlock*, 1 Bing. 34). On the other hand, an allegation that, in consideration that the plt. *would consent* to stay proceedings against A., deft. promised to pay, was held sufficiently proved by a paper stating **"the plt. having at [*192] my request consented, to stay,"* &c., as the request must have preceded the consent (*Payne v. Wilson*, 7 B. & C. 423). The words "I agree to pay," in an instrument given in evidence in an action on an account stated may import consideration (*Davies v. Wilkinson*, 2 P. & D. 256).

4. The deft.'s contract, or promise, the breach of which is complained of, must be positively and distinctly alleged. If this be omitted, the declaration will be bad on demurrer, or in arrest of judgment, as where it was alleged that, in consideration that plt. would surrender a term, deft. "*solvere vellet 10l.*" without stating any promise (*Buckler v. Angill*, 1 Lev. 164; *S. C.* 1 Sid. 246; *Lee v. Welsh*, 2 Ld. Raym. 1517; 1 Rol. Abr. 8, m. pl. 1; *Chandelor v. Lopes*, Cro. Jac. 4). So, where the name of the deft. was omitted in the statement of the promise the judgment was arrested (*Law v. Saunders*, Cro. Eliz. 913). But where there were two other counts, in each of which it was averred that *the deft.* promised; the court applied the same nominative to a *third* count, in which deft.'s name was omitted (*Roe v. Gatehouse*, 2 Salk. 663; 5 Mod. 305; see *Carth.* 309; and *Shore v. Brown*, 1 Salk. 27). The plt. can only recover upon the promise alleged, therefore, if that be bad or insufficient in law, the court cannot give judgment for him, though it appear on the record that he has a good cause of action, if it be different from that for which he has proceeded (*Head v. Baldrey*, 2 N. & P. 217; *S. C.* 6 Ad. & E. 459; see *Marsh v. Bulteel*, 5 B. & A. 507). The second count stated an agreement, by which the plaintiff was to receive from the company a salary in lieu of rendering a bill of costs for general business done by him as their attorney and solicitor, and alleged, that, in consideration that the plt. promised the company to perform the agreement, which was in the first count alleged to be to retain and employ plt. as permanent solicitor, in all things on his part, the company promised the plaintiff to perform the same in all things on their part, and to retain and employ him as attorney and solicitor of the company. The count assigned as a breach, the dismissal of the plaintiff from such employment, alleging also, that the company had, since such dismissal, refused to retain or employ him as such attorney, or to pay him the salary: held, bad in arrest of judgment, there being no consideration for the promise to retain and employ. Held, also, that even if there was a good breach for the non-payment of the salary, there was no necessity for a *venire de novo*, though general damages had been assessed on this count, inasmuch as the promise could not be severed, and there was no consideration for the entire promise (*Elderton v. Emmens*, 16 Law J. 209, C. P.; 11 Jur. 612). Allegation that a person since deceased was indebted to plt., and that after the death, in consideration of the premises, and that the plt., at deft.'s request, "would give time for the payment of the debt, deft. promised," &c., not stating that there was any person liable in respect of assets,

or otherwise, to be sued by the plt., for the debt, and to whom he gave time: held, insufficient on demurrer, for neither benefit nor detriment was shown to the deft. or plt., as it was not stated that any one was liable to be sued, or that plt. had suspended the enforcement of any right (*Jones v. Ashburnham*, 5 East, 455). So, where it was alleged that in consideration that the plt. would retain and employ the deft. to lay out a sum of money in the purchase of an annuity, and the latter undertook to do his duty in the premises, and plt. retained deft., but he neglected to do his duty, and took an insufficient security: held, bad in arrest of judgment, for not showing that any reward was to be paid to the deft., nor that he was employed as attorney, or in any particular character *whereby it became his duty not to take a security of an insufficient nature (*Dartnell v. Howard*, 4 B. & C. [*193] 345); see *Whitehead v. Greetham*, 2 Bing. 464, where it was held that a count in assumpsit, that plt. had retained the deft. at his request to lay out 700*l.* in the purchase of an annuity, that the deft. promised to lay it out securely, that plt. delivered the money to him for that purpose, and that deft. did not lay it out securely, contained a sufficient consideration for deft.'s promise after verdict.

The consideration must be co-extensive with the promise. Thus, where the declaration stated that the deft. was liable, as executor, to pay a certain debt, and that in consideration thereof he personally promised to pay the debt: held, bad in arrest of judgment, as no additional consideration was shown for the enlarged responsibility arising from the promise (*Rann v. Hughes*, 7 T. R. 350, n. a). So, a declaration against a husband alone, on his mere promise to pay the debt of his wife contracted before marriage, must show a new consideration, or the judgment will be arrested (*Mitchenson v. Hewson*, 7 T. R. 348). A deed of separation having been drawn up, but not executed by plt.; held, that his executing it was a legal consideration for a promise by deft. to pay certain debts and expenses, for which plt. was solely liable (*Jones v. Waite*, 5 B. N. C. 341). So, where it was stated that in consideration that the plt., at the request of deft., had consented to allow the deft. to weigh two boilers of the plt., the deft. promised to give them up, after weighing, in as perfect a condition as they were in at the time of the consent; holden to disclose a sufficient consideration (*Bainbridge v. Firmstone*, 8 Ad. & E. 743).

In actions on special agreements, it is usual, after setting out the agreement, to allege mutual promises, and perhaps on special demurrer the omission would be objectionable; but no objection can be taken on general demurrer, or after the verdict, as the agreement itself imports a promise (*Mountford v. Horton*, 2 N. R. 62). And in actions against the acceptor of a bill, or maker of a note, the want of such an averment is no objection even on special demurrer (*Donaldson v. Thompson*, 8 Dowl. 209; 6 M. & W. 316). Otherwise, in actions against the drawer, or indorsee (*Henry v. Burbridge*, 4 Sc. 296; 3 Bing. N. C. 501; S. C. 5 Dowl. 484); but even in these cases, the objection must be taken by special demurrer (*Starkey v. Cheesman*, Salk. 128; S. C. Carth. 509; *Wegusloff v. Keene*, 1 Str. 214; *Griffith v. Roxbrough*, 2 M. & W. 734; S. C. 6 Dowl. 133).

It should also be averred that the promise was made to the plt., and where the declaration does not show to whom the promise was made, nor that the consideration moved from the plt., the judgment will be arrested (*Price v. Easton*, 1 N. & M. 303; S. C. 4 B. & Ad. 433; Sty. 255; S. C. Noy, 832; *Coulston v. Carr*, Cro. Eliz. 848). Where a reward is offered to any person who would give such information as should lead to the conviction of a felon, a person giving such information may sue for the reward and allege the promise as made to himself in consideration of giving the in-

formation (*England v. Davidson*, 3 P. & D. 594; 4 Jur. 1032; S. C. 11 Ad. & E. 856). But where it appears that the consideration moved from the plt., it is sufficient to allege the promise without stating to whom (*Com. Dig. Plead. C*, 18; *Jones v. Owen*, 5 Ad. & El. 222; *Banks v. Camp*, 9 Bing. 604; S. C. 2 M. & Sc. 734), as it will be intended that the contract was made with the party from whom the consideration proceeded (*Ib.*; see *Marshall v. Birkenshaw*, 1 N. R. 172). It should be stated also that the deft.'s promise was made "in consideration" of what had been alleged as the plt.'s part of the contract (see *Whitehead v. Greetham*, 2 Bing. 464).

Though the contract were in writing, and required by the statute to be *so, yet it is not necessary so to state it in the declaration (1 [*194] *Saund.* 276 *a*, n. 2; 2 *Steph. Pl.* 3rd ed. 375): this is matter of evidence. There are circumstances which may render it advisable, though not necessary, to state the contract to be in writing (see *Whittaker v. Mason*, 2 B. N. C. 359; see 1 & 2 *Geo. IV. c.* 78; *Chalie v. Belshaw*, 6 Bing. 529; *post*, "BILLS OF EXCHANGE"). Where the promise is to do two things, and as to one it is invalid for want of being in writing, the other cannot be enforced, but the whole action fails (*Chater v. Beckett*, 7 T. R. 201; *Thomas v. Williams*, 10 B. & C. 664; *Head v. Baldrey*, 2 Nev. & P. 217; S. C. 6 Ad. & E. 459). And there is no difference in pleading in the statement of an express and an implied promise.

The contract should be stated according to its legal effect (1 *Ch. Pl.* 312, n. *t*). Thus an agreement, promissory note, &c., made with husband and wife, where the husband sues alone, should be described as made with him, without naming the wife (*Arnold v. Revoult*, 4 Moo. 66; *Ankerstein v. Clarke*, 4 T. R. 616; *Beaver v. Lane*, 2 Mod. 217; see *post*, "HUSBAND AND WIFE"). So a promise made to A., but which comes to B., should be stated as having been made to B. (*Feltmakers' Company v. Davis*, 1 B. & P. 102.) Where it is doubtful whether an agreement amounts to an actual demise or not, the declaration need not allege what it amounts to in law, it suffices to set out the agreement in terms (*Price v. Williams*, 1 M. & W. 6). Where the agreement was "to sell the house and fixtures, No. 163, Piccadilly, to commence from the 1st of January next, for 60*l.*," held, to be an agreement to sell an interest in fee simple, and will not support a declaration alleging a contract for the sale of a dwelling-house and fixtures for the residue of a term of years, although the agreement given in evidence was really intended to convey the latter interest (*Hughes v. Parker*, 8 M. & W. 244). When there exists any doubt as to the legal effect and construction of a written instrument, it seems to be the preferable course to set it out in its precise words (see *Ross v. Parker*, 1 B. & C. 358; 1 *Ch. Pl.* 314; 3 & 4 *Will. IV. c.* 42, s. 23).

The declaration set out a guarantee whereby, in consideration that a banking company would make advances to the deft., the plt. undertook to guarantee the company the payment of sums advanced not exceeding 250*l.* Averment, advances to deft. that he afterwards became bankrupt, and at that time there was due to the company exceeding 250*l.* That, after issuing of the fiat, deft. in consideration of the premises, promised plt. that if he should be called upon by virtue of the guarantee to pay the said 250*l.*, the deft. should repay the same when it should be in his power, notwithstanding he should previously obtain his certificate, and also interest on the said sum, that plt. paid in respect of the guarantee, 250*l.*, of which deft. had notice. Breach, non-payment. Held, no objection to the promise, that it was made before the certificate (*Earl v. Oliver*, 2 Ex. 71); also, that the mere liability to repay the plt. was an equally good consideration to support the promise as an existing debt (*Ib.*); that the conditional promise to pay was good as sup-

ported by the original consideration (Ib), and that the promise to pay interest was supported by the same consideration as the original promise (Ib.).

The construction of a contract, and the meaning of particular words used in it, is for the judge, except in cases where there is evidence that a particular word was used in a sense peculiar to a particular trade or business, or that its meaning depends on the usage of a particular place (*Simpson v. Margetson*, 12 Jur. 155; 17 Law J., Q. B. 81).

Where it was agreed that the plt., an auctioneer, should receive a certain amount of commission, in case a sale of a certain estate should be effected "within two months" of a given day: held, that months; *prima facie*, meant lunar months, and that the subsequent conduct of the parties was not to be looked at to shew that it meant calendar months (Ib.). *Quære*, whether evidence was admissible to show, that, according to the usage of auctioneers, month was considered as meaning calendar month? (Ib.).

The deft. agreed to supply the plt. with 150 tons weight of iron girders, at a certain price per ton, and according to plans to be furnished by the plt. Plans were furnished within a reasonable time from the date of the agreement, and at the same time fourteen tons weight of girders were ordered. Four months after the date of the agreement, the fourteen tons were demanded, and other plans were furnished, and orders given for sixty tons more girders. The deft. then repudiated the contract: held, that the contract was entire; and that, as the plt. had not furnished plans for the whole 150 tons within a reasonable time from the date of the agreement, he could not recover for the non-delivery of the fourteen tons, for which plans had been furnished within a reasonable time from such date (*Kingdom v. Cox*, 12 Jur. 336; 17 Law J., C. P. 155). Where a thing is to be done in a reasonable time, the reasonableness of the time is a question wholly for the jury (*Nelson v. Patrick*, 2 C. & K. 461—Wilde).

Effect of Bad Statement of Consideration.] When plt. states no legal consideration; as, where it is entirely insufficient or void from illegality, it is objectionable on demurrer (*Clipsam v. Morris*, 1 Vent. 9; *Jones v. Ashburnham*, 4 East, 455); in arrest of judgment (*Dartnall v. Howard*, 4 B. & C. 345; 6 D. & R. 438); or writ of error (*Whitehead v. Greetham*, 2 Bing. 464; *Mitchinson v. Hewson*, 7 T. R. 348; see "ILLEGAL CONSIDERATION"). Plt. sought to recover the sum of 50*l.* on an agreement, which was set out in the declaration. It recited that the plt. had for a long time carried on business as a law stationer, and also had been a sub-distributor of stamps, and collector of assessed taxes, and "that, in consideration of 300*l.*, payable by instalments, the plt. agreed to sell, and the deft. agreed to purchase, the business of a law stationer, theretofore carried on by the plt.; and it was thereby further agreed between them, that the plt. should not, after the 1st of March then next, carry on the business of a law stationer, or collect any of the assessed taxes, &c., but that the plt. would use his utmost endeavours to introduce the deft. to the said business and offices," &c.: held, that the agreement was for the sale of an office within the 5 & 6 Edw. VI. c. 16, and that the declaration was therefore bad (*Hopkins v. Prescott*, 16 Law J. 259, C. P.; 11 Jur. 562). But, if the consideration be merely alleged insufficiently, it should be objected to by special demurrer (*Whitehead v. Greetham*, 2 Bing. 464); and, where it is untruly stated, it will be a ground of nonsuit as a variance (*King v. Robinson*, Cro. Eliz. 79; *Miles v. Sheward*, 8 East, 7). An uncertain or informal statement of the consideration is cured by verdict (*Sty.* 304; *Jones v. Ashburnham*, 4 East, 464; *Ward v. Harries*, 2 B. & P. 265; *Whitehead* [*195]

v. Greetham, M'Cle. & Yo. 205). The objection should be raised by special demurrer (Jones v. Ashburnham, 4 East, 455; Andrews v. Whitehead, 13 East, 102. As to what is a sufficient consideration, see Chit. Contr. 30 *et seq.*; 2 Bing. 468). The main rule seems to be, that it may arise either, first, by reason of a benefit resulting to the party promising, or, at his request, to a third person, by the act of the promisee: secondly, on the latter sustaining any loss or inconvenience, or subjecting himself to any charge or obligation at the instance of the person making the promise, although such person obtain no advantage therefrom (Chit. Contr. 30, and cases cited; see Jones v. Ashburnham, 4 East, 463; Morley v. Berkly, 3 Bing. 112; Willatts v. Kennedy, 8 Bing. 10; 2 Saund. 137 *e*); and with reference to the benefit conferred on the promiser, the consideration need not be adequate in point of actual value. It is sufficient that a slight *benefit* be conferred by the plt. on the deft., or at his request upon a third person, or even that a benefit may arise to the party promising (see Hitchcock v. Coker, 6 Ad. & E. 456; Phillips v. Bateman, 16 East, 372, per Lord Ellenborough, C. J.; Kirwan v. Kirwan, 2 C. & M. 623). When the adequacy of consideration is material at law, it is a question for the court (Horne v. Ashford, 3 Bing. 327). So it is with regard to the detriment arising to the deft. (Chit. Contr. 32; Sturlyn v. Albany, Cro. Eliz. 67; Wilkinson v. Oliveira, 1 B. N. C. 490; Bainbridge v. Firmstone, 1 P. & D. 2; Haigh v. Brooks, 4 P. & D. 288; Traver v. —, Sid. 57).

When the consideration for deft.'s contract consists of any agreement on the part of the plt., it must appear from the declaration that such agreement was binding on the plt. at the time the deft.'s promise was made; for if the declaration show that the obligation was all on one side, it will be bad (Cooke v. Oxley, 3 T. R. 653; see Payne v. Cane, 3 T. R. 149; M'Iver v. Richardson, 1 M. & S. 557; Adame v. Lindsell, 1 B. & A. 681; Humphreys v. Carvalho, 16 East, 45; Drant v. Brown, 3 B. & C. 668; Hawkins v. Wane, 3 B. & C. 690).

Instances of what a Sufficient Statement of Contract.] As instances of what is a sufficient statement of a contract, according to its legal effect, it has been held, that a contract to furnish goods with a certain latitude as to price, may be described as a contract to furnish them at a reasonable price (Laing v. Fidgeon, 6 Taunt. 108; see Squiver v. Hunt, 3 Price, 38). Where the contract was laid in the declaration, to deliver stock on the 27th Feb., and the contract proved was to deliver stock on the settling-day, which at the time was fixed, and understood by the parties to mean the 27th Feb., it was held no variance (Wickes v. Gordon, 2 B. & A. 335, overruling Payne v. Hayes, B. N. P. 145). A contract stated to be for the purchase of a certain quantity, to wit, eight tons of goods, is supported by evidence of a contract for the purchase of *about* eight tons, the precise quantity having been ascertained to be eight tons (Gladstone v. Neale, 13 Ea. 410). A declaration stating a contract to pay a sum of money at a certain time is supported by proof of a contract to pay it at that time, and at a certain place (Paine v. Emery, 4 Dowl. 191; S. C. 2 C. M. & R. 304). A joint and several bond is sufficiently described as a joint bond only (Middleton v. Sandford, 4 Camp. 34; and see Bass v. Clive, 4 M. & S. 13; Willis v. Barrett, 2 Star. 29; *post*, "BILLS OF EXCHANGE"). A contract for the sale of fifty casks of tallow, at 72s. per cwt., "warranted ready for delivery *from ship or [*196] warehouse, by the 1st Nov., to be weighed or taken at the king's landing scale," &c.; it was held, this was only a general undertaking to deliver, and that the omission of the words "ship or warehouse," was immaterial (Thornton v. Jones, 2 Marsh. 287; S. C. 6 Taunt. 581.

Where the contract was stated to be, to deliver a quantity of gum senegal, but the contract proved was for the delivery of *rough* gum senegal, this was held no variance, as all gum senegal, on its arrival in this country, was called rough (*Silver v. Heseltine*, 1 Ch. R. 39). Where the plts. declared, that they agreed to sell, and the deft. agreed to buy, certain goods and merchandizes, to wit, three hundred and twenty-eight half-chests of oranges and lemons, at, &c., for a certain price, to wit, the price of 623*l.* 13*s.*, the contract proved was for three hundred and eight chests, and thirty half-chests of China oranges, and twenty chests of lemons, without specifying the price; this was held no variance (*Crispin v. Williamson*, 8 Taunt. 107; S. C. 1 Moo. 547; see also *Robson v. Fallows*, 3 B. N. C. 392). Where the contractors stated that deft. had agreed to buy a large quantity of head matter, and sperm oil, in the possession of the plt., which was afterwards ascertained to be a given quantity, and the contract proved to be for the purchase of "all the head matter, and sperm oil, per the W.," it was held no variance (*Wildman v. Glossop*, 1 B. & A. 9; see *Ross v. Parker*, 2 D. & R. 662; S. C. B. & C. 358). In *assumpsit* on guarantee, the declaration stated that the defts. undertook to indemnify A. from holding goods in his warehouse, on their behalf, and delivering same up to them when requested. On production of the instrument, it appeared that the defts. only guaranteed him for holding the goods in this warehouse, on their behalf: it was held that this was no variance, as it must be implied he was to deliver them up to the defts. (*Sampson v. Burton*, 4 Moo. 515). A declaration, in consideration that plt. would procure A. to grant a lease to deft., the latter promising to pay to plt. £170, the proof was, that A., having agreed to grant a lease to the plt. the latter undertook originally to assign it to the deft. for the consideration mentioned, but that afterwards a lease to which plt. was a party, and assented, was granted immediately by A. to the deft. It was held, that the evidence proved the substitution of a new contract, to procure a lease from A. to the deft., in lieu of the original contract, and that there was no variance (*Boone v. Mitchell*, 1 B. & C. 18).

An agreement by plt. (an attorney), deft. and B., set forth that in consideration of B. having agreed to pay to deft. his claim against B. and certain costs, out of the proceeds to arise from the recovery by B. in action of B. against J., deft. undertook to pay plt. all costs incurred by him in prosecuting the action of B. against J., plt. thereby agreeing with deft. to bring the same: held, that in *assumpsit* on this agreement the consideration was rightly described to be that plt., at the request of deft., would, with B.'s assent, prosecute the action of B. against J. (*Dally v. Poolly*, 6 Q. B. 494).

A declaration in *assumpsit* stated, that the plt. and deft. had been partners in trade, and had dissolved partnership, and that a bill of exchange, drawn by the plt. upon and accepted by M. for 40*l.*, being a debt due from M. to the plt. and deft., had been lost by the plt. and deft., with their indorsement in blank thereon; and thereupon, in consideration that the plt. delivered to the deft. another bill for 40*l.* and four promissory notes for 20*l.* each, for his share of the capital of the partnership, the deft. promised the plt. to bear the loss of half the amount that might not be paid in liquidation of the lost bill; provided that, in case of M.'s making any difficulty, the plt. should obtain the approval of Messrs. B. & G., the deft.'s advocates, *to any proceedings against M.; and that the deft. would deposit, when required [*197] by the plt., 40*l.* in the hands of a third party, in case such deposit should be found necessary to recover the said debt due by M. Averment, that it became necessary to deposit the 40*l.* for the purpose of recovering the debt due from M., M. being ready to pay the debt if the 40*l.* were deposited at the Bank of England, to indemnify him against the payment of the lost

bill; and that the Bank were ready to receive and hold the money. Breach, that the deft. refused to make such deposit: held, on special demurrer, that the promise of the deft. was an absolute promise to deposit the 40*l*. if necessary, and was not dependent on the approval of his advocates; and that a sufficient consideration for, and breach of such promise, were alleged in the declaration (*Applemans v. Blanche*, 14 *M. & W.* 154).

If the consideration be expressly traversed by plea (but not otherwise since *R. G. H. T.* 4 *Will. IV.*), it must be proved as stated, or the plt. will fail at the trial on the ground of a variance, unless the judge permit an amendment under the 3 & 4 *Will. IV. c. 42, s. 23*. We shall now proceed to consider some of the cases in which variances have been holden fatal.

What a Variance.] The statement of a contract to sell oats at so much per bushel, must be taken to mean the Winchester bushel, and will not be supported by evidence to sell by some other bushel (*Hockin v. Cooke*, 4 *T. R.* 314; *St. Cross (Master) v. Howard De Walden (Lord)*, 6 *T. R.* 338). A contract stated as a general covenant to repair is not supported by proof of a covenant to repair, "casualties by fire excepted" (*Browne v. Knill*, 5 *Moo.* 164; *S. C.* 2 *B. & B.* 395; see also *Horsfall v. Testar*, 1 *Moo.* 89; *S. C.* 7 *Taunt.* 385). But where a lease contained a proviso that if a certain event should happen after the execution of the lease the rent reserved should be reduced; held, that plt. may declare as on an absolute covenant to pay so much (*Grogan v. Magan*, 1 *Al. & Nap.* 366, *Irish*). A declaration or promise to deliver good merchantable wheat, is not supported by proof of a promise to deliver good second sort of wheat (*Anon. Raym.* 735). A contract to remove goods in a reasonable time, is not supported by proof of a contract to remove them in a month (*Hore v. Milner*, *Pea.* 42, a). A contract to be performed on request, is not supported by evidence that it was performed on a particular day (5 *East*, 111). A contract to carry goods, and deliver them to A. B. the plt., varies from a contract to deliver them to J. S. (*Leery v. Goodson*, 4 *T. R.* 687). Where a bill of exchange is stated to have been drawn for a certain sum of money, it will be intended to mean English money (*Sprowle v. Legge*, 1 *B. & C.* 16; *Kearney v. King*, 2 *B. & A.* 301). Stating a party to be retained at a certain salary, to wit, 250*l.* per annum, is supported only by proof of a contract for a specific annual salary (*Preston v. Butcher*, 1 *Stark.* 3). Stating a contract to take a full cargo of wheat, is not supported by proof of a contract to take on board five hundred quarters of wheat, though that quantity, in fact, amounts to a full cargo (*Harrison v. Wilson*, 2 *East*, 708). A count stated deft. to be a tenant to plt., and that he promised to *use* lands in a husbandlike manner; the contract proved, was to *farm* land in a husbandlike manner, to be kept constantly in grass; this was held a fatal variance (*Saunderson v. Griffiths*, 5 *B. & C.* 909). In an action of assumpsit the declaration stated, that there were accounts between plt. and deft., which were open and unsettled; and that there were disputes concerning such accounts, and mutual claims by each party; and that it was agreed that they should give up their respective claims *upon each [*198] other, and thereupon, in consideration that plt. would relinquish and forbear to prosecute all claims which he had against deft., the deft. then promised to pay the plt. an annuity of 6*l.*; held, that the declaration disclosed a sufficient consideration for the promise (*Llewellyn v. Llewellyn*, 15 *Law J.* 4 *Q. B.*; 9 *Jur.* 991). The declaration alleged that deft. was indebted to T. in 200*l.*, and that a commission in bankruptcy had issued against deft., and that in consideration of T.'s proving for this 200*l.* against the estate of the deft. the deft. then promised to pay to him the said sum of 200*l.* after the delay of a few months. Judgment was arrested after evidence for

the plt. as there appeared no consideration (*Bremley v. Andrew*, 7 Ad. & E. 108). The discharge of one of two joint debtors is the discharge of the other, a promise therefore in consideration of his discharge is void (*Herring v. Dorrell*, 8 Dowl. P. C. 604). In an action for wages to be paid to plt. in consideration he would proceed on a particular voyage, a variance in the description of the voyage is fatal though laid under a *videlicet* (*White v. Wilson*, 2 B. & P. 116). The declaration alleged that in consideration that the plt., at the request of the deft., *would consent* to suspend proceedings against A., deft. promised, &c., and the agreement put in evidence was in these terms, viz.: "Plt. having, at my request, consented to suspend proceedings against A., I do hereby, in consideration thereof, promise to pay 30*l.* on the 1st of April:" held, in arrest of judgment, that the consideration was sufficiently described (*Payne v. Wilson*, 7 B. & C. 423). Where a declaration against a carrier alleged that in consideration that plt., at the request of the deft., *had secured* to be shipped, &c., a quantity of wheat, &c., and it appeared that deft.'s undertaking to carry was made *before* the whole of the wheat had been shipped on board, &c.: objected, that the consideration was executory; held, that the count might be supported, as where an order is given to a carrier before the delivery of the goods, and he assents to deal with them when delivered in a particular manner, a duty attaches on the receipt of the goods to deal with them according to the order previously given, and the law implies a promise to perform such duty (*Shuter v. Horlock*, 1 Bing. 34). Where a contract is *conditional*, it will be a fatal misdescription to state it as an absolute one (*Langston v. Corney*, 4 Camp. 176); and, upon the same principle, it would seem that if plt. rely upon a subsequent promise where debts are barred by the Statute of Limitations, to take the case out of the statute, and the promises were qualified or conditional, as to pay when the deft. is able, &c. the plaintiff should declare upon the subsequent promise (*Tanner v. Smart*, 6 B. & C. 603; *Pitman v. Foster*, 1 B. & C. 248; *Hayden v. Williams*, 7 Bing. 163; see "BILLS OF EXCHANGE").

Where Liability qualified by Exception.] If the promise or engagement contain an exception or proviso, which qualifies deft.'s liability, the declaration must notice the exception, or there will be a fatal misstatement. Thus, where the declaration stated that the deft. had undertaken to carry and deliver goods safely, and the contract proved was subject to the exception of fire and robbery: held, a fatal variance (*Latham v. Rutley*, 2 B. & C. 20). So, where the carrier was not liable to any extent, unless insured (*Latham v. Rutley*, *supra*; see *Clarke v. Gray*, 6 East, 569); so, where the declaration averred that the deft. had warranted a horse to be sound, and the warranty was subject to the exception of a kick in the leg: held, a fatal mistake (*Jones v. Cowley*, 4 B. & C. 446; *Heming v. Parry*, 6 C. & P. 580; see *Brown v. Knill*, *supra*; *Tempany v. Burnand*, 4 Camp. 20; *Beech v. White*, 12 Ad. & E. 668; see *Saunderson v. Griffiths*, *supra*; *Vavasour v.* [*199] *Ormwood*, 6 C. & P. 430). But if the exception be distinct from and not even referred to by the clause creating the debt, it is considered matter of defeasance, and ought to come from the other side (1 Ch. Pl. 246, 318).

Variance in stating Contract too specially.] The contract must not be stated more specially than it really was, and any additional statement, varying the effect of the contract, will be fatal. Thus, a contract to deliver soil cannot be declared on as a contract to deliver soil or *breeze*, it appearing that soil and breeze are different articles (*Clarke v. Manstone*, 5 Esp. 239); and see the case of a note being stated to have been made payable at a particular

place, when it was not so (*Exon v. Russell*, 4 M. & S. 505, *post*). Where two lots were sold under an enclosure act, a declaration upon a sale of "divers, to wit, two lots," &c., is bad, the agreements being separate, both in law and fact, and not forming one contract (*James v. Shore*, 1 Stark. 426; *Emmerson v. Heelis*, 2 Taunt. 47).

Variance in Omission of Part of Contract.] The omission of any part of an entire contract or promise, and which omission affects that part of the contract for the breach of which the plt. proceeds, will be fatal; as where the contract declared on was, that the deft. should deliver to plt. all his tallow, at 4s. per stone, and the contract proved was, that the deft. should deliver it at 4s. per stone, and so much more as the plt. paid to any other person, the variance was held fatal (*Churchill v. Wilkins*, 1 T. R. 447). Where land was alleged to have been demised at a rent of 15*l.* and in evidence the rent appeared to have been 15*l.* and three fowls, the variance was held fatal (*Sands v. Ledger*, 2 Raym. 792). In a case where the plt. purchased a horse for 55*l.* deft. warranting it sound, and agreeing to give back 1*l.* if it did not fetch plt. 4*l.* or 5*l.*, and the averment was, that, in consideration plt. would buy of deft. a horse for a certain price, to wit, 55*l.*, deft. undertook that horse was sound, it was held a fatal variance (*Blyth v. Bampton*, 3 Bing. 472; *Gaselee*, J. diss.). But the omission of any immaterial part of the contract is immaterial (*Thornton v. Jones*, 2 Marsh. 287; S. C. 6 Taunt. 582, sup.). A variance between the evidence and declaration, as to such part of the consideration stated as is frivolous or insufficient, is immaterial (*ante*, p. 187; see *Farewell v. Dickinson*, 6 B. & C. 251). Sums of money as stated in pleading are not essential, unless from the nature of the case, as by forming an essential part of some calculation or otherwise, they necessarily become material (*Cooper v. Blick*, 2 G. & D. 299, per Lord Denman, C. J.). In declaring upon contracts made in Ireland, relative to the payment of a sum of money, and in the currency of that country, the plt. must show that the money was to be of Irish currency; otherwise it will be a fatal variance, the intendment being that when a sum of money is stated generally, English money is meant (*Sprawle v. Legg*, 1 B. & C. 16; *Kearney v. King*, 2 B. & A. 301). Literal errors would now be amended (see instances of such, 1 Ch. Pl. 320, 324; see *Silver v. Heseltine*, 1 Chit. Rep. 39; *post*, "VARIANCE"). Where the declaration stated the loan of a horse to the deft., and averred that the deft. was to take care of him and return him in good condition, or pay a certain sum of money; but the contract proved showed that the deft. was to find the horse meat for his work: held, sufficiently stated, as the law implied that a party borrowing a horse was to keep it, unless the contrary appeared (*Handsford v. Palmer*, 2 B. & B. 359; see *Ward v. Smith*, 11 Pri. 19).

**No more of Contract to be stated than that which was broken.*]*

[*200] But where the contract consists of several distinct parts and collateral provisions, it is sufficient to state so much of it as constitutes that contract the breach of which is complained of, and which prescribes the duty to be performed, and the time, manner, and other circumstances of its performance (*Miles v. Sheward*, 8 East, 7); containing the entire consideration for the act, and the entire act which is to be done in virtue of such consideration (per Lord Ellenborough, *Clark v. Grey*, 6 East, 564; *Martin v. Smith*, 6 East, 563; *Thompson v. Miles*, 1 Espin. 184; *Miles v. Sheward*, 8 East, 7). Where the plt. declared, that, in consideration of his re-delivery to deft. of an unsound horse, which he had before then sold to the plt., the deft. promised to deliver him another horse, which would be worth 80*l.*, and be a young horse, and then alleged a breach in both these respects, the

declaration was held sufficient, though the proof was not only of a promise that the second horse should be worth 80*l.* and be a young horse, but also of a warranty that it was sound and never been in harness (*Miles v. Sheward*, 8 East, 7; *Thornton v. Jones*, 2 Marsh. 237). A declaration on a contract to pay 52*l.* 10*s.* for rum-money is supported by proof of a note, by which the deft. undertook to pay the plt. 52*l.* 10*s.* together with a pint of rum per day (*Baptist v. Cobbold*, 1 B. & P. 7). A declaration that, in consideration plt. would lend deft. a horse, deft. would take care of it, and return the same in as good condition, or pay fifteen guineas, in addition to which terms it was proved that deft. contracted to find meat for the horse: it was held no variance (*Handford v. Palmer*, 5 Moo. 74; S. C. 2 B. & B. 359). So, where the contract was stated to be that deft. warranted certain bacon to be prime bacon, and the contract proved was a warranty that it should be prime *singed* bacon, it was held no variance (*Cotterill v. Cuff*, 4 Taunt. 285.) Where, in an action for not accepting goods sold, it was averred in the declaration that the deft. bought of plt. a quantity of rice according to certain conditions and it appeared in evidence that in addition to these conditions the rice was sold *per sample*: held, no variance, for this was a mere collateral engagement or warranty (*Squier v. Hunt*, 3 Pri. 68; *Ward v. Smith*, 11 Pri. 19). As to declaring on a lease under seal, see 1 Wms. Saund. 233. n. 2; *Dundass v. Weymouth* (Lord), Cowp. 665; *Bristow v. Wright*, Doug. 667.

Part relating to Liquidation of Damages need not be stated.] No part of the contract which relates merely to the liquidation of damages, and goes in defeasance of the contract, need be stated. In an action against a carrier, it was held unnecessary to state in the declaration a notice by which the carrier limited his responsibility (in certain cases) to 5*l.* (*Clarke v. Gray*, 6 East, 564). If a carrier *limit* his responsibility, that need not be noticed in pleading; but if a stipulation be made that under certain circumstances he shall not be liable at all, that must be stated (per *Abbott, C. J.*, *Latham v. Rutley*, 2 B. & C. 22; 3 D. & R. 211; see *post*, "CARRIER"). So, where to the warranty of a horse was annexed a condition that the warranty should terminate at twelve the next day, unless in the meantime a notice of defects was sent, it was held that the condition formed no qualification of the contract of warranty, but was matter of defence (*Smart v. Hyde*, 1 Dowl. N. S. 60; 8 M. & W. 723). In assumpsit for not accepting rice sold, and the contract was to accept *per sample*, the omission in the declaration of these words was held immaterial; "as they were not a description of the commodity sold, but a mere collateral engagement on the part of the seller, *that it should be of a particular quality" (per *Abbott, C. J.*, *Parker v. Palmer*, 4 B. & A. 391). But any matter which qualifies the [*201] contract, and destroys the plt.'s right to recover, either *in toto* or in part, or constitutes a condition precedent, must be stated in the declaration. Therefore, on a warranty, where plt. stated deft. warranted a horse to be sound, and the proof was, that deft. warranted the horse to be sound every where except a kick on the leg, it was held to be a qualified warranty (*Jones v. Cowley*, 4 B. & C. 445; 6 D. & R. 533). So, exceptions and conditions, qualifying the insurer's liability on a policy of insurance, should be stated (*Strong v. Rule*, 3 Bing. 315).

It was agreed in writing, between the plt. and defts., that certain growing crops of the plt. should be taken by the defts. at a valuation made by certain valuers, on the 1st of April, 1844, and the amount secured by the defts.'s promissory note; but that such valuation should be examined and revised on the 1st of August then next ensuing; and that the parties should be bound

by any alteration then made in it. The valuers, on the 1st of April, estimated 41*l.* 0*s.* 8*d.* to be due to the plt. for the crops (after certain deductions), and the defts. accordingly gave their promissory note for that amount. The valuers revised their valuation on the 2nd of August, 1844, and, according to their revised valuation, the sum due to the plt. was only 3*l.* 5*s.*: held, that the time fixed for the revision of the valuation was of the essence of the contract, and that the plt. was entitled to the full amount of the note, though it was proved that nothing had occurred between the first and second of August to affect the value of the crops (*Marshall v. Powell*, 11 Jur. 61; 16 Law J. 5 Q. B.; 1 N. P. C. 590).

Statement of Alternative Contract.] A contract in the alternative must not be stated as an absolute contract, though the option were in the party pleading (*Penny v. Porter*, 2 East, 2; 2 B. & P. 119, n.; *Tate v. Wellings*, 3 T. R. 531; *White v. Wilson*, 2 B. & P. 116; see *Miles v. Sheward*, 8 East, 8). An agreement to pay 20*l.*, if a given number should be drawn on a given day, varies from an agreement to deliver an undrawn ticket, or pay 20*l.* (*Churchill v. Wilkins*, 1 T. R. 448). As, where it was agreed to purchase a hundred bags of wheat, forty or fifty to be delivered on one market-day, and the remainder on the next, and only forty were delivered, and, in an action for the non-delivery of the remainder, the contract was not stated in the alternative, it was held fatal (*Penny v. Porter*, 2 East, 2).

A collateral consideration is not sufficient to support an action of assumpsit, but there must be an immediate consideration for the precise promise (*Smart v. Chell*, 7 D. P. C. 78); therefore, where the declaration stated that by negligence of the deft. (an attorney), the plt., his attorney, was compelled to pay 14*l.*, and in consideration thereof deft. promised to pay half that sum (not stating any forbearance to sue for the negligence): held, not sufficient consideration stated (*Smart v. Chell*, *supra*).

Where there are two or more special contracts, it will be fatal to blend them together, and treat them as one; therefore, where different lots were sold at an auction for different sums, the contracts were deemed separate, both in law and in fact, and the plt. having, in assumpsit for refusing to comply with the conditions of sale, blended the two contracts, and declared upon them as one agreement, he was non-suited (*James v. Shore*, 1 Stark. 426; see *Emmerson v. Heelis*, 2 Taunt. 38). But, where the terms of a former agreement have been modified and altered by a subsequent one, the [*202] plt. may *declare upon the latter one, without noticing the former (*Boone v. Mitchell*, 1 B. & C. 18; *Thresh v. Rake*, 1 Esp. 53; *Robinson v. Tobin*, 1 Stark. 336).

Scilicet: When the matter alleged is material and traversable, it must be stated with exactness and certainty, the stating it under a *videlicet* will not avoid the consequences of a variance, or a repugnancy, if the matter be misstated, and there would be a fatal variance in the absence of the *videlicet*; whether the matter be the consideration or promise, or be time, or place (1 Ch. Pl. 325, and cases cited in n. (k)). "On the other hand, the want of a *videlicet* will in some cases make an averment material, that would not otherwise be so; as if a thing which is not material be positively averred without a *videlicet*, though it were not necessary to be so, yet it is thereby made material and must be proved" (2 Saund. 291 c, n.).

Averments.] Next to the statement of the contract, the declaration should contain all such averments as are necessary to show a complete cause of action. If, for example, deft.'s contract be to do an act at the expiration of a given time, or the happening of a certain event, it must be averred that

the time expired, or that the event happened before the commencement of the suit (see *Parkinson v. Whitehead*, 2 Sc. N. R. 620; S. C. 2 M. & G. 329); or, if the act to be done were such as required time, and no specific time were agreed on, it must be averred that a reasonable time had elapsed (*Sansom v. Rhodes*, 6 B. N. C. 621; 8 Sc. 544; see *post*, "MARRIAGE"). But in actions on bills of exchange and promissory notes, it is sufficient, as formerly, to aver, with respect to the time of payment, "which period *has now elapsed*" (*Owen v. Waters*, 2 M. & W. 91; S. C. 5 Dowl. 324, overruling *Abbott v. Arlett*, 4 Dowl. 752; S. C. 1 M. & W. 209; see *post*, "BILLS OF EXCHANGE").

The class of averments upon which generally the greatest difficulty arises, are:—

Averment of Performance of Conditions Precedent—when necessary.]

Where there are several promises, or agreements, or covenants, which are independent of each other, one party may bring an action against the other for a breach of his promise, &c., without averring or proving a performance of the promise, &c., on his, the plt.'s part; and it is, in such case, no excuse for the deft. to plead, or show a breach of the promise on the plt.'s part. But, where the promises, &c., are *dependent*, it is necessary for the plt. to aver, and prove a performance of the promise, &c. on his part, or, what is tantamount thereto, an excuse for the non-performance, to entitle himself to sue for a breach of the promise on the part of the deft. (1 Saund. 320 *a*, n.; *Ughtred's case*, 7 Co. Rep. 10 *a*, *b*; *Jones v. Barkley*, Doug. 690; *Hotham v. East India Company*, 1 T. R. 638); except in cases where the *promise* of the plt. was the consideration for the deft.'s promise (see *Peate v. Dicken*, 1 C. M. & R. 422; *Martindale v. Fisher*, 1 Wils. 88; *Nichols v. Rainbred*, Hob. 88; *Pullen v. Stokes*, 2 H. Bl. 312). And, wherever there is a condition precedent, however improbable the thing may be, or difficult to be performed, performance must still be averred; as, where plt. stipulates for the act of third persons (1 Saund. 320 *d*; *Worsley v. Wood*, 6 T. R. 710, 719; see *Glazebrook v. Woodron*, 8 T. R. 373), though *strangers*, an averment of performance of that act is nevertheless as necessary as in other cases (*Ib.*).

What a Condition Precedent.] It is extremely difficult to lay down any general rule as to what constitutes a condition precedent; *the question depending on the whole tenor of the contract, and the [*203] intention of the parties (*Glazebrook v. Woodrow*, 8 T. R. 373; *Hotham v. East India Comp.* 1 T. R. 645; *Thornton v. Jenyns*, 1 M. & G. 166; S. C. 1 Sc. N. R. 52; *Stevens v. Curling*, 3 B. N. C. 355; 3 Sc. 740; *Kemble v. Mills*, 2 Sc. N. R. 121; S. C. 9 Dowl. 446). It makes no difference where different contracts are placed on a written instrument; the precedency of the performance must depend on the order of time in which the intent of the transaction requires their performance (*Jones v. Barkley*, Doug. 690). The following rules, however, have been ably collected on the point (see *Thorpe v. Thorpe*, *Ld. Raym.* 662; S. C. *Salk.* 171; 1 Saund. 319, n. 1; 1 Ch. Pl. 6th ed. 323; *Selw. N. P.*, 10th ed. 108):—

Condition where Defendant's Act is to be or may be done first.] 1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent (*Pordage v. Cole*, 1 Saund.

319 *h*; see *Mattock v. Kinglake*, 10 Ad. & E. 50). Therefore, if a man covenant to pay another 500*l*. for teaching him a business, 250*l*. to be paid down, and 250*l*. on the 25th February following, an action may be maintained for the second 250*l*. after the 25th February, without averring that the plt. taught the deft. the trade (*Campbell v. Jones*, 6 T. R. 571; see *Franklyn v. Miller*, 4 Ad. & E. 599; *Cerrall v. Cattell*, 4 M. & W. 734; *Wilkes v. Smith*, 10 M. & W. 355; see also *Lester v. Lobley*, 7 Ad. & E. 124). Where A. contracts to build a house for B., and finish it on or before a certain day, in consideration of a sum of money which B. contracts to pay A. by instalments, as the building shall proceed, the finishing the house is not a condition precedent to the paying of the money, but the contracts are independent; and A. may, therefore, sue B. for the whole sum, though the building be not finished at the time appointed (*Terry v. Duntze*, 2 H. Bl. 389). If it is *agreed* between A. and B., that B. shall pay A. a sum of money for his lands, &c., *on a particular day*, it is an independent contract; and A. may bring an action for the money *before* any conveyance by him of the land (*Thorpe v. Thorpe*, 1 Salk. 171); for, perhaps, the conveyance cannot be made by the day appointed for payment of the money (*Pordage v. Cole*, Raym. 183; *Mattock v. Kinglake*, 2 P. & D. 343; 10 Ad. & E. 50; S. C. 3 Jur. 699; *Spiller v. Westlake*, 2 B. & Ad. 155; *Irving v. King*, 4 C. & P. 309). Where an agreement was to sell land for a sum to be paid at the expiration of four years, and interest in the mean time half-yearly, held, that the declaration for an instalment of this interest need not contain an averment of readiness to convey (*Wilkes v. Smith*, 10 M. & W. 360; see *Alexander v. Gardner*, 1 B. N. C. 671; *Hall v. Bainbridge*, 5 Q. B. 233; *Howden (Lord) v. Simpson*, 10 Ad. & E. 793; *Pister v. Cater*, 9 M. & W. 315). Where the plt. declared that, in consideration that he had agreed to deliver cloth to the deft., deft. agreed to pay him so much in case A.'s horse should win a certain race, an averment that A.'s horse won the race was held sufficient, without averring a delivery of the cloth; but, had the declaration been, that deft. agreed, &c., in consideration that plt. would deliver the cloth, the delivery must have been averred (*Martindale v. Fisher*, 1 Wils. 88). Where A. covenanted with B. to serve him with three esquires in the wars of France, and B. covenanted with him to pay him so [*204] much *money for the service; and it was further agreed, that *half the money* should be paid in England, on a certain day, *before* they went to France, and the rest by *quarterly payments* (which also *might* occur *before* the service), it was held an action would lie for the money before the service (1 Saund. 320 b; 12 Mod. 461). A ship, having been let to freight for twelve months, or for such longer period as the freighters should detain her, for which, certain proportions of the freight were to be paid at the end of two, six, ten, and fourteen months, &c., it is no answer to a breach of non-payment of six months' freight, due at the end of the ten months, that the owner had covenanted to keep the vessel in repair during the time she was freighted, and that she was not in repair when the freighter shipped the goods on board her, during the twelve months, which made it necessary for him to unload and repair her, whereby she was unserviceable for part of the six months, and that he had paid the freight for all the time she was serviceable, and that she was not in his service for ten months in the whole; for *non constat* but that, after she had been used by the freighter, she wanted repair, without any default of the owner; or, that he was guilty of any delay in making the repairs; and the freight would still run on during the time of repair; the freight being reserved at so much per month, was earned at the end of each month, although the stipulated times of payment were from four

months to four months, and the ship were lost before the end of fourteen months (Havelock v. Geddes, 10 East, 555).

Condition where Defendant's Act is to be done afterwards.] 2. But, when a day is appointed for the payment of money, &c., and the day is to happen *after* the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money before performance (Thorpe v. Thorpe, 1 Salk. 171; S. C. 1 Raym. 665; Anon. Cro. Eliz. 46). Therefore, where a ship was let to freight at a certain sum per month, to be paid on her final discharge at the end of her voyage, and she was lost in the middle of her voyage, it was held that no action could be maintained for any freight (Abbott, Ship. 347; Smith v. Wilson, 8 East, 473). So, where freight was to be paid on the ship's arrival at her first destined port, and she was lost before her arrival (Gibbon v. Mendez, 2 B. & A. 17). 'In an action on a covenant against a lessee for not repairing (the covenant adding, "the lessor allowing and assigning timber for the repairs"), it is necessary to aver that the lessor did allow and assign timber, &c. (Thomas v. Cadwallader, Willes, 496). In a lease for seven years, containing the usual covenants that the lessee should pay the rent, keep the premises in repair, &c., there was a proviso that the lessee might determine the term at the end of the first three or five years, giving six months' previous notice; and that then, from and after the expiration of such notice, and payment of all rents and duties to be paid by the lessee, and performance of all his covenants, until the end of three or five years, the indenture should cease, and be utterly void. Ruled, that the payment of rent, and performance of the other covenants, are conditions precedent to the lessee's determining the term at the end of the first three years, and that his merely giving six months' notice, expiring with the first three years, is not sufficient for that purpose (Porter v. Sheppard, 6 T. R. 665). So, where bail are bound in a recognisance that if deft. be condemned, he shall appear in eight days after warning, and render himself, or pay, &c., the plt. must aver that he was warned, for it is a *condition precedent* (Com. Dig. Plead. C, 51). So, where deft. agreed to deliver to plt. at a certain price, fifteen *tod of wool, to be [*205] chosen by plt. out of a parcel containing seventeen tod, in an action for the non-delivery of the fifteen tod, the declaration was holden bad, because it did not aver that the plt. had chosen the fifteen tod, which was as a condition precedent to the deft.'s delivering them (Raynay v. Alexander, Yelv. 76). But where deft. agreed, in consideration that plt. would suspend proceedings against A., to render A. to any writ of execution which plt. might issue within fourteen days after notice thereof; held, not a condition precedent that plt. should lodge the writ with the sheriff (Turner v. Standage, 4 B. N. C. 208; 5 Sc. 554; S. C. 2 Jur. 97). Where it was agreed that a vessel was to proceed to T. and there load, and then proceed to a port in the United Kingdom, and upon payment of freight at a certain rate, that forty running days shall be allowed the merchants (if not sooner despatched) for loading at T. and for unloading at the port of discharge, and twelve days on demurrage at 6*l.* per day, the vessel to sail from England on the 24th of February next; held, that the sailing on or before the 24th of February was a condition precedent (Glaholm v. Hays, 2 Man. & G. 257; see Lucas v. Godwin, 3 Bing. N. C. 737). An agreement by which a debtor undertook to convey his property to trustees for the benefit of his creditors, contained a proviso that "the said agreement was to be void unless the creditors, &c., should concur in the arrangement; held, that this was not a condition precedent, the performance of which the debtor was bound to aver on setting up the agreement as an answer to an action by one of his creditors (Matthews v.

Taylor, 2 Man. & G. 667; Olive v. Booker, 1 Exch. 416). Deft. had sold to plts. cement in casks and bags for a certain sum, the deft. to allow the plts. 3s. 6d. for each cask and 2s. 6d. for each bag, which should be returned, terms cash. In an action upon this contract, for the price of the casks and bags, the deft. pleaded that the plts. did not duly pay the deft. for the cement, according to the terms in the declaration mentioned. It appeared that the plts. had not paid for part of the cement on delivery, nor until after an action had been brought for it. Held, that the words "terms cash" had been sufficiently complied with to entitle the plts. to recover in this action and upon this issue. The plts. averred and the deft. traversed a readiness and offer to return the casks and bags: held, that the averment was severable, and that the plts. were not bound to prove a readiness to return all the casks and bags (Nelson v. Patrick, 16 Law J. 99; 3 C. B. 772).

Condition where Contract goes to Part of Consideration on both sides.]

3. "Where a contract or covenant goes only to *part* of the consideration on both sides, and a breach of such contract or covenant may be paid for in damages, it is an independent contract or covenant, and an action may be maintained for a breach of the contract or covenant on the part of the deft., without averring performance in the declaration" (1 Saund. 320 *b*; and per Lord Ellenborough, Davidson v. Gwynne, 12 East, 389). As, where A. conveyed to B. the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of 500*l.*, and an annuity of 160*l.* for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and B. should quietly enjoy; and B. covenanted that A. *well and truly performing all and every thing therein contained* on his part to be performed, he would pay the annuity; in an action by A. against B. on this covenant, the breach assigned was the non-payment of the annuity: plea, that A. was not at the time *legally possessed of the negroes* on the plantation, and so had not a good title [*206] to convey. The court of K. B., on demurrer,* held the plea to be ill; and added, that, if such plea were allowed, any one negro not being the property of A. would bar the action (Boon v. Eyre, 1 H. Bl. 273, n.; S. C. 2 Bl. R. 1312; St. Albans (Duke) v. Shore, 1 H. Bl. 279; Carpenter v. Cresswell, 4 Bing. 409; S. C. 1 M. & P. 66; Rose v. Poulton, 2 B. & Ad. 822; Lawton v. Sutton, 9 M. & W. 795). So, where "it was agreed between C. and D., that, in consideration of 500*l.*, C. should teach D. the art of bleaching materials for making paper, *and* permit him, during the continuance of a patent which C. had obtained for that purpose, to bleach such materials according to the specification, and C., in consideration of the sum of 250*l.* paid, and of the further sum of 250*l.*, to be paid by D. to him, covenanted that he would, with all possible expedition, teach D. the method of bleaching such materials, and D. covenanted that he would, on or before the 24th of February, 1794, or sooner, in case C. should before that time have taught him the bleaching of such materials, pay to C. the further sum of 250*l.*: in covenant by C. against D., the breach assigned was, the non-payment of the 250*l.*; to which it was objected, that it was not averred that C. had taught D. the method of bleaching such materials. The court, however, held, that the *whole* consideration of the agreement being that C. should permit D. to *bleach materials*, as well as *teach* him the method of doing it, the covenant by C. to teach formed but part of the consideration, for a breach of which D. might recover a recompense in damages; and C. having in part executed his agreement, by transferring to D. a right to exercise the patent, he ought not to keep that right without paying the remainder of the consideration; because he may have sustained some damage by D.'s not having

instructed him" (Campbell v. Jones, 6 T. R. 570). Where, in a lease, the lessee covenanted to pay the rent, and the lessor covenanted that the lessee, *paying the rent*, should quietly enjoy; held, that the payment of the rent was not a condition precedent to the lessee's rights to quiet enjoyment (Dawson v. Dyer, 5 B. & Ad. 584; and, see Allen v. Cameron, 1 C. & M. 833). Where the master and freighter of a vessel of four hundred tons mutually agreed in writing that the ship, being every way fitted for the voyage, should, with all convenient speed, proceed to Petersburg, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight for hemp 5*l.* per ton, for iron 5*s.* per ton, &c., one half to be paid on a right delivery, the other at three months: held, that the delivery of a complete cargo was not a condition precedent, but that the master might recover freight for a short cargo at the stipulated rates per ton, the freighter having his remedy in damages for such short delivery (Ritchie v. Atkinson, 10 East, 295; see Stavers v. Curling, 3 B. N. C. 355; S. C. 3 Sc. 740; Bornmann v. Tooke, 1 Camp. 377; Gallo way v. Jackson, 3 Sc. N. R. 753). Plt., as captain of a South Sea whaler, covenanted with defendants that he would proceed to the fishery and procure a cargo of sperm oil, &c., or as great a portion as might be under all circumstances within his power to obtain; would return to London and at his own cost deliver the cargo; would obey instructions, be frugal of provisions, and not dispose of them without accounting for the same, and would not smuggle or trade; deft. covenanted on the performance of the before-mentioned terms and conditions on the part of the plt. to pay him a certain proportion of the net proceeds of the cargo. Held, that the plt.'s covenants were independent and that the performance of them was not a condition precedent to an action on the deft.'s covenant (Stavers v. Curling, *supra*; see Invett v. Spencer, 1 Exch. 647; Ollive v. Booker, *sup.*; Mills v. Blackall, 17 Law J., 31, Q. B.; 12 Jur. 93; *Dicker v. Jackson, 17 Law J., 234, C. P.; 12 Jur. 541; see also Franklin v. Miller, 4 Ad. & E. 599; Wilkes [*207] v. Smith, 10 M. & W. 355; Glaholm v. Hays, *supra*). Where in a contract for a loan it was agreed that securities deposited should be returned upon repayment, held, that the return of the securities was neither a concurrent act nor a condition precedent (Scott v. Parker, 1 Q. B. 809; see Fishmongers' Company v. Robertson, 5 Man. & G. 131; Mackintosh v. Midland Railway Company, 14 M. & W. 548). Where a charter-party contained a covenant by the owner, that the ship should and would proceed from D., where she then lay, on or before the 12th day of February, on her outward-bound voyage, and return, &c., and a covenant by the freighter that, in consideration of every thing above mentioned, &c., he would pay certain freight for the voyage; the voyage being averred to be performed, and the freight earned, the owner may recover in an action of covenant, without averring that the ship sailed *on or before* the 12th February: such covenant that the ship should sail *on or before* the 12th February being no condition precedent, but only an independent covenant, for breach of which the party had his remedy for damages (Hall v. Cazenove, 4 East, 477; see also Havelock v. Geddes, 10 East, 555; Fothergill v. Walton, 8 Taunt. 576; S. C. 2 Moo. 630; Storer v. Gordon, 3 M. & S. 308). But where it was agreed that the vessel should proceed to Trieste, and there load a full cargo of wheat, and therewith proceed to a port in the United Kingdom, the vessel to sail from England on or before the 4th of February; held, that the sailing on or before the 4th was a condition precedent to the owner's right to sue the merchants for not providing a cargo at Trieste (Glaholm v. Hays, 3 Sc. N. R. 471; S. C. 2 M. & G. 257; see also Shadforth v. Higgin, 3 Camp. 385; Freeman v. Taylor, 8 Bing. 124; S. C. 1 M. & Sc. 182). So, where

a day is specified for the performance of certain works, and the money is to be paid on performance, although the works be not performed on the day specified, yet an action may be maintained for the money when they are performed; and the party who is to pay the money must have recourse to a cross-action for any damages occasioned by the delay (*Cock v. Curtoys*, cited 1 Saund. 319). If a vendee receive one of several articles bought together under one contract, he must pay for such article, although he might have refused to take it (*Champion v. Short*, 1 Camp. 53). Where the deft. agreed to purchase a lot of trees for a certain sum, and pay for the same according to conditions of sale, and afterwards felled and carried away part of them, without making such payment, and refused to pay until the remainder had been delivered, it was held, he was liable for the value of the trees he had taken (*Bragg v. Cole*, 6 Moo. 614). Upon a contract for twenty-four numbers of a periodical work, to be delivered monthly, at a guinea a number, a plt. may sue for the numbers actually delivered, though not amounting to the whole twenty-four (*Mavor v. Pyne*, 3 Bing. 285).

Where mutual Promises go to whole Consideration on both sides.] 4. But, where the mutual covenants go to the *whole consideration* on both sides, they are mutual conditions, and performance or excuse for it *must* be averred (*Large v. Cheshire*, 1 Vent. 147; *St. Alban's (Duke) v. Shore*, 1 H. Bl. 270). An entire contract cannot be apportioned; and if a party contract to do a certain work before his claim to remuneration is to accrue, he cannot recover for a partial performance, although the completion was prevented by accident, as by fire, &c. (*Cutter v. Powell*, 6 T. R. 320; *Hulle v. Heightman*, 2 East, 145; *Mulloy v. Baker*, 5 East, 316); unless, indeed, the deft. [*208] disaffirm the entirety of the contract, by receiving what in law *amounts to a partial benefit (*supra*). A. covenants that he will, on or before a certain day, convey to B., by such conveyance as B.'s counsel should advise, *all* the ground before conveyed to him by C.; in consideration of which, B. covenants to pay a certain sum, and reserve certain rents, &c., to A., and to lay out a certain sum on the premises; it was held, that A. cannot maintain covenant against B. without averring such a conveyance, or a readiness to convey to B., on or before the day, *all* the land, or that B. prevented him by some act or neglect of his (*Heard v. Wadham*, 1 East, 619). In an action for covenant on a charter-party of affreightment, in which the deft. covenanted to pay so much for freight for goods delivered at A., freight cannot be recovered *pro rata itineris*, if the ship be wrecked at B. before her arrival at A., though the deft. accept his goods at B. (*Cook v. Jennings*, 7 T. R. 381; *Leddard v. Lopes*, 10 East, 526; *ante*). Plts. and deft. entered into the following contract: "Bought of Messrs. A. and Co., about thirty packs of Cheviot fleeces, ewes and hogs, and agreed to take the undermentioned *noils* (coarse woolen cloths); also agreed to draw for 210*l.* on account at three months," specifying the quantity and quality of the *noils*; held, one entire contract, and that A. and Co. could sue for non delivery of the *noils*, without averring the delivery or tender to the deft. of the fleeces (*Atkinson v. Smith*, 14 M. & W. 695).

In the case of reciprocal covenants, constituting *mutual conditions* to be performed at the *same time*, the plt. must aver performance, or a readiness to perform his part of the contract (*Rawson v. Johnson*, 1 East, 203). Thus, in declaring on a promise to pay a sum of money, in consideration that plt. would execute a release, it must be averred that such release was executed, or tendered and refused (*Collins v. Gibbs*, 2 Burr. 899; *Smith v. Wilson*, 8 East, 437; *Andrews v. Whitehead*, 13 East, 117; 2 Saund. 108, n. 3). A declaration in covenant by the vendor, against an intended purchaser of lands,

for non-payment of the purchase money, need not aver that plt. offered or tendered a conveyance: it suffices to say that he was always ready and willing to execute one; for, in the absence of an express stipulation to the contrary, it is the purchaser's duty to prepare the conveyance and tender it to the vendor for execution (*Poole v. Hill*, 6 M. & W. 835; see *De Medina v. Norman*, 2 D. N. S. 239). In an action for not delivering goods sold, a readiness on the plt.'s part to pay the price must be alleged (*Rawson v. Johnson*, *supra*; see *Wilkes v. Atkinson*, 1 Marsh. 412; *Levy v. Herbert* (Lord), 7 Taunt. 314; 2 Saund. 352, n.); but paying rent is not a condition precedent to the lessee's right to sue for a disturbance of possession (*Dawson v. Dyer*, 5 B. & A. 584).

Where concurrent Acts to be done at the same time.] 5. Where two acts are concurrent, and to be done at the same time. When A. contracts or covenants to convey an estate, or to deliver goods, to B. on such a day, or generally, and, in consideration thereof, B. contracts or covenants to pay A. a sum of money on the same day, or generally, neither can maintain an action without showing performance of, or a readiness and offer to perform, his part, and either stating that the deft. neglected to attend when necessary, or refused to perform his part, or discharged the plt. from his performance (*Morton v. Lamb*, 7 T. R. 125; *Callonel v. Briggs*, 1 Salk. 112, 3; *Thorpe v. Thorpe*, ib. 171; *Giles v. Hart*, 2 Salk. 623; *Gordison v. Nunn*, 4 T. R. 761; *Glazebrook v. Woodrow*, 8 T. R. 366; *Jones v. Barkeley*, Doug. 684; *Rawson v. Johnson*, 1 East, 203; 2 Saund. 252, n. 3; *Stephens v. De Medina*, 4 Q. B. 422; see **Head v. Baldrey*, 6 Ad. & E. 459; [*209] *Chanter v. Leese*, 4 M. & W. 295); or that the deft. had incapacitated himself from performing his part (*Knight v. Crockford*, 1 Esp. 190; see 1 Camp. 253, 552); but it does not seem necessary in such case to aver a tender and refusal: it is sufficient averment, at least after verdict, that plt. was ready and willing, and offered to pay the money or do the particular act (*Feny v. Williams*, 8 Taunt. 62; *Martin v. Smith*, 6 East, 555; *Levy v. Herbert*, 7 Taunt. 314; *Waterhouse v. Skinner*, 2 B. & P. 447; *Kemble v. Mills*, 2 Sc. N. R. 121; 1 M. & G. 757; S. C. 9 Dowl. 446; *Hannuic v. Goldner*, 11 M. & W. 849; *Granger v. Dacre*, 12 M. & W. 431). Where the declaration was founded on an agreement to accept goods within a reasonable time after notice, the plt. must aver that he was himself during such reasonable time ready to deliver them (*Granger v. Dacre*, 12 M. & W. 431; *Hannuic v. Goldner*, 11 M. & W. 849; see *Jackson v. Allawy*, 6 Man. & G. 942; *Bond v. Lett*, 1 C. B. 222); and it will be sufficient proof of this averment to show that he called on deft. to accomplish this (*Wilks v. Atkinson*, 1 Marsh. 412; *Levy v. Herbert*, *supra*, per Dallas, C. J.). In an action against a carrier for refusing to carry goods, the declaration averred that plt. was ready and willing, and then offered to pay to deft. such sum of money as deft. was legally entitled to receive for the receipt, carriage, and conveyance of the said parcel: held, on special demurrer, sufficient, and that it was not necessary to aver an actual tender of the money (*Pickford v. Grand Junction Railway Company*, 8 M. & W. 372); and the performance of an implied condition ought to be averred as well as an expressed one, as, for instance, the lapse of a reasonable time (*Samson v. Rhodes*, 6 B. N. C. 261; *Granger v. Dacre*, 12 M. & W. 431; *Startup v. Macdonald*, 2 Man. & G. 401). Where there are two acts to be done in pursuance of an agreement, and a day is specified for the performance of one and none for the other, an action will lie for the omission to comply with the act at the specified time, without averring performance of the other act (see *Mattock v. Kingslake*, 10 Ad. & E. 50; *Wilks v. Smith*, 10 M. & W. 355). In an action on an un-

dertaking to deliver on request at a certain price, it is sufficient, without alleging an actual tender of the price, to aver a request, and that plt. was ready and willing to receive the goods, and to pay for them according to the terms of the sale, and that deflt. had notice of such readiness, but refused to deliver them (*Rawson v. Johnson*, 1 East, 203); or, if deflt. did not attend at the appointed place, such non-attendance should be stated, and then the averment of request would be unnecessary (*Morton v. Lamb*, *supra*; *Bardenave v. Gregory*, 5 East, 107; see *Lilly v. Hewitt*, 11 Price, 494). On a promise to pay money in consideration of forbearance by plt., the fact of forbearance must be averred (*Com. Dig. Plead. C. 52*). But where A. and B. agreed to exchange horses, and a sum of money was given by way of earnest: held, that A. might sue B. for non-delivery of his horse, without averring a delivery of, or readiness to deliver his, as the payment of earnest vested the property of A.'s horse in B. (*Back v. Owen*, 5 T. R. 409).

Where a party was to pull down a wall and *then* to be paid for it, the pulling down is a condition precedent to the right to enforce payment; but a readiness to pay is not a condition precedent to the right to oblige the deflt. to commence the work (*Morton v. Lamb*, 2 Saund. 352 b; see *Combes v. Green*, 11 M. & W. 480).

There are many cases where it has been held, though no condition be expressed, yet the lapse of a reasonable time is an implied condition precedent to the right of action (see *Stewart v. Eastwood*, 11 M. & W.

[*210] 197; *Sansom v. Rhodes*, *supra*; **Granger v. Dacre*, *supra*;

Startup v. Macdonald, *supra*); the delivery of goods so late that they could not be examined before twelve o'clock at night, is not an unreasonable hour (*Startup v. Macdonald*, 2 Man. & G. 395).

Where an estate or interest passed or vested immediately in the plt., and was to be defeated by condition subsequent, or matter *ex post facto*, performance of that matter need not be averred (7 Co. R. 10 a; *Cornish v. Bolitho*, Willes, 147); as, if a grant of an annuity were until the plt. should be advanced to a benefice, he need not say that he was not yet advanced (Pl. Com. 25 b, 30, a, 32 b; *Hotham v. East India Company*, 1 T. R. 645; *Wood v. Worsley*, 2 H. Bl. 579).

Declaration in *assumpsit* recited an agreement in writing by which the deflt. agreed to permit the plt. to occupy certain lands until the 29th of September, 1843, the plt. paying therefore on that day, as he thereby agreed to do, 30*l.* as rent for the same, and then to deliver up the premises to the deflt. in good repair, and meantime to cultivate the same in a husbandlike manner; and that, upon the plt. so quitting the premises, paying the rent, and observing the other stipulations, and releasing the deflt. from all claim under the will of H. G., as also releasing the deflt. all the lands devised by H. G. which the plt. thereby agreed to do, the deflt. should pay to the plt. 200*l.* with interest from the 29th of September, 1842; it was further agreed that all releases required by the deflt. should be prepared by the deflt.'s attorney. Averment that the plaintiff was ready and willing to deliver up the premises, and to pay the rent, and to release the deflt. (as agreed on). Breach, that although the 29th of September did elapse, &c., and although a reasonable time elapsed between that day and the commencement of this suit for the payment of the 200*l.*, and although no release was prepared by deflt.'s attorney before the said day,—non-payment of the 200*l.* by the deflt. Plea, that the plt. was not ready and willing to deliver up the premises: held, on special demurrer, that the acts to be done by the plt. were not conditions precedents to, or independent of, but concurrent with, the payment of the 200*l.* by the deflt. That it was, therefore, sufficient for the plt. to aver his readiness and willingness to do them, without alleging performance; but that this

avermment was necessary, and, therefore, that the plea was good, as raising a material issue. Third plea, that the plt. was not ready and willing to release the deft.; held, that as the release was to be prepared by the deft.'s attorney, and it was averred that no such release was prepared, the plt.'s readiness to execute it was immaterial, and the plea was therefore bad, as raising an immaterial issue (*Giles v. Giles*, 15 Law J. 387, Q. B.).

Form of Averments of Performance, or Excuse for Performance.] Averments should be formally stated by an express allegation; as, "that plt. avers," or, "in fact saith" (Com. Dig. Plead. C. 77; 1 Saund. 117, n.; ib. 235; 2 ib. 61 g). The simple and best mode is, "and the plt. saith that" (1 Ch. Pl. 333). And, when an express averment of performance is necessary, plt. must aver it with time and place, when and where it was done, and the performance must be precisely alleged, and with reasonable certainty, so that the court may judge whether the intent of the contract has been duly performed (see per Holt, C. J., *Ld. Raym.* 662; *S. C. Salk.* 171). Thus, in consideration that plt. would acquit A. of a debt. it must be shown *how*, as by deed (*Lanaret v. Rivet*, Cro. Jac. 503; *King v. Hobbs*, Cro. Eliz. 914; *Prideaux v. Rawlins*, Jones, 125). On a promise to pay the debt of another in consideration of forbearance, the fact and time of forbearance must be averred * (Com. Dig. Plead. C. 52; see *Martin v. Burn*, [*211] 2 N. & P. 297; 7 Ad. & E. 19), and it must appear either by averment or necessary intendment to whom the forbearance was given (*Jones v. Ashburnham*, 4 East, 455; *Marshall v. Birkenshaw*, 1 N. R. 172). When an usurious contract was set out in the declaration, and the period of forbearance was stated to be from the 21st Dec. 1774, until the 23d Dec. 1776; held, that evidence of a contract from the 23rd Dec. 1774, for two years, did not support the declaration (*Carlisle v. Trears*, Cowp. 676; *Fox v. Keeling*, 2 Ad. & E. 620). So, where the forbearance was alleged to be until a certain specified day absolutely, but the contract proved was until the day named, or a certain other day at the option of the borrower: held, that the declaration was not supported (*Tate v. Wellings*, 3 T. R. 531). But, on a promise to pay so much as the plt. should expend for the officers of the army in such a suit, an averment that he spent so much is sufficient, without showing for what officers in particular (Com. Dig. Plead. C. 61; *Jermy v. Jenny*, T. Raym. 8, 9). In a declaration on a contract to pay so much if the plt. would marry deft.'s daughter at his request, an averment that he did marry her, without saying at the deft.'s request, is sufficiently certain (*Poynter v. Poynter*, Cro. Car. 194). And upon a contract by deft. to restore plt.'s goods on plt. giving him two warrants of attorney, an averment that he gave deft. two warrants of attorney, without specifying when or what they were, was holden sufficient on general demurrer (*Radford v. Smith*, 6 Dowl. 138; *S. C.* 3 M. & W. 254). The performance must be averred to have been according to the agreement and intention of the parties (*Jermy v. Jenny*, T. Raym. 8, 9; Com. Dig. Plead. C. 61): as, on a promise in consideration that the plt. would cause A. to be bound to the deft. for 20*l.*, it is not sufficient to aver that the plt. caused A. to come to be bound, but it also ought to be alleged that A. was bound (Com. Dig. Plead. C. 58; *Game v. Harvie*, Yelv. 50). An exact performance, according to the intention of the parties, must also be stated, as on a promise in consideration that the plt. would procure the loan of 20*l.* for one year, it will not suffice to allege that he procured part at one time and part at another (Com. Dig. Plead. C. 59; *Dorrington v. East*, Yelv. 87); but a condition to enfeoff is satisfied by a conveyance by lease and release (Co. Litt. 207 a); and a condition to deliver a will by delivery of the letters testamentary (1 Rol. Abr.

426, pl. 2—4; Poynter v. Poynter, Cro. Car. 194). It is usual, in declarations on mutual promises and in covenant between landlord and tenant, &c., to aver that the plt. hath performed all things on his part to be performed; but this is unnecessary (1 Saund. 234, c, n. (5)); though it may, after verdict, aid the omission of an averment of a special performance (Thorpe v. Thorpe, Lut. 253; Sir T. Jones, 125; Varley v. Manton, 9 Bing. 363; S. C. 2 M. & Sc. 484). As to where a general allegation of performance is sufficient, see Proctor v. Sargent, 2 Man. & G. 20; Kemble v. Mills, 1 Man. & G. 757). If the condition be in the disjunctive, the averment of performance must be so too (Burgess v. Brazier, 1 Stra. 594).

Averment of Request—when necessary.) When it is necessary, by the terms of the contract, that the deft. should be requested by plt. to perform his part of the contract, such request, being a condition precedent, must be specially alleged in the declaration (Com. Dig. Plead. C, 69; 1 Saund. 33, n. (2)); Phillips v. Fielding, 2 H. Bl. 131; Back v. Owen, 5 T. R. 409; Williams v. Germaine, 7 B. & C. 468; see Radford v. Smith, 3 M. & W. 258); or a sufficient excuse for the omission (see *post, infra*). In *an [*212] action for not delivering a horse sold by deft. to plt., or for not finding timber for repairs, a special request should be alleged (Back v. Owen, *supra*; Lowe v. Kirby, Jon. 56; Rawson v. Johnson, 1 East, 204). So, where a note is payable one month after demand, a demand must be made (Sharpe v. Booth, 1 R. & M. 388); but not where payable on demand (Rumball v. Ball, 10 Mod. 38). It must be averred and proved, or else excused, if the contract were to deliver up a bond to be cancelled on request (Peck v. Methold, 3 Bulst. 299); so, to pay money on request (Carter v. Ring, 3 Camp. 459); so, if an award direct the deft. to perform some act on request (1 Saund. 32); so, if deft. contracted, as surety, to pay the debt or rent of a third party on request (Sicklimore v. Thistleton, 6 M. & S. 9; see Rede v. Farr, 6 M. & S. 9; see Bowdell v. Parsons, 10 East, 359; Lilley v. Hewitt, 11 Pri. 494). But, on a bond conditioned generally for payment with interest, no demand need be alleged (Gibbs v. Southam, 5 B. & Ad. 911). Where a mere duty or sum of money, which the deft. is in duty bound to pay or perform, is promised to be performed or paid on request, there needs no actual request (see Rowe v. Young, 2 B. & B. 231); and, in the case of common counts for goods sold, work and labour performed, money lent, &c., although the promise have been laid to pay *on request*, the "*licet sæpius requisitus*" need not be laid or proved (Ring v. Roxbrough, 2 C. & J. 418; 2 Tyr. 468); but, where a collateral duty or sum is promised to be performed or paid on request, there must be an actual request (Birks v. Trippet, 1 Saund. 33 a), or some averment to excuse it (Amory v. Brodrick, 5 B. & A. 712; S. C. 1 D. & R. 361). Thus, where a party promises to pay on request money previously due, plt. need not make or aver a request to pay (B. N. P. 151 b; Williams v. Germaine, *supra*; Ring v. Roxbrough, *supra*). The bringing of the action would, in that case, be a sufficient request (Simpson v. Routh, 2 B. & C. 683; Wallis v. Scott, 1 Str. 88). So, no demand of payment need be made on a note payable on demand so as to charge the maker (Norton v. Ellam, 2 M. & W. 461; Rumball v. Ball, 10 Mod. 38; Frampton v. Coulson, 1 Wils. 33). And, though a distinction was formerly taken between a promise by the deft. to pay a debt originally his own, and that of a third person, that distinction is now overruled (Hill v. Wade, Cro. Jac. 523; Wallis v. Scott, 1 Str. 88; Brockingham v. Shacker, 2 Vent. 75). Therefore, where deft. promised, in consideration that plt. would discharge A. from custody, to give his note for 10s. in the pound on the debt, it was held unnecessary to state a request to deliver the note (Brown

v. Dean, 2 N. & M. 317; S. C. 5 B. & Ad. 848; see also Radford v. Smith, 6 Dowl. 381; S. C. 3 M. & W. 254); so, where deft. undertook to procure plt.'s goods, which had been seized under a *fi. fa.*, to be re-delivered to him on his giving deft. two warrants of attorney for securing the amount; held, it was not necessary, after alleging the giving of the warrants of attorney, to aver a request of the goods (Radford v. Smith, 6 Dowl. 381; S. C. 3 M. & W. 254; see Spaeth v. Hare, 1 Dowl. N. S. 595; 9 M. & W. 326).

No request is necessary where the party has, by his own act, rendered the performance of the contract by him impossible: as, where deft. was to deliver a certain quantity of hay to plt. on request, and it was stated that deft. had otherwise disposed of it (Bowdell v. Parsons, 10 East, 359; see also Amory v. Brodrick, 5 B. & A. 716; S. C. 1 D. & R. 361; Bristow v. Waddington, 2 N. R. 355; Lovelock v. Franklyn, 8 Q. B. 371). On the other hand, in an action for not marrying on request, plt. should aver a request, or some other allegation, to dispense with it (Seymour v. Gartside, 2 D. & R. 55). *But, in a declaration for not marrying [*213] within a reasonable time after request, if the count show that the deft., after promise and before action brought, married a person other than the plt., a request is not a necessary averment; and a plea to such count, alleging, as new matter, that request was not made, is no defence. The declaration, averring deft.'s marriage to such other person, need not show that the person is living. So held, on demurrer to a plea, which stated by way of confession and avoidance that plt. did not at any time, before action brought request deft. to marry (Short v. Stone, 8 Q. B. 368; see Cains v. Smith, 15 Law J. 106, Ex.). In an action against an agent for not accounting, a request to account should be averred (Topham v. Braddick, 1 Taunt. 572). So, on a contract to deliver up a bond to be cancelled on request (3 Bulst. 549); or, on an award to perform an act on request (Birks v. Trippet, 1 Saund. 32). So, a request of payment should be made on sheriff previous to an action for not paying over the proceeds of an execution (Jefferies v. Sheppard, 3 B. & A. 696); or, for any surplus in his hands after satisfying it (see Simpson v. Routh, 2 B. & C. 685); and it seems necessary, in all cases where plt. alleges, not the actual performance of an act which was to be concurrent with deft.'s, but a readiness and offer to perform it, to aver a request (see *ante*, p. 207). But where actual performance is averred, the allegation of a request is unnecessary, except where deft.'s contract was to do the act on request (see Radford v. Smith, 6 Dowl. 381; S. C. 3 M. & W. 254; where Back v. Owen, 5 T. R. 409, is commented on by Parke, B.).

Form and Manner of stating Request or Excuse.] When a *special* request is necessary, it must be stated when, and by and to whom it was made (3 Bulst. 298; Wallis v. Scott, 1 Str. 88; Com. Dig. Plead. C. 69). The general averment, "*although often requested*," &c. will not be sufficient (Back v. Owen, 5 T. R. 409); since the pleading rules H. T. 4 Will. IV., no place of request need be stated, unless a request at a particular place be material according to the terms of the contract; and the request must be so set forth, that the court may judge whether it was sufficient, according to the contract (Hardr. 38; Skin. 391). But the want of particularity in the statement of a request can only be taken advantage of by special demurrer (Bowdell v. Parsons, 10 East, 359; Amory v. Brodrick, 5 B. & A. 712; Seymour v. Gartside, 2 D. & R. 55). If a special request be unnecessarily stated, plt. is not bound to prove it (Buckley v. Thomas, Plow. 128), consequently it cannot be traversed (Spaeth v. Hare, 1 Dow. N. S. 595; S. C. 9

M. & W. 320). The usual averment of "although often requested so to," do," in cases where this general form is sufficient, is of no avail in pleading, and the omission of it is immaterial (Phillips v. Fielding, 2 H. Bl. 131; Morgan v. Sargent, 1 B. & P. 59; Frampton v. Coulson, 1 Wils. 33; Ring v. Roxbrough, 2 Crompt. & J. 418); though, indeed, its insertion will, after verdict, avoid a defect in or omission of stating a special request (see Seymour v. Gartside, 2 D. & R. 55). In averring an excuse of performance by the plt., he must state his readiness to perform the act and the particular circumstances which constitute the excuse, so that it is not sufficient to state that arbitrators *could not* make their award, without showing the special cause which prevented them, (2 Saund. 129; 1 Ch. Pl. 335). It must in general be shown that deft. either prevented the performance, or rendered it unnecessary to do the prior act by his neglect, or by his discharging the plt. from performance (Hotham v. East India Company, 1 T. R. 638; Jones v. Barkley, 1 Ch. Pl. 336, n. *h*). Where deft. stipulated *to pay a

[*214] sum of money on plt.'s assigning to him a certain equity of redemption, and the declaration averred that plt. was ready, &c., and offered to assign, and tendered a draft of assignment to the deft. for approbation, and offered to execute, &c., and would have executed, &c.; but that he absolutely *discharged* the plt. from executing the same, or any assignments whatever, and had not paid the money, held sufficient (Jones v. Barkley, *supra*; Laird v. Pim, 7 M. & W. 474). The absence of the deft. if his presence were necessary for the plt.'s performance, or his neglect to do the first act if it were incumbent on him to perform it, will be a sufficient excuse (1 Rol. Abr. 457, 458); or, in some cases, by the deft. not giving *notice* to the plt. (1 Rol. Abr. 457; Co. Lit. 207 a). It is no excuse for the plt. to show that the third person refused to do the act (Worsley v. Wood, 6 T. R. 710).

Deft. being bail for C. H. in an action brought against him by plt., and plt. having agreed to forego bail on C. F. giving a cognovit to pay 23*l*. by instalments, deft. undertook in default of payment to render C. S. within fourteen days after notice of the issuing of a *ca. sa.* against him. In a declaration on this agreement, averment of notice of the issuing of the *ca. sa.* held sufficient without averring a delivery of the writ to the sheriff (Turner v. Standage, 4 Bing. N. C. 208).

Averment of Notice to Defendant, when necessary.] Wherever the fact upon which the deft.'s liability is incurred, lies peculiarly within the knowledge and privity of the plt., notice thereof must be stated to have been given to deft. previous to the commencement of the action (Rex v. Holland, 5 T. R. 621, 624; 2 Saund. 62 a; Com. Dig. Plead. C, 73—75; 1 Saund. 117, n. (2); Henning's case, Cro. Jac. 432). As, where the deft. promises to give the plt. so much for a commodity as it is worth, or as any other had given him for the like, or to give so much for every cloth the plt. should buy, or pay to plt. what damages he had sustained by a battery, or to pay the plt.'s costs of suit (Ib.; Harris v. Ferrand, Hardr. 42; 16 Vin. Abr. Notice; Rex v. Holland, 5 T. R. 621; Tidd, 442; but see Pullen v. Stokes, in error, 2 H. Bl. 312); and where deft. covenanted to appear at an insurance office, so that plt. might insure his life, and not to go beyond the limits of Europe, notice of the policy was holden necessary though deft. had appeared at the office (Vyse v. Wakefield, 6 M. & W. 442; 8 Dowl. 372; affirmed in error 7 M. & W. 126; S. C. 8 Dowl. 912). But, when the matter does not lie more peculiarly in the knowledge of the plt. than of the deft., no notice is requisite (Harris v. Ferrand, Hardr. 42; 1 Saund. 117, n. (2); 2 Saund. 62 a, n. (4)). Therefore, if a man contracts to do a thing on the perform-

ance of an act by a stranger, notice need not be averred, for it lies in the deft.'s knowledge as much as the plt.'s, and he ought to take notice of it at his peril (*Harris v. Ferrand*, *supra*; 2 Saund. 62 a, n. (4); Com. Dig. Plead. C, 75). If a man be bound to another to indemnify against the acts of a third person, no notice of these acts need be alleged (1 Saund. 116; *Lelly v. Hewitt*, 11 Pri. 494). Where the deft. promises plt. to give as much as a third person named, there the information was as accessible to the deft. as the plt. (*Smith v. —*, 11 Mod. 48; *Smith v. Goff*, 2 Salk. 457; S. C. 2 Raym. 1127). And so, in the case of an award, no notice thereof need be stated (2 Saund. 62 a), unless it be expressly stipulated that a notification be made to the parties (2 Bulst. 144; *Harris v. Ferrand*, *supra*; *R. v. Holland*, 5 T. R. 621; see *Mansell v. Bulteel*, 5 B. & Ad. 507). And, in an action on a promissory note by indorsee against maker, notice of the *indorsement need not be averred (*Reynolds v. Davies*, 1 B. & P. 625). [*215] And on a promise to pay so much money on the full age of an infant, no notice is requisite of his having attained that age (1 Saund. 117, n. (2); *Tidd*, 442); or where deft. had been a party to a previous suit or decree, no notice thereof was deemed requisite (*Ashe v. Doughty*, *Yelv.* 121). Where the deft., by the terms of the contract, engaged to take notice at his peril, no notice need be averred, even though the fact peculiarly lie in plt.'s knowledge: as, where he contracted to pay money on the marriage of the plt. with B. (*Selby v. Wilkinson*, 2 Bulst. 254; Com. Dig. Plead. C, 75); and, in the case of a condition precedent, to be performed by the plt. to the deft. in person, no notice of the plt.'s performance need be averred (Com. Dig. Plead. C, 75).

In actions on bills of exchange, promissory notes, &c., against the drawer or indorsee, an allegation of notice of dishonour, or some excuse for the neglect, is essential (*Rashton v. Aspenall*, Doug. 679; *Lundie v. Robertson*, 7 East, 231; *Bristow v. Waddington*, 2 N. R. 355; see *post*, "BILLS OF EXCHANGE"). Where the acts are mutual, and to be performed at the same time, the plt. should, it appears, not only aver his readiness to perform the act, but also a notice of his readiness, or insert some other allegation to dispense with it. Thus, in an action against a woman for not marrying plt. within a reasonable time, an averment of notice of readiness to marry should be stated, though the omission would suffice after verdict (*Seymour v. Gartside*, 2 D. & R. 55).

When notice is necessary, it ought to appear that the notice was given in due time, and to a proper person (Com. Dig. Plead. 74); but, where a special request is averred, notice will sometimes be presumed (*Bradley v. Soder*, Cro. Jac. 228; *Reynolds v. Davies*, 1 B. & P. 626; *Alfrey v. Blackmore*, 3 Bulst. 326). Where no notice has been given, the absconding of the party or other circumstances should be stated as an excuse (1 Ch. Pl. 338); but where a notice has been given, but a justifiable delay in giving it at the regular time has occurred under the averment that notice was given, sometimes the facts excusing the delay may be proved (*Firth v. Thrush*, 8 B. & C. 387). The omission of an averment of notice, when necessary, will be fatal on demurrer or judgment by default (— *v. Henning*, Cro. Jac. 432); but may be aided by a verdict (*Palgrave v. Wyndham*, 1 Stra. 214; 1 Saund. 228 a; *Seymour v. Gartside*, 2 D. & R. 55); unless in an action against the drawer of a bill (*Rushton v. Aspenall*, Doug. 679; *Lundie v. Robertson*, 7 East, 231).

Consequence of Insufficient Averment of Performance.] The omission of an averment of performance of a condition precedent or of an excuse for non-performance is fatal, or in arrest of judgment by default (*Collins v.*

Gibbs, 2 Burr. 899); but, after verdict, in some cases the omission may be aided (1 Ch. Pl. 337, n. *t*; and cases cited). In actions upon agreements to sell and assign leasehold property, an averment by the plt., the vendor, that he was ready and willing, and offered to assign, seems to be sufficient after verdict, without alleging that he had good title (Perry v. Williams); and at least, after verdict, an averment of readiness and willingness to assign is tantamount to an averment of a tender of an assignment (1 Ch. Pl. 337). But, where the non-performance of the condition precedent appears on the face of the pleadings, a verdict will not aid the defect (Worsley v. Wood, 6 T. R. 710); as to the sufficiency of a general allegation of performance, even on general demurrer, see Proctor v. Sargent, 2 M. & G. 20.

**Breach.*] It is necessary in all cases for the plt. to allege a [*216] *breach* of the contract (Com. Dig. Plead. C, 44, &c.). When there are several counts in the declaration for a money demand: as, in actions on bills of exchange and the common counts, one breach, viz. "that the deft. had not paid any of the said moneys, or any part thereof," usually suffices (Frampton v. Coulson, 1 Wils. 33; Butterworth v. Le Despencer (Lord), 3 M. & S. 150). But this would be found almost impracticable in an action, not merely for the non-payment of money. In an action on a special contract, there may be several breaches, all of which may be alleged in one count (Com. Dig. Plead. C, 33; Legh v. Hewitt, 4 East, 154; 1 Ch. Pl. 295). The new rules of pleading expressly allow this (R. H. 4 Will. IV. r. 5). As to several breaches on bonds, *post*, "BONDS." The usual averment of deft.'s contriving, &c., to injure, &c., the plt., is unnecessary (Tewkesbury (Bailiffs of) v. Diston, 6 East, 433); and, in a declaration against a peer, it should be omitted (Imp. K. B. 526). See the form of breach prescribed by the R. G. T. T. 1 Will. IV.

Must be stated with Certainty.] The breach must be so assigned, and with such certainty, as to show the subject-matter of complaint (Pitt v. Williams, 4 N. & M. 412; S. C. in error 2 Ad. & E. 419; 5 Ad. & E. 685); a breach that deft. has not performed his agreement or promise, is too general, and bad (Com. Dig. Plead. 48; Skin. 344; 7 Pri. 550; Hinde v. Gray, 1 Sc. N. R. 123; 1 Man. & G. 195; S. C. 4 Jur. 392); but the breach may be assigned with less particularity and more conciseness, when great prolixity would be thereby avoided (Barton v. Webb, 8 T. R. 463; Shum v. Farrington, 1 B. & P. 640; Gale v. Reed, 8 Ea. 85); or, where the particulars lie more in the deft.'s than the plt.'s knowledge (Ib.). It may be assigned in the words of the contract, or in words which agree with the sense and substance of it (Com. Dig. Plead. B, 45, C, 46, &c.; 2 Saund. 181 *b, c*; Baxter v. Jackson, 1 Sid. 178; Sedden v. Senate, 13 East, 63; Knight v. Cambridge, 6 Taunt. 45; see Hodges v. Gray, 4 Dowl. 733; Archer v. Marsh, 6 Ad. & E. 959; S. C. 2 N. & P. 562): thus, in *assumpsit*, to manage a farm in a good and husbandlike manner, and according to the custom of the country, it may suffice to assign a breach in the words of the promise (Falmouth (Earl) v. Thomas, 1 C. & M. 89; 3 Tyrw. 38); but the breach must not be too general; it must show the subject-matter of complaint (Warn v. Bickford, 7 Pri. 550); therefore, "that the deft. did not perform the said agreement" is not sufficient (Knight v. Keech; but see Falmouth (Earl) v. Thomas, 1 C. & M. 89). In covenant for revoking an arbitrator's authority, it is sufficient to aver that deft. by deed revoked, without showing *notice* to the arbitrators, for without such notice there could be no revocation (Marsh v. Bulteel, 5 B. & Ad. 507; 8 Co. Rep. 162; *sed quære*). So, in *assumpsit* against a tenant on his implied contract to man-

age, use, and cultivate a farm in a good and husbandlike manner, and according to the custom of the country, it suffices even on special demurrer to assign as a breach that the deft. did not so manage, &c.; but, on the contrary, managed, &c., the said farm, lands, and premises in a bad, improper, and unhusbandlike manner, and contrary to the custom of the country where the said farm was so situate, not showing any particular acts of bad husbandry, or what custom had been violated (*Falmouth (Earl) v. Thomas, supra*). In an action on deft.'s promise to pay the debt of a third person, a breach that deft. did not pay the debt, has been held in substance and effect to agree with the terms of the contract (1 Sid. 178; 2 Roll. 738); but debt on *bond, conditioned for payment of an annual sum to the wife of an obligor, a breach assigned in non-payment of the same [*217] to the obligee is bad, and in such a case judgment was arrested (*Lunn v. Payne*, 6 Taunt. 140; S. C. 1 Marsh. 495). On a contract not to release or aliene without license, it must be averred that deft. released or aliened without license, though, indeed, the burthen of proving the license lies on deft. (*Coppin v. Haymaker*, Jon. 229; *Skin*. 120). In *assumpsit* by A. against B., the declaration set out an agreement, under which B. was to be let into possession of a public-house, and to purchase certain fittings, &c. for 65*l.*, 4*l.* thereof to be paid immediately, and the residue on the 30th of July, on which day B. was to be let into possession; and, if either party made default, or failed to fulfil the agreement, he was to forfeit 30*l.* to the other, on demand. Averment, that A. was always ready and willing, and offered to give possession, and to sell and deliver the fittings. Breach, that although B. paid the 4*l.* yet he did not pay the plt. the 61*l.*, or any part thereof, or pay the plt. the 30*l.* or any part thereof: held, on special demurrer, assigning for cause that there had been no demand for the 30*l.*, that the breach was sufficient, notwithstanding the reference to the clause of forfeiture by the introduction of the words negating the payment of the 30*l.* (*Maylam v. Norris*, 1 C. B. 244; 2 D. & L. 829).

Certainty in Statement of.] More certainty is required in assigning an affirmative breach, that is, a breach that the deft. has done that which he contracted not to do, than a negative breach, that is a breach that deft. has not done something he contracted to do (*Ib.*). In the former case, time must be alleged to the breach, but not so in the latter, if the breach on the face of it is complete and co-extensive with the contract without such allegation. In an action by an apprentice for not finding victuals and other necessaries, a breach in the words of the contract suffices (*Proctor v. Burdet*, 3 Lev. 170). And, in a covenant for not repairing, a breach in the words of such covenant suffices, without enumerating the particular dilapidations (*Lee v. Johnson*, Lutw. 329: cited in *Falmouth (Lord) v. Thomas*, 3 Tyrw. 41; *Harris v. Mantle*, 3 T. R. 308). On a contract to show a sufficient record, it suffices to aver deft. did not show a sufficient record (*Heyford v. Reve*, Yelv. 39, 40). And, in action on a condition that one B. should account for and pay over to plts. such voluntary contributions as he should collect for the charity, an averment that B. "had received divers large sums of money, amounting to a large sum, to wit, 100*l.*, from divers persons, for divers voluntary contributions for the said charity," which he had not accounted for or paid over, is sufficient (*Barton v. Webb*, 8 T. R. 463; *Shum v. Farrington*, 1 B. & P. 640; *Gale v. Reed*, 8 Ea. 85). On the other hand, if the contract were for quiet enjoyment without *lawful* disturbance, a breach merely stating that the plt. was disturbed, is insufficient; for it should be that he was by lawful means disturbed, in the words of the covenant or otherwise. The plt. should show by whom he was disturbed, and how (2 Saund. 181 b). But, an averment

that A. B. lawfully claiming title under deft., entered by virtue thereof, is sufficient, without setting out the particulars of his title (*Hodgson v. E. I. Co.*, 8 T. R. 278; see *Foster v. Pearson*, 4 T. R. 617; *Campbell v. Lewis*, in error, 3 B. & A. 392; S. C. 3 Moo. 35; see also *Brookes v. Humphries*, 5 B. N. C. 55; 6 Sc. 756; 7 Dowl. 118; 2 Jur. 945). So, where the declaration is on a contract for good title, it should be shown that the person evicting had a lawful title before or at the time of the date of the grant to [*218] the plt., and an averment that he *had a lawful title without this qualification, is too general, and bad after verdict; for it will be intended that the title of the person entering is derived from the plt. himself; but the plt. is under no necessity of setting out the title of the person who entered upon him (2 Saund. 181 n. (10); Com. Dig. Plead. C, 47, 49). If the matter to be performed by the deft. depend on some other event, it seems proper to assign the breach not merely in the terms of the contract, but first to aver that such event took place (*Serra v. Wright*, 6 Taunt. 45; but see *Willcocks v. Nicholls*, 1 Pri. 109). Thus, in debt on bond, conditioned that a collector of poors' rate should render an account of money received, it should aver that he received moneys, and then that he did not render an account, &c. (*Serra v. Wright*, *supra*; *Wilcocks v. Nicholls*, *supra*); and, in *Falmouth (Earl) v. Thomas*, *supra*, the court considered it safer to state the custom affirmatively, and then the breach.

Breach must not be too Narrow.] The breach must be assigned in terms co-extensive with the contract, and not be too narrow. Thus, in an action by the assignee, heir, or executor, the breach should be, that the deft. did not perform the act to the original contractor or the plt.; and so, if it be against an assignee, heir, or executor, the declaration should state, that neither the original contractor nor deft. performed the act. And a declaration by husband and wife, or by an administrator, merely stating that the deft. did not pay before marriage, or that he did not pay since the death, would be bad on demurrer, though aided by verdict (*Elstob v. Thorowgood*, 1 Raym. 284; *Hornsey v. Dimocke*, 1 Vent. 119). But an allegation that the deft. "had not paid any of the said moneys, or any part thereof," was in such a case holden good on special demurrer (*Debenham v. Chambers*, 3 M. & W. 128; S. C. 6 Dowl. 101). So, in *sci. fa.* on recognisance of bail, conditioned, that, if J. B. and G. K. be condemned, they shall *pay or render*, after an allegation that J. B. was condemned, it is *not sufficient to aver* that J. B. and G. K. *did not pay or render*, without adding, "nor did either of them" (*Wilkinson v. Thorley*, 4 M. & S. 33). For, although payment by one would be payment by both, yet a render of one is not a render of both, and, consistently with the allegation, B., against whom only the judgment was, might have rendered, which would have been sufficient to discharge the recognisance (1 Saund. 234 c). And, if the promise were in the disjunctive, to do one or other of two things, the breach must deny he did either; as, if a contract be, that "the deft. and his executors and assigns should repair," a breach for not repairing should not be in the conjunctive (*Colt v. How*, Cro. Eliz. 348; *Gyse v. Ellis*, 1 Stra. 228). So, on a promise to deliver a horse by a particular day, or pay a sum of money, it should be denied deft. did either (*Wright v. Johnson*, 1 Sid. 440; *Anon.* Hard. 320; *Plummer v. Woodburne*, 4 B. & C. 634; S. C. 7 D. & R. 249). But, if the breach in this respect be co-extensive with and according to the substance of the contract, it will suffice. Thus, in assigning the breach of warrant or contract "to pay," or "cause to be paid," a sum of money, it suffices to say that the deft. did not pay, omitting the disjunctive words (*Aleberry v. Walby*, 1 Stra. 231; 1 Saund. 235, n. (6)); so, where there are several defts., an averment that they have not paid suffices,

for a payment by one is a payment by all (*Aleberry v. Waleby*, *supra*; 1 Saund. 235, n. (6); but see *Wilkinson v. Sherley*, 4 M. & S. 33). So, in an action by several persons, or where deft. is to perform his act to several persons, an averment that he did not perform it to them suffices, without adding *the words, "or either of them" (*Aleberry v. Wale-* [*219] by, 1 Stra. 231; 1 Saund. 235). So, if a contract be to perform an act *to* or *by* a person or his assigns, it need not be averred that it was not performed to or by the assigns (*Gyse v. Ellis*, 1 Stra. 228). But, if the action be by or against the assignee, heir, or executor, the breach should then be in the disjunctive, and the declaration by husband and wife only, or by an administrator; merely stating that the deft. did not pay before the marriage, or that he did not pay since the death would be bad on demurrer though aided by verdict (*Elstob v. Thorogood*, 1 Ld. Raym. 284; *Hornsey v. Dimocke*, 1 Vent. 119). It is injudicious to narrow the breach unnecessarily; and where plt. stated as a breach that the deft. had not used the premises in a husbandlike manner, &c., but, *on the contrary*, committed *waste, spoil, and destruction*, these latter words were held to exclude evidence as to bad husbandry in not sowing, &c., as they tied down plt. to proof of such facts as amounted to waste, spoil or destruction (*Harris v. Mantle*, 3 T. R. 307; *Radford v. McIntosh*, 3 T. R. 637; *Moore v. Clark*, 5 Taunt. 95; see *Falmouth (Lord) v. Thomas*, *supra*). When an averment is divisible, the plt. may recover, though he only prove a part of the breach alleged in the pleadings; as, in an action against the sheriff for a false return, an averment that A. and B. had goods in his bailiwick, is divisible, and is supported in evidence by proof that A. only had property therein (*Jones v. Clayton*, 4 M. & S. 349; *Forty v. Imber*, 6 East, 437; *Barnard v. Duthy*, 5 Taunt. 27).

Breach must not be too Large.] The breach must not be more extensive and *large* than the deft.'s contract, so that thereby it remains uncertain whether the contract has been broken. As, in a contract to repair a fence, except on the west side thereof, a breach that the deft. did not repair the fence, without showing that the want of repair was in other parts besides that on the west, is bad on demurrer (Com. Dig. Plead. C, 47); though not after verdict (Ib.; *sed vide* *Spire v. Parker*, 1 T. R. 144, 5). So, if a covenant were for quiet enjoyment, without *lawful* disturbance, a breach merely stating that the plt. was disturbed is insufficient, for it should be that he was *legitimo modo* disturbed in the words of the covenant, otherwise the plt. should show by whom he was disturbed, and how (2 Saund. 181, a). And, if the matter to be performed by the deft. depend on a certain event, the happening of that event must be averred: as, if the promise be to account for moneys to be received by deft., the receipt of money ought to be averred (*Serra v. Wright*, 6 Taunt. 45). Where the contract was to deliver a gelding in as good plight as he borrowed him, and the breach that he did not deliver him at all, the judgment was arrested (*Wright v. Johnson*, 1 Vent. 64).

Several Breaches.] Two breaches of the same specific stipulation would be bad for duplicity (Com. Dig. Pl. 633; *Falmouth (Earl) v. Thomas*, *supra*; see *Hoggett v. Exley*, 6 B. N. C. 607); except in *debt*, on bond conditioned for the performance of covenants, &c. (8 & 9 Will. III. c. 11; 1 Ch. Pl. 250, 347): But at common law where the deft.'s contract was general, and several distinct breaches thereof can in fact be committed, as if a tenant agree to observe the due course of husbandry, which is obviously an engagement capable of several breaches, the declaration may then con-

tain several (Leigh v. Hewett; *ante*, p. 215); and the R. G. H. T. 4 Will. IV. permits several breaches.

When there has been a part payment or part performance, it is advisable to admit it on the face of the declaration, so as to avoid a plea to that effect (Bos. Rules, 50, n. 48).

[*220] **Consequence of Omission or defective Statement of Breach.*] The total omission of a breach, or a defective statement of it, so that thereby the contract does not appear to have been broken, would be bad on demurrer, or after verdict (Brickhead v. York (Arch.), Hob. 198, 233; Heard v. Busherville, 1 Sid. 440; 1 Lunn v. Payne, 6 Taunt. 140; Sicklemore v. Thistleton, 6 M. & S. 9; 7 Pri. 550; Pitt v. Williams, 4 Nev. & M. 412; S. C. in error, 2 Ad. & E. 419; 5 Ad. & E. 885; Newton v. Wilmot, 8 M. & W. 711). But a mere informal statement of it, provided there be sufficient matter on the whole, to show a breach of the contract, would not be bad, except on demurrer (see Wright v. Goddard, 3 Nev. & P. 361; S. C. 8 Ad. & E. 144; Amory v. Brodrick, 5 B. & A. 702); and, therefore, where, in an action against husband and wife, on the contract of the *feme*, whilst *sole*, to perform an award, it appeared that the award was made after the marriage, which was a legal revocation of the arbitrator's authority, and consequently the breach was improperly assigned in the non-performance of such award, it was held the plt. was entitled to recover, because it appeared that the *feme* had broken her covenant by the very act of her marriage, which, though a different breach to that assigned, was sufficient, after verdict, to support the declaration (Charnley v. Winstanley, 5 East, 270, 271; Perreau v. Bevan, 5 B. & C. 284; Anon. Jon. 125; Vivian v. Champion, 1 Salk. 140; Brooks v. Heberd, 8 D. & R. 69; see Warn v. Pickford, 7 Pri. 550). If one of several breaches, or a part of a breach, be improperly assigned, the deft. cannot demur to the whole (Amory v. Brodrick, 5 B. & A. 712; S. C. 1 D. & R. 361; Duffield v. Scott, 3 T. R. 374; Orton v. Butler, 5 B. & A. 652; Samuel v. Judin, 6 East, 333; S. C. 1 N. R. 43; Powdick v. Lyon, 11 East, 565); although, if the deft. plead and damages be given on the whole declaration, the judgment might be arrested (Sicklemore v. Thistleton, *supra*; but see "PARTICULARS OF DEMAND"). And, if he do so demur, the court will give judgment for the plt. on the whole record, and he can then avoid a writ of error by entering a *nolle pros.* to the bad breach (Webb v. Baker, 3 Nev. & P. 87; S. C. 7 Ad. & E. 841; Wainwright v. Johnson, 5 Dowl. 317; Ferguson v. Mitchell, 2 C. M. & R. 687; 4 Dowl. 513; Spyer v. Thelwall, 2 C. M. & R. 692; 4 Dowl. 509; Price v. Williams, 1 M. & W. 6; Boydell v. Jones, 4 M. & W. 446; S. C. 7 Dowl. 210; Parrett Nav. Co. v. Stower, 6 M. & W. 564; S. C. 8 Dowl. 405, *sed qu.* see 1 Saund. 285; Powell v. Graham, 1 Moo. 365; S. C. 7 Taunt. 580). If one of several breaches be ill assigned, so that the same be not cured by verdict, and general damages be given, the court will not now arrest the judgment, but grant a *venire de novo* (Leach v. Thomas, 2 M. & W. 427; Lewin v. Edwards, 1 Dowl. N. S. 639; 9 M. & W. 720; 6 Jur. 401). And if the damages are assessed separately, they will arrest the judgment on the bad breach only (Haytes v. Moat, 5 Dowl. 298; S. C. 2 M. & W. 56).

Averment of Damages.] If the contract be broken, the plt. will be entitled to some damages, however small, whether they be stated or not, for damages will be implied from the very breach itself; and wherever the damages sustained necessarily and naturally arise from the breach complained of, and may therefore be implied, they need not be specially stated.

In an action for not giving possession of certain apartments taken by plt., it was held that he might give in evidence the loss of business by his wife, in her trade of a milliner, though not mentioned in the declaration (*Ward v. Smith*, 11 Pr. 19). But the damages ought to be stated, in order to prevent the surprise on the deft., which might otherwise ensue at the trial;

*and, if he do not state them particularly, he will not be permitted [*221] to prove them in evidence (*Vin. Abr. Damages*; 1 Ch. Pl. 348).

In an action against a vendor of an estate for not making a good title to, or conveying same, only the deposit can be recovered under the count for money had and received; and, if the purchaser proceed for interest and expenses, he must declare specially, stating such expenses, and the loss arising from not having the use of the deposit (*Camfield v. Gilbert*, 4 Esp. 223; *Walker v. Constable*, 1 B. & P. 306; *Fleureau v. Thornhill*, 2 Bla. 1078; *Slack v. Lovell*, 3 Taunt. 157; *Harrison v. Allen*, 2 Bing. 4). In an action for refusing to complete an agreement for the purchase of land, the measure of damage is not the amount of the purchase-money, but only such damage as the plt. has actually sustained by the breach of the contract (*Laird v. Pim*, 7 M. & W. 474). The damages must be proximate, not remote or depending upon a contingency. Therefore, in an action for not replacing stock, it will be of no avail to state in the declaration that the plt. was prevented from completing an advantageous contract he had entered into (1 Ch. Pl. 348). Such damages as may be presumed necessarily to arise from the breach of contract do not require particularity in their statement in the declaration, therefore, in an action for not accepting goods sold to the deft. damages resulting from a fall in the market may be recovered under a special count, with a general allegation of loss of profit, without averring that the value of the goods was less at the time the contract was broken than when it was made (*Boorman v. Nash*, 9 B. & C. 145). Where a sum is mentioned as a penalty the plt. may proceed for general damages, and may recover them beyond the amount of the penalty (*Harrison v. Wright*, 13 East, 343; *Barton v. Glover*, *Holt's N. P.* 44; *Davies v. Penton*, 6 B. & C. 224).

Mode of Statement of Damages.] The damages must be stated according to the facts; and, as the jury cannot give greater damages than those stated, the plt. should take care to state them sufficiently extensive (*Cheveley v. Morris*, 2 Bla. 1300); especially as the jury may give less than the amount claimed (*Dow*, 207; *Gardiner v. Croasdale*, 2 Burr. 904): as, in declaring on a policy, under a statement of a total loss, a partial one may be recovered (lb.). In the statement of them, the word "whereby," or "by means of the premises," &c., refers to all the antecedent matter (*Pereau v. Bevan*, 5 B. & C. 292). Where the declaration positively and expressly avers that plt. has sustained damages from a cause subsequent to the commencement of the action, or previous to the plt.'s having any right of action, and the jury give entire damages, judgment would be arrested; but where the cause of action is properly laid, and the other matter either comes under a verdict, or is void, insensible, or impossible, and therefore cannot be intended that the jury ever had it under their consideration, the plt. will be entitled to his judgment (2 Saund. 171 b). If the jury give more damages than are laid, the surplus should be remitted before judgment has been entered (1 Ch. Pl. 349). The incurring a liability to pay costs, without having paid them, should be so stated (*Pritchett v. Boevey*, 3 Tyrw. 949); noting and postages on a bill must be declared for specially (*Kendrick v. Lomax*, 1 C. & J. 408). As to what damages are recoverable, see *post*, "DAMAGES."

Several Counts.] Formerly, the plt. was at liberty to insert in his decla-

ration as many counts as he thought proper, so as to be prepared for every complexion which the case might assume at the *trial; but now [*222] by the pleading rules of H. T. 4 Will. IV., which have the force and authority of an act of parliament, it is ordered, that:

Several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall *several* pleas, or avowries, or cognisances be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each. Therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed. *Ex. gr.* counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed; for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract. So, counts for not giving, or delivering, or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed. So, counts for not accepting and paying for goods sold; and for the price of the same goods, as goods bargained and sold, are not to be allowed. But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint; for the debt and the security are different contracts, and such counts are to be allowed. Two counts upon the same policy of insurance are not to be allowed. But, a count upon a policy of insurance, and a count for money had and received, to recover back the premium upon a contract implied by law, are to be allowed. Two counts on the same charter-party are not to be allowed. But, a count for freight upon a charter-party, and for freight *pro ratâ itineris*, upon a contract implied by law, are to be allowed. Counts upon a demise, and for use and occupation of the same land for the same time, are not to be allowed. In actions of tort for misfeasance, several counts for the same injury, varying the description of it, are not to be allowed. In the like actions for nonfeasance, several counts founded on varied statements of the same duty are not to be allowed. Several counts in trespass, for acts committed at the same time and place, are not to be allowed. Where several debts are alleged in *indebitatus assumpsit* to be due in respect of several matters, *ex. gr.* for wages, work, and labour as a hired servant, *work and labour generally*, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count within the meaning of the rule which forbids the use of separate counts, though one promise to pay only is alleged in consideration of all the debts. Provided, that a count for money due on an account stated may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts. The rule which forbids the use of several counts is not to be considered as precluding the plaintiff from alleging *more breaches* than one of the same contract in the same count. The examples, in this and other places specified, are given as some instances only of the application of the rules to which they relate; but the principles contained in the rules are not to be considered as restricted by the examples specified.

And to enforce the due observance of this rule, it is ordered (R. G. H. T. 4 Will. IV.) that:

Where more than one count, plea, avowry, or cognisance, shall have been used in apparent violation of the preceding rule, the opposite party [*223] shall be at liberty to apply to a judge, suggesting *that two or more of the counts, pleas, avowries, or cognisances are founded on

the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognisances, introduced in violation of the rule, be struck out at the cost of the party pleading; whereupon the judge shall order accordingly, unless he shall be satisfied, upon cause shown, that *some distinct subject-matter* of complaint is *bona fide* intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognisances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognisances mentioned in such application, which shall be allowed. Upon the trial, where there is more than one count, plea, avowry, or cognisance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognisance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognisance, which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognisance, including those of the evidence as well as those of the pleadings; and further, in all cases in which an application to a judge has been made under the preceding rule, and any count, plea, avowry, or cognisance, allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was *bona fide* intended to be established at the trial in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognisance so allowed, if the court or judge, before whom the trial is had, shall be of opinion that no such distinct subject-matter of complaint was *bona fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognisance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which *he succeeds*, arising out of any count, plea, avowry, or cognisance with respect to which the judge shall so certify.

Cases within the Rule.] In an action by grantee of a corporation for dues, it was held that plt. could not have two counts for the same sums, the one claiming them as *metage fees*, and the other as a port duty (*Jenkins v. Treloar*, 1 M. & W. 16; S. C. 4 Dowl. 690). Two counts on the same agreement were disallowed, the one describing deft. as liable jointly with another person, and the other as solely liable (*Cholmondeley v. Payne*, 3 B. N. C. 708; 4 Sc. 418; S. C. 5 Dowl. 638). And, two counts on the same promissory note, one alleging the promise to plt. and a deceased partner, and another to plt. alone (*Kinglake v. Pickham*, 1 W. W. & H. 301). But see a case in which the Q. B. allowed two counts on a guarantee, one describing it as absolute and the other as conditional (1 P. & D. 661; S. C. 9 Ad. & E. 126). So, a count on a demise will not be allowed with a count for use and occupation (*Arden v. Pullen*, 9 M. & W. 430; S. C. 1 Dowl. N. S. 612). And where in an action arising out of a horse race, two counts were introduced, one upon the Newmarket and the other upon the Ludlow races, the court ordered one to be struck out (*Anon.* cited 3 Dowl. 778). So, where in one count plt. declared that E. T. was possessed of shares in a railway, and that deft. promised plt. that he was authorized by E. T. to sell them, whereas he was not; and in another, that deft. bargained with plt. to sell the shares, and promised to transfer them within a reasonable *time, this was considered a violation of the rule (*Roy v. Bristow*, 2 M. & W. 241; 5 Dowl. 452; S. C. 1 Jur. 168). So two. [*224] counts on a policy of insurance will not be allowed, one alleging

the loss to have been occasioned by the barratry of the master, and the other by the perils of the sea (*Blyth v. Shepherd*, 1 Dowl. N. S. 880; S. C. 9 M. & W. 763; 6 Jur. 489). And, where a special count on a charter-party, from which it appeared that a certain number of days of demurrage were allowed, alleged as a breach, a detention beyond the demurrage days, but contained no breach for nonpayment of demurrage, the court refused to allow with it a common count for demurrage (*Temperley v. Browne*, 1 Dowl. N. S. 310; S. C. 6 Jur. 150).

Cases not within the Rule.] On the other hand, a count for double rent is allowable, together with a count for use and occupation (*Thornton v. Whitehead*, 1 M. & W. 14; 4 Dowl. 747; *Laurence v. Stephens*, 1 Gale, 164; but see S. C. 3 Dowl. 777); these being distinct subject-matter of complaint. And it seems that, by analogy to this case, a count for the treble value of tithes not set out would be allowed, together with a count for tithes bargained and sold, though the contrary was once ruled (see *Lawrence v. Stevens*, 3 Dowl. 777; but see the observation of Parke B., in *Thornton v. Whitehead*, *supra*). A count in detinue for a bill or note, is allowable with a count for the amount of the same bill or note (*Kirkpatrick v. England (Bank)*, 8 Dowl. 881). In an action against a shipowner for the loss of goods, one count alleged a contract to carry from Dublin to London, and there to deliver; and another to take care of the goods at the wharf in London, and carry them thence to plt.'s place of business; and the court refused to strike out either (*James v. Bourne*, 4 B. N. C. 420; 6 Sc. 231; 6 Dowl. 603). *Tindal, C. J.*, in giving judgment in this case, said, "Undoubtedly if we were to take in their more general sense the words of the rule, counts founded on one and the same principal matter of complaint, the allowing the two to stand together would appear to be a violation of the rule, because it is impossible not to see that the subject-matter of complaint in both counts is that the goods were not delivered by the deft., but taking the whole of the instances given in connexion with the rule, I think it means that if there be a second and distinct contract in respect of the same subject-matter, the count on such contract may stand, and that it would be an unnecessary extension of the rule to strike it out. Here the first count is to carry goods on a contract from B. to D. and from D. to L., the second count relates to the same subject-matter so far as the goods are concerned, but it is on a separate and distinct contract as to the deft.'s undertaking, that is to carry goods from the place of their landing at the port of L. to the plt.'s place of business. The instances given in the rules themselves show that a distinct subject-matter of complaint means in cases of contract a separate contract." (*James v. Bourne*, 4 B. N. C. 420). So, a count on a charter-party, whereby deft. agreed that a certain ship should sail to Honduras, take on board a cargo of mahogany, and proceed to London or Liverpool, and deliver the same, alleging, as a breach, that part of the cargo was not taken on board according to the agreement, was allowed to stand, with a count averring that in consideration that plt. had caused certain goods to be taken to and loaded on board deft.'s vessel in the bay of Honduras, deft. promised that due and proper care should be taken of them until they were loaded on board the said vessel, and that while in deft.'s custody they were lost (*Vaughan v. Glenn*, 8 Dowl. 396; S. C. 5 M. & W. 577; see also *Bleaden v. Rasallo*, 9 Dowl. 857; 3 Sc. N. R. 564; S. C. 3 Man. & G. 116). Each

*of the common counts is, for the purposes of pleading and costs, [*225] considered as a separate count (*Jourdain v. Johnson*, 2 C. M. & R. 564). See the construction of these rules, 3 Ch. G. P. 400).

Precedents.

To prevent the unnecessary prolixity of statement which formerly prevailed in declarations, it is ordered, by Rule of T. T. 1 Will. IV., "That if any declaration in assumpsit hereafter filed or delivered being for any of the demands mentioned in the Schedule of forms and directions annexed to this order, *or demands of a like nature*, shall exceed in length such of the said forms set forth, or directed in the said Schedule, as may be applicable to the case; or if any declaration in debt, to be so filed or delivered for similar causes of action, for which the action of assumpsit would lie, shall exceed such length, no costs of the excess shall be allowed to the plt. if he succeed in the cause; and such costs of the excess as have been incurred by the deft. shall be taxed and allowed to the deft., and be deducted from the costs allowed to the plt."

And it is further ordered, that, on the taxation of costs, as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and in case any costs shall be payable by the plt. to the deft. on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill.

For the Schedule of forms on Bills of Exchange and Promissory Notes, see those titles.

Common Counts.

Whereas the deft. on — was indebted to the plt. in £—— for the price and value of goods then* bargained and sold [or sold and delivered] by the plt. to the deft. at his request.

And in £——, for the price and value of work then* done, and materials for the same provided by the plt. for the deft. at his request.

And in £——, for money then* lent by the plt. to the deft. at his request.

And in £——, for money then* paid by the plt. for the use of the deft. at his request.

And in £——, for money then* received by the deft. for the use of the plt.

And in £——, for money found to be due from the deft. to the plt. on an account then* stated between them.

General conclusion.

And whereas the deft. afterwards, to wit, on the day and year aforesaid, in consideration of the premises respectively, promised to pay the said several moneys respectively to the plt. on request; yet he hath disregarded his promises, and hath not paid any of the said moneys, or any part thereof, to the plt.'s damage of £——, and therefore he brings suit, &c.

Directions as to general conclusion.

If the declaration contain one or more counts against the maker of a note, or the acceptor of a bill of exchange, it will be proper to place them first on the declaration, and then in the general conclusion to say, "promised to pay the said *last-mentioned several moneys respectively*."

For the forms of other counts, common and special, which are too numerous to be inserted here, see 2 Ch. Pl. 7th ed., Ch. Jun. by Pearson.

Pleas.

Pleading Rules.] By the Pleading Rules of H. T. 4 Will. IV. r. 11, it is ordered that—

* This word is now unnecessary (see *ante*, p. 182). The words "and then," originally introduced, have been omitted in conformity with the rule of H. T. 4 Will. IV. r. 8; *post*, "DECLARATION."

"1. In all actions of assumpsit, except on bills of exchange and *promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

"*Ex. gr.* In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and, in an action on a policy of insurance, of the subscription to the alleged policy by the deft., but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

"In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

"In an action of *indebitatus assumpsit*, for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the deft. a receipt to the use of the plt.

"2. In all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.* the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

"3. In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.*, infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded."

The plea of *non assumpsit* is admissible in an action against an executor on a banker's cheque drawn by his testator (*Rolleston v. Dixon*, 14 L. J. 304, Ex.; 2 D. & L. 892).

Form of Plea.] The general rules as to pleas here apply (*post*, "PLEAS"). The general issue in form denies the undertaking or promise in manner and form, as stated in the declaration. The omission of the usual words, "or promise," does not render the plea a nullity (3 D. & R. 621). A plea of not guilty only is bad on demurrer, though aided by verdict (*Marshall v. Gibbs*, 2 Stra. 1022; Ca. t. Hard. 173). A plea of *nil debet* is a mere nullity (*Barnes*, 257; *Brennan v. Egan*, 4 Taunt. 165). This plea is now abolished (Reg. Gen. H. T. 4 Will. IV.; see *Faulkner v. Chevell*, 5 Ad. & E. 213; *Spencer v. Swannell*, 3 M. & W. 155). As to the forms of special pleas, see the various titles of defences throughout this work.

Effect of Non Assumpsit to Common Counts.] The plea of *non assumpsit*, as applied to the common *indebitatus* counts, denies, 1st, the fact, that the goods were sold and delivered to, or that the work was done, or the money was paid, &c.; and 2ndly, that it was done, paid, &c. under circumstances which made the deft. a debtor at law to the plt. for the amount; and 3rdly, if so, that the time of payment had arrived when the action commenced. Hence,

the deft. may give in evidence under *non assumpsit*, partnership with the plt. *in the transaction (Worrall v. Grayson, 1 M. & W. 166; S. C. 4 Dowl. 718; Pearson v. Skelton, 1 M. & W. 504; Payne v. Hales, [*227] 5 M. & W. 598; S. C. 7 Dowl. 859; see Gregory v. Hartnoll, 1 M. & W. 183; S. C. 4 Dowl. 695). In *indebitatus assumpsit* by one ship-owner against another for contribution to damages recovered from the plt. for the loss of goods of a third party, the deft. may show that the loss arose from the plt.'s negligence (Gregory v. Hartnoll, *sup.*); to an action for work and labour, or goods sold and delivered, that the goods were worthless, or that the work done turned out of no value (Cousins v. Paddon, 2 C. M. & R. 547; Hill v. Allen, 2 M. & W. 283; S. C. 5 Dowl. 471; Hayselden v. Staff, 5 Ad. & E. 153; S. C. 6 N. & M. 659; Bracey v. Carter, 12 Ad. & E. 373; see Dicken v. Neale, 5 Dowl. 176; 1 M. & W. 556; Nicholls v. Wilson, 11 M. & W. 107; Hill v. Featherstonehaugh, 7 Bing. 569; Shaw v. Arden, 9 Bing. 287; Gill v. Laugher, 1 Tyrw. 124; Huntley v. Bulwer, B. N. C. 111). Or it was agreed to be done for nothing (Jones v. Nanney, 5 Dowl. 90; S. C. 2 Gale, 24; Jones v. Read, 1 N. & P. 18; 5 Dowl. 216; S. C. 5 Ad. & E. 529; Groundsell v. Lamb, 2 Gale, 28, S. C. 1 M. & W. 352; Hill v. Allen, 2 M. & W. 283; 5 Dowl. 471; S. C. 1 Jur. 44; see Cleworth v. Pickford, 7 M. & W. 314; S. C. 8 Dowl. 873; Bradshaw v. Hayward, 1 C. & M. 591). There are two cases in which a party is precluded from recovering for work and labour; one where work which is useful has been performed unskilfully, the other where work which is useless for the object in view has been performed even skilfully (Hill v. Featherstonehaugh, 7 Bing. 569; see Lewis v. Samuel, 8 Q. B. 685); to a count for goods sold and delivered, that they were not according to sample and were returned, see Gardner v. Alexander, 3 Dowl. 146; or, that no delivery took place; or, that deft. paid for them at the time, and no credit was given (Bussey v. Barnett, 9 M. & W. 312; 1 Dowl. N. S. 646); or, that they were not sold on the credit of deft., but on the credit of another person (see Crawshay v. Barry, 1 M. & G. 235); or that they were delivered in part payment of a debt due from plt. to deft. (Wilson v. Story, 4 Jur. 463); or, that a machine was sold, to be paid for, if it worked well (Groundsell v. Lamb, *supra*); so, in an action for work as an attorney, that deft. was unqualified (Parker v. Riley, 3 M. & W. 230); that the contract was void by the statute, 29 Chas. II. s. 17, for want of a note in writing, &c. (Buttmer v. Hayes, 7 Dowl. 489; 3 Jur. 704; Eastwood v. Kenyon, 3 P. & D. 276; Leaf v. Tuton, 10 M. & W. 393; 2 Dowl. N. S. 300; S. C. 6 Jur. 690; Freeken v. Tomlinson, 1 M. & G. 772); to an action for money had and received, that the money though received by the deft. was received for the use of another, and not of the plt. (Clark v. Dignam, 3 M. & W. 478; 2 Jur. 419); Solly v. Neish, 2 C. M. & R. 355); to an action for use and occupation, that before the rent became due pl. evicted him (Prentice v. Elliott, 5 M. & W. 606; S. C. 7 Dowl. 819); or that the premises were in mortgage when deft. took them, and that the mortgagee had given him notice not to pay any more rent to the plt. (Woodhouse v. Burnett, 2 B. N. C. 385); or, it seems, in an action for board and lodging of deft.'s wife, that she committed adultery (see Symes v. Goodfellow, 2 B. N. C. 532); under this plea also the deft. may show that the goods were sold, work done, money lent, &c. on a credit which had not expired at the time the action was commenced (Hayselden v. Staff, 5 Ad. & E. 153; S. C. 6 Nev. & M. 659; overruling Edmunds v. Harris, 2 Ad. & E. 414; S. C. 4 Nev. & M. 182; Maude v. Mesham, 6 Dowl. 570; 3 M. & W. 502; S. C. 2 Jur. 701; Smith v. Cole, 4 Dowl. 571); and, generally, any defence which shows a liability different from, and incompatible with, that declared on, is admissible on *non assumpsit* (Morgan v. Pebrer, 3 B. N. C.

457; Jones v. Nanney, 5 Dowl. 90; *Waddilove v. Barnett, 2 B. N. C. 538; Brind v. Dale, 2 M. & W. 775; Lyall v. Hegins, 5 Q. B. 529); or a contract with a material provision not mentioned in the declaration (Nash v. Breeze, 11 M. & W. 352). The nonjoinder of co-contractor, as plt. may be shown, or the misjoinder of either a co-plt. or co-deflt., for this is a variance (see "VARIANCE").

Assumpsit against E. and H. attorneys, for money had and received. Plea, that plt. had retained and employed E. as his attorney, and was indebted to him for work, and thereupon plt. and defts. agreed that, in lieu of the sole retainer of E. defts. should be jointly retained and employed by plt. as his attorneys, and that they should have a lien upon all moneys which they should receive for plt. in the course of such employment, to the amount of all debts that then were, or thereafter should be, due from plt. to E. solely, or to defts. jointly, in respect of the said retainers and work respectively; and that they should hold and apply the same on account and in discharge of such debts to E. or to defts. jointly, and thereout pay to E. and to defts. the said debts respectively. Averment, that defts., on such joint retainer, did work for plt.; there became due, and was still due from him to them, in respect thereof, a certain sum, which, together with the said debt to E. exceeded the amount claimed in this action; that defts. received the amount so claimed to the use of plt.; and, under and by virtue of their said retainer and employment, and subject to the said lien, and held and applied part thereof on account and in discharge of the debt due to E. and paid him the same, and the residue on account, and in discharge of the debt due to the defts. and paid themselves the same: held, a bad plea, as substituting a different contract for that declared upon, and consequently amounting to the general issue (Williams v. Vines, 6 Q. B. 355).

Where an article is warranted, and the warranty is not complied with, the vendee has three courses open to him, 1st, he may refuse to receive the article; 2dly, he may receive it and bring a cross action for the breach of warranty; 3dly, he may give in evidence, in reduction of damages, the breach of warranty in any action brought by the vendor for the price (Street v. Blay, 2 B. & Ad. 456; see Chanter v. Hopkins, 4 M. & W. 399; Olivant v. Bayley, 3 Q. B. 288; Parsons v. Sexton, 4 C. B. 899; Poulton v. Latimore, 9 B. & C. 259; see Gompetz v. Denton, 1 C. & M. 205; see also O'Kell v. Smith, 1 Stark. 107; Jordan v. Norton, 4 M. & W. 159; Young v. Cole, 3 B. N. C. 730; Lorrymer v. Smith, 1 B. & C. 1; see this subject discussed in Cutter v. Powell, 2 Smith's L. Ca. 16, *et seq.*)

What Defences must be Specially Pleadet.] But any defence which admits the contract, and which seeks to avoid its effect, for some matter which is the subject of proof on the part of deflt., such as usury, fraud, gaming, infancy, coverture, &c. (see *per* Parke, B., in Leaf v. Triton, 10 M. & W. 397); or which shows it to be defeated, or, satisfied by matter subsequent, must be specially pleaded. Hence, to an action for money had and received, the deflt. cannot give in evidence, on *non assumpsit*, that it was received in respect of an illegal wager (Martin v. Smith, 6 Dowl. 639; 4 B. N. C. 436; 6 Sc. 268; 2 Jur. 376); nor, in an action for work and labour, that the contract was void as against public policy (Clutterbuck v. Coffin, 4 Sc. N. R. 509; 1 Dowl. N. S. 479; S. C. 6 Jur. 131. See "ILLEGAL CONSIDERATION"). An agreement to put an end to a suit for nullity of marriage, on the ground of impotency, is not contrary to public policy (Wilson v. Wilson, 14 Sim. 405). In Martin v. Smith, 4 B. N. C. 436, the question was raised whether the coverture of the plt. need be pleaded specially [*229] in assumpsit, and Tindal, C. J., and Parke, *and Coltman, Js.,

seemed to be of opinion that it need not (see *Moss v. Smith*, 1 Man. & G. 228). On a specialty it cannot be pleaded in bar, but only in abatement (*Bendix v. Bateman*, 12 M. & W. 97; see "ABATEMENT"). Nor for goods sold and delivered, that they were such as the law prohibits the sale of—(*Fenwick v. Laycock*, 1 Q. B. 414; 1 G. & D. 27; S. C. 5 Jur. 459; and it makes no difference that the illegality is disclosed on the plt.'s own case (Ib.; see *Daintree v. Hutchinson*, 10 M. & W. 85; S. C. 6 Jur. 736); illegality must be pleaded. Thus, that an attorney was guilty of maintenance in the services in respect of which he sues (*Potts v. Sparrow*, 1 B. N. C. 594; see "ILLEGAL CONSIDERATION"). In an action for demurrage that plt. defrauded the customs (*Alcock v. Taylor*, 6 Nev. & M. 296); so, failure of part of the consideration must be pleaded (*Head v. Baldrey*, 6 Ad. & E. 670); so, the merger of a simple contract in a specialty *subsequently* given (*Weston v. Foster*, 2 B. N. C. 693); so, if a subsequent account be stated upon which deft. relies (*Fidgett v. Penny*, 1 C. M. & R. 108); so, in use and occupation that the mortgagee required the deft. to pay him the rent after it became due (*Waddilove v. Burnett*, 2 B. N. C. 385). A plea to an action for not accepting shares in a foreign undertaking and paying for them; that the contract was made in France, plt. and deft. residing therein; that, by the law of France, a person, who has neither the property nor the actual nor constructive possession of a thing, cannot sell it, and that the shares were at the time when, &c., the property of F., held by him in his own right, and not the property, nor in the actual nor constructive possession of the plt., amounts to the general issue (*Hannui v. Golder*, 11 M. & W. 849). To a special assumpsit the deft. pleaded a plea showing a partial failure of the consideration for the promise alleged; held, a complete answer to the action (*Head v. Baldrey*, 2 Nev. & P. 217; *Chater v. Beckett*, 7 T. R. 201; *Thomas v. Williams*, 10 B. & C. 664). Where it is doubtful whether a statutory objection to the contract can be rendered available under the plea of *non assumpsit*, the court will allow it to be specially pleaded (*Smith v. Dixon*, 4 Dow. P. C. 571). In an action for goods sold, &c., plea that they were sold under a contract which was afterwards rescinded, held bad, as admitting an executed contract, and attempting to avoid it by a release not under seal (*Edwards v. Chapman*, 1 Gale, 376). Puffing at an auction must be specially pleaded (*Teeley v. Crew*, 6 C. & P. 671). That a contract was made on a Sunday must be specially pleaded (*Peate v. Dicken*, 1 M. & R. 423. See "SUNDAY").

In an action on an attorney's bill, the objection that it was not delivered a month before action cannot be taken on the general issue, but must be specially pleaded (*Lane v. Glenny*, 2 N. & P. 258; 7 Ad. & E. 83; S. C. 1 Jur. 475; *Robinson v. Rowland*, 6 Dowl. 271; 2 Jur. 136); nor that plt. was not duly qualified to practise (*Hill v. Sydney*, 7 Ad. & E. 956; 3 N. & P. 161; S. C. 2 Jur. 416; see *Eyre v. Shelley*, 6 M. & W. 269; 8 Dowl. 185; S. C. 4 Jur. 415; see *Sherwood v. Hay*, 5 Ad. & D. 388); nor, that the work consisted of the preparation of an illegal deed (*Potts v. Sparrow*, 1 Sc. 578; 1 B. N. C. 594; 3 Dowl. 630; see *post*, "ATTORNEYS"; see also *Friebriezer v. Duerr*, 1 B. N. C. 266; *Bolton v. Caghlán*, 1 B. N. C. 640; *Martin v. Smith*, 4 B. N. C. 436). Usury must be pleaded at least unless the contract or deed declared on, be on the face of it usurious (*Ferguson v. Sprang*, 1 Ad. & E. 576; see "USURY"); but in an action by an apothecary, for his fees, his want of qualification need not be pleaded, but it is incumbent on him to prove it on the general issue (see *ante*, "APOTHECARY").

The 57 Geo. III. c. 99, s. 53, enacts that any difference arising [*230] between *any rector and his curate touching the stipend or

allowance appointed to such curate, under the provisions of the act, or the payment or arrears thereof, shall be summarily determined by the bishop; and by s. 74 no other jurisdiction shall be exercised in any case where jurisdiction is given by this act; held, in assumpsit by a curate against his rector for arrears of salary; 1st, that these provisions of the statute were properly pleaded in bar, and not to the jurisdiction; 2ndly, that the plea need not state the nature of the difference which arose (*West v. Turner*, 7 Nev. & P. 612).

By a recent rule of court (R. M. 1 Vict.) payment cannot in any case be given in evidence, unless specially pleaded (see "PAYMENT").

Effect of Non Assumpsit to Special Counts.] As in the case of an indebitatus count, so when pleaded to a special count, *non assumpsit* denies the making of the promise as alleged, and that it was made upon the alleged consideration. Consequently, under this plea, deft. may avail himself of any material variance, in the statement either of the consideration or the promise (see *Beech v. White*, 4 P. & D. 399; 12 Ad. & E. 668; S. C. 5 Jur. 116; *Kemble v. Mills*, 2 Sc. N. R. 121; S. C. 9 Dowl. 446; *Wright v. Newton*, 3 Sco. 595; *Sutherland v. Pratt*, 11 M. & W. 296; *Brydges v. Lewis*, 3 Q. B. 603; *Lyall v. Higgins*, 12 Law J., N. S. 241); or, give in evidence any matter which tends to disprove either (*Raikes v. Todd*, 1 P. & D. 138; *Bennion v. Davison*, 3 M. & W. 179). The failure of part of the consideration whereby the whole contract failed must be specially pleaded. He may also avail himself of any legal objection to the means or document by which plt. proposes to prove the contract. Hence, in an action on an agreement, bill, &c., he may object that the instrument is not properly stamped (*Dawson v. Macdonald*, 2 M. & R. 26); and, with this view, may, in an action on a cheque, show that the cheque was post-dated (*Field v. Woods*, 2 N. & P. 117; 7 Ad. & E. 114; 6 Dowl. 23; S. C. 1 Jur. 496; see "BILLS OF EXCHANGE"). So, in an action on a guarantee, or other contract within the Statute of Frauds, he may object that it was not in writing, as required by the statute (*Buttermere v. Hayes*, 5 M. & W. 456; S. C. 7 Dowl. 489; *Eastwood v. Kenyon*, 3 P. & D. 276; S. C. 4 Jur. 1081; *Head v. Baldray*, 11 Ad. & E. 441; 6 Ad. & E. 459). So in the case of a demise for three years, a writing must be proved, not merely on a special traverse of the demise, but where the denial of a demise is included in the general issue (*Buttermere v. Hayes*, 5 M. & W. 461, 462); so, also, that a contract within the 17th sect. of the Statute of Frauds for the sale of goods above the value of 10*l.* was in writing, and that there was an acceptance of part (*Johnson v. Dodgson*, 2 M. & W. 653; *Elliott v. Thomas*, 3 M. & W. 173; *Fricker v. Tomlinson*, 1 Man. & G. 772). So in the case of an agreement to answer for the debt of another (*Eastwood v. Kenyon*, *supra*); and a special plea of the statute is but an argumentative denial of the facts alleged in the declaration (*Leaf v. Tuton*, 2 Dowl. N. S. 300).

Where a declaration in assumpsit describes the terms of the contract in language denoting that a particular act which the plt. has engaged to do is to be dependent on or concurrent with an act or acts to be done on the part of the deft., if from the position of the parties or from the nature of the agreement such act is to be considered as intended to constitute a condition precedent, the proper course is to plead *non assumpsit* and give the special matter in evidence (*Kemble v. Mills*, *supra*; per-Maule, J.).

But, under *non assumpsit*, deft. cannot show that the contract was not binding in law, by reason of plt.'s being already bound to do that [*231] which was the alleged consideration for deft.'s promise *(*Passenger v. Brooks*, 1 Sc. 560); for this is not in denial, but in confession

and avoidance (see *Bennion v. Davison, supra*; *Raikes v. Todd, supra*). So, where the declaration averred that plt. had composed and written certain music, and as such composer had a right thereto, and that, *in consideration of the premises*, and that plt. would sell such right to deft. the latter promised to buy it, it was ruled, by Tindal, C. J., that deft. could not, upon *non assumpsit*, contend that plt. was not the author, or had not the right (*De Pinea v. Ponhill*, 8 C. & P. 78). So, where he consideration is alleged as an executory one, and plt. avers performance, deft. cannot, in this plea, deny the performance (*Gibson v. Harris*, ib. 378). Nor can a breach be disproved on this plea (*Smith v. Parsons*, 8 C. & P. 199). Nor can he object, at the trial on *non assumpsit*, that the contract is void for illegality, although it so appears on the face of the declaration (*Daintree v. Hutchinson*, 10 M. & W. 85; S. C. 6 Jur. 736).

In an action on a special agreement the deft. may, under *non assumpsit*, avail himself of a defence arising from an alteration in the contract, made without his consent, after it was entered into, provided that the plt. has declared upon it as altered (see *Cock v. Coxwell*, 2 C. M. & R. 291; and see *Clifford v. Parker (Lady)*, 3 Sco. N. R. 233; *Cariss v. Tatterson*, 3 Sco. N. R. 257). A defence to an action on a guarantee, that, subsequently to the execution of it, and whilst it was in the possession of the plt. a seal was affixed to the deft.'s signature, so as to make the instrument purport to be a deed, must be specially pleaded (*Davidson v. Cooper*, 11 M. & W. 778). A subsequent alteration by agreement of the contract declared on, must be pleaded specially (*Heath v. Durrant*, 13 Law J., N. S., Exch. 95). Where a guarantee, on production at the trial, appeared to have been altered in a material part, and so vitiated, it was held that deft. could not take the objection on *non assumpsit*, the declaration describing it as it was before the alteration (*Hemming v. Trenery*, 1 P. & D. 661; S. C. 9 Ad. & E. 26; see *Langton v. Lazarus*, 5 M. & W. 629; *Harden v. Clifton*, 1 Q. B. 522; see "ALTERATION"). And, if a parol contract, once complete and binding, be afterwards merged by the execution of a deed between the parties, the merger must be specially pleaded; but if there never was a complete parol contract, as where the writing was only signed as the draft of the deed and the latter was afterwards executed, deft. may, in an action on the parol agreement, show this matter on *non assumpsit* (*Filmer v. Burnby*, 2 Sco. N. R. 689; 9 Dowl. 666; S. C. 2 M. & G. 529).

If the defence be that the contract was with A., not with the plt., the fact of payment by the deft. to A. is not impertinent to the issue, for it shows that the defence is a *bona fide* one, and not a pretext to avoid payment of the debt (*Gerish v. Chartier*, 1 C. B. 13). The deft. may show that the contract was made abroad, and good by the *lex loci* (*Hannuic v. Goldner*, 11 M. & W. 849). He may show that the contract was made on a different consideration from that stated in the declaration (*Lyall v. Higgins, supra*).

The deft. under *non assumpsit* may show that there was not any contract save under seal (*Filmer v. Burnby*, 2 Man. & G. 529; *Edwards v. Bates*, 2 D. & L. ante; see *Atty v. Parish, ante*). So he may show that the contract was not entered into with the plt. (*Sutherland v. Pratt*, 11 M. & W. 296). In an action against an attorney for negligence, such plea puts in issue the fact of his having been retained as an attorney (*Aldis v. Gardner*, 1 C. & K. 564). Where plt. declared that in consideration that the plt. would give the deft. a horse and 2*l.*, the deft. promised, &c.; *non assumpsit*; held, that plt. was not bound to prove the delivery of the horse or payment of the 2*l.* (*Smith v. Parsons*, 8 C. & P. 200, n.). *Plt. declared that in consideration he had sold and delivered twenty [*232] tons of best Dutch lead to the deft., the latter had promised to

deliver to the plt. prussiate of potash to the same amount, averring the delivery of the twenty tons, &c. Breach, that deft. would not deliver the full quantity of potash. Plea, *non assumpsit*; held, that as deft. had not pleaded that plt. had not delivered best Dutch lead, he could not show the inferiority of the quality (Pegg v. Stead, 9 C. & P. 636). In an action on a warranty, breach, unsoundness; held, that deft. could not, under *non assumpsit*, show that the horse was sound (Smith v. Parsons, 8 C. & P. 199). A plea denying the identity of the contract made, and that declared on, amounts to the general issue (Smith v. Dixon, 7 Ad. & E. 1). In *assumpsit* for money paid; plea, 1st, that the money was paid to the use of the deft. in manner, &c., *videlicet*, as one-sixth part for the damages and costs recovered against the plt. as owner of a vessel, of which the plt. was part-owner to the extent of one-sixteenth share for the loss of certain goods shipped, &c., and which loss was alleged in the action to have happened through the negligence of the plt. by his servants, &c.; whereas the loss was not only caused by the negligence, &c., of the plt. by his servants, but plt., by his own personal and wilful misconduct, &c., contributed to the loss; 2ndly, that although deft. was the legal owner of one-sixteenth part of the said vessel, yet he did not concur with the plt. and the other part-owners in the employment of the vessel in that voyage; but that the said voyage was undertaken and carried on for the profit and advantage of the plt., and certain other persons separate and distinct from the deft., and without his having been concerned, or having in any way participated, in the adventure: held, that both pleas amounted to the general issue (Gregory v. Hartnoll, 1 M. & W. 183). Where a known and ascertained article is ordered and sent, it is no answer to an action for the price of it to show that it does not answer the purpose for which it was ordered (Chanter v. Hopkins, 4 M. & W. 399; Ollivant v. Bayley, 5 Q. B. 288; Parsons v. Sexton, 4 C. B. 899).

In an action against a carrier, deft. cannot, under *non assumpsit*, object that the goods were of more than 10*l.* value, and that no notice thereof was given pursuant to the statute 11 Geo. IV. & 1 Will. IV. c. 68 (Syms v. Chaplin, 5 Dowl. 429; 5 Ad. & E. 634; S. C. 1 N. & P. 129); but must plead this defence specially. So, where a warranty is given subject to a condition that it shall terminate at twelve the next day unless in the mean time the purchaser give notice of unsoundness, this condition must be pleaded specially (Smart v. Hyde, 1 D. N. S. 60; S. C. 8 M. & W. 723).

A declaration stated, that before making the promise thereafter mentioned, the plt. had brought an action in the Exchequer against the deft. to recover a certain sum of money; that issues in fact had been joined between the parties, and notice of trial given; that in consideration that the plt. would forbear further proceedings until the 14th of December, the deft. promised to pay the money and costs on that day; and that in the event of his not paying a judge's order should be drawn up to secure payment. There was also a count on an account stated. Pleas, first, to the first count, that the plt. never had any cause of action in the action in the Exchequer, which he well knew; secondly, to both counts, that the original action was brought on two cheques, and that the judge's order was made on certain terms (setting them forth); that the promise in the first count mentioned was deduced from that order, and that the promise in the second count was deduced from the order ascertaining the amount of costs due on taxation, and that the order was afterwards set aside: held, upon general demurrer, that the former

*plea was good, and, on special demurrer, that the second plea [*233] was bad, as amounting to the general issue. *Quere*, if it had been objected on special demurrer that the former plea did not show the deft. to be in a condition successfully to defend the action in the

Exchequer, would the plea have been good? (Wade v. Simeon, 3 D. & L. 587, C. P.).

Declaration upon an agreement whereby it was contracted that the plt. should supply, and the deft. receive, certain bales of wool, and alleging as a breach the refusal of the deft. to receive. Plea, that the wool contracted for was to be according to sample, but the wool tendered was inferior to the sample: held, on special demurrer, that the plea was not bad, as amounting to *non assumpsit* (Sieveking v. Dutton, 4 D. & L. 197; 2 C. B. 331).

In an action on a special contract for non-payment of stakes won by the plt. on a race which was run, subject to a condition that the decision of the committee, on any dispute that might arise, should be final, it seems that a defence that a dispute has arisen, which was pending before the committee, who have not made a decision, must be specially pleaded (Walmesley v. Matthews, 3 Man. & G. 133). A merger of the contract on which the action is brought in a deed under seal must be pleaded specially (Filmer v. Burnby, 2 Man. & G. 529).

Stamp.] Where a written agreement is declared upon, or must be proved, and a stamp is essential, this plea in effect puts in issue the sufficiency of the stamp, because the statute not only enacts that the agreement unless duly stamped shall be unavailable, but shall not be admissible in evidence. The plt. will, therefore, be nonsuited for want of a stamped instrument to support his declaration. A plea of the want of a stamp is bad (Haward v. Smith, 4 B. N. C. 684); and if a statute expressly require a fact to be proved by the plt. as part of his case, as the Apothecaries' Act requiring proof of the plt.'s certificate, or that he was in practice before a certain day, then the want of such qualification need not be pleaded to an action for the amount of a bill (Morgan v. Ruddock, 1 H. & W. 505; 4 Dowl. 311; Shearwood v. Hay, 5 Ad. & E. 383; Wagstaffe v. Sharpe, 3 M. & W. 531); and the plt. is equally bound to show his certificate, or previous practice, where (in debt) deft. has pleaded as to part *nunquam indebitatus*, and a tender to the residue (Wills v. Langridge, 5 Ad. & E. 383; see "APOTHECARY"). It seems that if an act of parliament give a party a general form of declaration, and enact that it shall only be necessary to prove certain matters in support of it, the plea of the general issue requires the plt. to prove all such matters. Where the plt. declared in special assumpsit that deft. held lands under a lease from E. on certain terms set forth, and that the reversion came to the plt., that deft. in consideration of an abatement of rent promised to hold on the same terms in all other respects, but that he broke the terms, and the deft. pleaded *non assumpsit*, plt. not proving an express contract with him: held, that he could not prove an implied one without producing the original lease, which could not be used as such evidence without being properly stamped (Wallis v. Broadbent, 4 Ad. & E. 877).

If deft. be entitled to a verdict, on the ground that no contract exists, the verdict must be against him on inconsistent pleas, which assume that there is a contract, as payment, &c. (Gregson v. Ruck, 4 Q.B. 737). But where there is no such inconsistency, the deft. may prove his special pleas for the sake of the costs, for which reason awards, finding for deft. on pleas which deny as well as pleas which confess the contract, are not necessarily repugnant (Beaufort v. Welch, *10 Ad. & E. 527; Cooper [*234-] v. Langdon, in error, 10 M. & W. 785).

Replication.] The plt., in his replication to a special plea, must either confess and avoid the matters alleged, or traverse them; and, in the latter case, he must, as a general rule, take issue on some single material pro-

position, and cannot traverse the whole (see Steph. Pl. 251—275; 1 Ch. Pl.; Regil v. Green, 1 M. & W. 328; and see “REPLICATION”). The exception is, when the plea contains simply matter of *excuse* for the non-performance of deft.’s promise, and in that case the general replication *de injuriâ*, which traverses all the material averments in the plea, is admissible, subject to the limitations laid down in Crogate’s case, 8 Co. 76 a (Mead v. Farrer, 1 M. & W. 65; Griffin v. Yates, 2 B. N. C. 579; Crisp v. Griffiths, 2 C. M. & R. 159; Humphreys v. O’Connell, 9 D. P. C. 213; “REPLICATION,” “TRESPASS”). But this is the only form of general traverse which it seems is allowable, even where the plea contains merely matter of excuse. A replication, “that the said plea and the statements therein contained in manner and form as the same are therein pleaded are not true, in substance and fact,” was holden bad on special demurrer, inasmuch as it traversed the immaterial as well as the material allegations in the plea (Mitchell v. Cragg, 10 M. & W. 367; and see Griffin v. Yates, 2 B. N. C. 579). On the other hand, plt. is not obliged to adopt the general replication; he may, if he pleases, select some two or more material allegations in the plea and take issue upon them, leaving the rest admitted (Garten v. Robinson, 2 D. N. S. 41).

When de injuriâ proper or not.] This replication is only admissible when the plea confesses the promise, and the breach of it, and sets up an *excuse* for such breach. A plea which admits a contract in fact, either express or implied, and seeks to avoid it on the ground of illegality or fraud, is a plea in excuse, and may be traversed by the replication *de injuriâ*. Therefore, where to an action for work and labour the deft. pleaded that the work was done by the plt. as a broker, and that the plt. was not licensed to act as a broker; held, that *de injuriâ* was a good replication (Bennet v. Bull, 1 Ex. R. 593). Therefore, where to a declaration for not paying for books sold and delivered, by bills at certain dates with security, according to conditions of sale, which were set out, deft. pleaded a custom that upon such sales the security need not be given unless required, and that plt. did not require it, it was held that a replication *de injuriâ* to this plea was improper, as the plea in effect denied the promise (Whittaker v. Mason, 2 B. N. C. 359; S. C. 2 Sc. 567). And where to an action by the drawer of a bill against the acceptor, deft. pleaded that he accepted the bill in blank, and consented that plt. should fill it up as a bill at two months, whereas he had made it payable at a month, the plt. replied *de injuriâ*, this was holden bad for the same reason (Fisher v. Wood, 1 D. N. S. 54; 5 Jur. 933; see also, Solly v. Neish, 4 Dowl. 248; Parker v. Riley, 6 Dowl. 375; Elwell v. Grand Junction Railway Company, 5 M. & W. 669; S. C. 8 Dowl. 225).

Again, where, to an action by indorsee against acceptor, deft. pleaded that, before the commencement of the suit, plt. indorsed the bill to A. who, thence until and after the commencement of the suit, was and still remained the holder; and that deft. was, and still is, liable to pay it to him; the replication *de injuriâ* was holden inadmissible, on the ground that the plea denied instead of excusing the breach of the non-payment of the bill according to its tenor and effect (Schild v. Kelpin, 8 M. & W. 673; 9 Dowl. 803; S. C. 7 Jur. 874).

So, if the plea amount to anything more than matter of *excuse*, this form of replication is not allowable. Hence, *de injuriâ* cannot be replied when the plea sets up a discharge by matter *subsequent*, as award and satisfaction after breach (see Jones v. Senior, 4 M. & W. 123; 6 Dowl. 701; Crisp v. Griffiths, 3 Dowl. 752); but, where it shows matter of discharge arising before breach, as where, to an action against the acceptor of a bill, deft. pleaded that he accepted for the accommodation of the drawer, of which

plt. had notice—that, before the bill became due, the drawer delivered to plt. other bills, upon an agreement that plt. should forbear to sue him upon the bill in the declaration mentioned, until default should be made in payment of the others—this being clearly matter of *excuse*, *de injuriâ* may be replied (Reynolds v. Blackburn, 2 N. & P. 136; 6 Dowl. 19; S. C. 7 Ad. & E. 161; see Humphrey v. O'Connell, 9 Dowl. 213; 7 M. & W. 371; S. C. 5 Jur. 271; Whitehead v. Walker, 9 M. & W. 506; S. C. 1 Dowl. N. S. 600; and see other cases, *post*, “BILLS OF EXCHANGE”).

A declaration in *assumpsit* charged the deft., in the first two counts, as the acceptor of two bills of exchange; and in other counts, for money lent, money paid, interest, and money due upon an account stated. The deft. pleaded, as to the first and second counts, and as to 852*l.* 9*s.* 6*d.* parcel of the moneys in the third and subsequent counts mentioned, that the bills were respectively drawn and on account of the sums they severally represented, parcel of the said sum of 852*l.* 9*s.* 6*d.* and for no other consideration; that after they respectively became due, and before the commencement of the suit, the deft. and one P. transferred certain stock of the value of 416*l.* 17*s.* 6*d.*, in full satisfaction and discharge of the sum of 416*l.* 17*s.* 6*d.* parcel, &c., and of the causes of action in the declaration, so far as they related to the said sum of 416*l.* 17*s.* 6*d.*; that the deft. gave the plt., and the plt. took and received from the deft., three several bills of exchange for 145*l.* 4*s.* each, and that the plt. accepted and received the stock and bills in full satisfaction and discharge of the said sum of 852*l.* 9*s.* 6*d.*, and of the causes of action in the declaration mentioned, so far as they related thereto. To this plea the plt. replied *de injuriâ*: held, that inasmuch as the plt. set up matter in discharge, and not in excuse, the replication *de injuriâ* was improper (Barnes v. Price, 1 C. B. 214).

The deft. pleaded to work and labour, that the claim was for work done by plt. as master of a boat used by defts. as common carriers, and that it was agreed that plt. as master, &c., should be answerable for all pilferings for goods under his charge, and that the amount should be deducted from his wages, and pleaded as a set-off, and then showed a pilfering of wine, and claimed the set-off; held, the replication *de injuriâ* was bad. *It seems* the plea amounted to the general issue (Cleworth v. Pickford, 8 D. P. C. 873). *It seems* that to a plea showing a *prima facie* case of a promise, but avoiding it by showing a want of consideration, a replication that deft. broke his promise, without the cause alleged, is good on general demurrer (Noel v. Rich, 2 C. M. & R. 360).

It seems to have been considered, in one case, that a plea, showing that the contract was illegal *ab initio*, could not be properly traversed by the general replication (see Parker v. Riley, 3 M. & W. 230; S. C. 6 Dowl. 375); but the contrary has been recently decided (Scott v. Chappelow, 2 D. N. S. 78; 6 Jur. 464, *nom.* Scott v. Taylor). This replication is not applicable in *assumpsit* where the plea does not admit the promise stated in the declaration (Whitaker v. Mason, 2 B. N. C. 359).

**De injuriâ* is a good replication to a plea of the Tipping Act (24 Geo. II. c. 40, s. 12), pleaded to a declaration for goods sold [*236] and delivered (Lansdale v. Clarke, 16 Law J. 246, Exch.).

When the plea alleges matter in the nature of title or interest, or authority from the plt., or matter of record, *de injuriâ*, in the general form, is improper (Crogate's case, 8 Co. 76 a). And, in such cases, the plt., if he wish to put in issue such matter, must confine himself to a simple traverse thereof: but if he admits it to be true, he may, by qualifying the general replication, apply it to all the other allegations (Steph. Pl. 265). See form of his replication, *post*, “REPLICATION.”

An objection to the replication, on the ground that it is inapplicable, must be taken on special demurrer (*Curtis v. Headfort* (Marquis of), 6 Dowl. 497; *Parker v. Riley*, ib. 375, overruling *Hooker v. Nye*, 1 C. M. & R. 258). On general demurrer, the replication will be held sufficient.

The usual form of a replication *de injuriâ*, is that deft., of *his own wrong*, and without the cause alleged, broke his promise *modo et formâ*, but the words, "of his own wrong," may safely be omitted (*Watson v. Weeks*, 6 Nev. & M. 752; S. C. 5 Ad. & E. 237).

Evidence for Plaintiff.

The right or obligation to begin depends on the form of the issue, and the test has been said to be not on which side the affirmative lies, but which side will be entitled to a verdict if no evidence be given.

Under non assumpsit.] Upon this issue the plt. must prove the contract as laid, involving both the promise and the consideration; but, neither the inducements, nor any of the averments subsequent to the statement of the promise are put in issue by *non assumpsit* (see *ante*, p. 186 *et seq.*; see proof of damage, *infra*). The contract must be proved to be one binding on all the defts., though all but one have suffered judgment by default (see *ante*, p. 171 *et seq.*).

If the action be on a written instrument, the original must be produced, properly stamped, or evidence be provided to show that it is destroyed, lost,* or, in the deft.'s possession; and in the last case, a notice to produce it must be given a reasonable time before the trial (see *Doe d. Phillips v. Morris*, 4 N. & M. 598; 3 Ad. & E. 46; S. C. 1 H. & W. 226); where, however, the plt. can establish his case without disclosing the fact that there was a written contract relating to the subject-matter of the action, he will not be precluded from recovering by the deft. showing it, but the latter must produce, and prove it, as part of his case (*Magnay v. Knight*, 1 M. & G. 944; S. C. 4 Jur. 1088; *Stephens v. Pinney*, 2 Moo. 349; S. C. 8 Taunt. 327).

If the contract be not admitted under a judge's order (see "ADMISSIONS," *ante*, p. 61), and there be no attesting witness, the deft.'s handwriting thereto must be proved in the usual way (see "HANDWRITING"). If there be an attesting witness, he must be called, or a sufficient excuse shown for his absence (see "ACCOUNT STATED," "PLEAS"). It is not necessary that the witness should recollect the transaction. It is enough if he recognizes his own

handwriting, and *states that he should not have signed the attes-
[*237] tation if he had not seen it executed (*Doe d. Counsell v. Caperton*, 9 C. & P. 112; *Doe d. Smyth v. Claxton*, 11 Moo. 347; *Burling v. Paterson*, 9 C. & P. 570). If he deny his attestation, or disavow having seen the instrument executed, evidence of deft.'s handwriting is admissible (*Talbot v. Hodson*, 7 Taun. 251; 2 Marsh. 527; *Ley v. Ballard*, 3 Esp. 173, n.; *Fitzgerald v. Elsee*, 2 Camb. 635; *Lennox v. Dean*, ib. 636. n.; *Burrows v. Lock*, 10 Ves. 474).

The rule is the same where it is necessary to prove the plt.'s signature, and that is attested by a witness. Evidence that deft. admitted the signature to be his, will not dispense with calling the attesting witness (*Call v. Dunning*, 4 East, 53; *Rex v. Harringworth*, 4 M. & S. 350; *Abbott v. Plumbe*, Doug. 216); nor will it suffice to prove the execution by another person, who was

* What is sufficient proof of this, see *Tulley v. Exeter* (Bishop), 4 Bing. 290; S. C. 12 Moo. 591; *McGately v. Aston*, 2 M. & W. 206; S. C. 2 Gale, 238; *Harper v. Hart*, 5 Jur. 1007; *Deacon v. Fuller*, 6 C. & P. 74; *Brewster v. Sewell*, 3 B. & A. 296; *Miller v. Miller*, 2 Sc. 123; 2 B. N. C. 76; 1 Hodg. 187; *Minshall v. Lloyd*, 2 M. & W. 450.

present at the time (*Breton v. Cope*, Peake, 31; *Higgs v. Dixon*, 2 Stark. 180; *Manver v. Postan*, 4 Esp. 239); as to what does or does not constitute the party an attesting witness (see *Lloyd v. Freshfield*, 2 C. & P. 325; *Parke v. Mears*, 2 B. & P. 217; *Doe d. England (Bank) v. Chambers*, 4 Ad. & E. 410; 6 N. & M. 539; S. C. 1 H. & W. 749; *Powell v. Blackett*, 1 Esp. 97; *McCraw v. Gentry*, 3 Camp. 232).

There are two exceptions to the rule which requires the testimony of an attesting witness. 1st. Where deft. himself claims an interest under the contract, and produces it at the trial, pursuant to notice, the plt. need not call the attesting witness, nor, of course, give any evidence of the execution of the instrument. Hence, in an action by the vendee against the vendor of an estate, to recover back the deposit, the deft. having produced the contract, pursuant to notice, it was ruled not to be necessary to prove it (*Bradshaw v. Bennett*, 5 C. & P. 48; S. C. 1 M. & R. 143; see also *Pearce v. Hooper*, 3 Taunt. 60; *Orr v. Morrice*, 3 B. & B. 139; *Doe d. Tyndale v. Heming*, 6 B. & C. 28; *Doe d. Wilkins v. Wilkins*, 5 N. & M. 434; S. C. 1 H. & W. 574; *Bowles v. Langworthy*, 5 T. R. 366; *Carr v. Burdiss*, 1 C. M. & R. 782; 5 Tyr. 309). But where the document was obtained from deft. some time before the trial, so that the plt. might have been prepared to prove the execution, it was held, that he was bound to call the attesting witness (*Vacher v. Cocks*, 1 B. & Ad. 145; see *Leith v. Post*, 1 Esp. 196); and, in cases where deft. does not claim an interest under the document, plt. cannot proceed without the regular proof, though the deft. produces it at the trial, and plt. was not until then aware who the attesting witness was (*Gordon v. Secretan*, 8 East, 548; overruling *Rex v. Middlezoy*, 2 T. R. 41; *Johnson v. Lewellin*, 6 Esp. 101; *Richards v. Frankum*, 9 C. & P. 221). To obviate this difficulty, an application to inspect and take a copy should be made before the trial (see *Lush's Pr. Index*; *Archb. Pr. Index*).

2ndly. The second exception is, where the document being in deft.'s possession, he refuses to produce it at the trial, after sufficient notice. In this case, the plt. being let in to give secondary evidence, need not call the attesting witness, to prove the execution of the original, but may prove it by other means (*Poole v. Warren*, 3 N. & P. 693; 8 Ad. & E. 582; S. C. 3 Jur. 23; *Cook v. Tunswell*, 8 Taunt. 450; *Jackson v. Allen*, 3 Stark. 74; *Burnet v. Lynch*, 6 B. & C. 589; S. C. 8 D. & R. 368; *Doe d. Rowlandson v. Wainwright*, 1 N. & P. 8; S. C. 5 Ad. & E. 509).

To excuse the absence of an attesting witness in cases where proof of the execution is necessary, plt. must show, 1st, Either that the witness is dead, or insane (*Currie v. Child*, 3 Camp. 283; *Bennett v. Taylor*, 9 Ves. 381); which must be proved by some person who knows the fact. The illness of the witness is no sufficient ground for letting in secondary evidence (*Harrison v. Blades*, 3 Campb. 457; *nor (according to *Cronk v. Frith*, 9 C. & P. 197; 2 M. & R. 262) is the fact that he has become [*238] blind (but see *Wood v. Drury*, 1 Ld. Raym. 734; *Pedler v. Page*, 1 M. & R. 258, *contra*). 2nd, Or, that he is out of the jurisdiction (*Barnes v. Trompowsky*, 7 T. R. 266). That he is in Ireland, or any other place beyond the reach of a subpoena, is enough (*Hodnett v. Forman*, 1 Stark. 90; *Doe d. Counsell v. Caperton*, 9 C. & P. 112). A temporary absence from the kingdom is sufficient (*Prince v. Blackburn*, 2 East, 250). Where on search at the Admiralty it appeared that the witness was serving in the navy, it was held, that his absence was sufficiently accounted for, though it was not shown where he was (*Parker v. Hoskins*, 2 Taunt. 233; see *Wyatt v. Bateman*, 7 C. & P. 586). And where a witness had set out to leave the kingdom, this was held sufficient, though the vessel had been driven back, and was at the time of trial in an English port (*Ward v. Wells*, 1 Taunt. 461).

The fact of the witness's absence should be proved by some relative or other person who can speak to it from his own knowledge. The witness's statement, while in this country, of where he lived, which was offered with the view of showing that inquiries had been made there, and that the answer received was that he was in America, was holden inadmissible, and it was ruled that the person in whose house he lived should be called (*Doe d. Beard v. Powell*, 7 C. & P. 617; and see *Doe v. Johnson*, 2 Ch. 196). 3rd, Or that a *bona fide* and diligent inquiry has been made for the witness and that he cannot be found, or it cannot be ascertained who he is (*Crosby v. Percy*, 1 Taunt. 364; *Willman v. Worrall*, 8 C. & P. 380; *Doe d. Clark v. Trapaud*, 1 Stark. 281; *Keeling v. Ball*, Peak. Add. Ca. 88). It is a question for the court whether the search is sufficient (see *Morgan v. Morgan*, 9 Bing. 359; 2 M. & Sc. 491; but see *Bampton v. Paulin*, 4 Bing. 264; 12 Moo. 497). What is or not sufficient (see these cases, and *Wardell v. Fermor*, 2 Campb. 282; *Evans v. Curtis*, 2 C. & P. 296; *Pytt v. Griffith*, 6 Moo. 538; *Cunliffe v. Sefton*, 2 East, 183; *Kay v. Brookman*, 3 C. & P. 555; S. C., M. & M. 286; *Burt v. Walker*, 4 B. & A. 697; *Hill v. Phillips*, 5 C. & P. 356). Several answers to inquiries made respecting a witness, such as, that nothing is known concerning him, are admissible; but statements of particular facts are not, if the party who made them is capable of being called (*Doe v. Johnson*, 2 Ch. 196; *Doe d. Beard v. Powell*, 7 C. & P. 617). 4th, If the witness had since the attestation become infamous (*Jones v. Mason*, 2 Str. 833), or if he had such an interest as disqualified him from being called as a witness (*Swire v. Bell*, 5 T. R. 371; *Hovill v. Stephenson*, 5 Bing. 493; S. C. 3 M. & P. 146; *Cunliffe v. Sefton*, 2 East, 183), secondary evidence might be given.

Where the absence of the attesting witness has been sufficiently accounted for it will suffice to prove the handwriting of the deft., or that of the witness; but in the latter case reasonable evidence of the identity of the deft. must be given (*Whitelock v. Musgrove*, 1 C. & M. 511; 3 Tyr. 541; *Middleton v. Sandford*, 4 Campb. 34; *Parkins v. Hawkshaw*, 2 Stark. 239). Where it was shown that the deft. was present in the room when the contract was signed; this was holden sufficient evidence of identity without proving the deft.'s handwriting (*Nelson v. Whittall*, 1 B. & A. 19).

If there were two attesting witnesses the absence of both must be accounted for, in order to let in secondary evidence, and where this is done proof of the handwriting of one of them is sufficient (*Adam v. Kerr*, 1 B. & P. 360; *Cunliffe v. Sefton*, 2 East, 183). Where both may be produced it is not necessary to call more than one, except in cases of doubt or suspicion.

Agency.] Where the contract was made by an agent of the deft. [**239*] *proof of the agency must be given, either by calling the agent himself, or by some other means.

Interlineation.] If there appears to be any erasure or interlineation in the instrument, evidence should be provided to explain for what purpose, and when it was done.

Proof of Damages.] The plt. must in all cases be prepared to prove the amount of the damages he has sustained; and, as ancillary thereto, the facts alleged as constituting the breach for which the action is brought. He will, at all events, upon proof of the contract, be entitled to nominal damages, and the jury are not restricted to these (*Hey v. Wyche*, 6 Jur. 559); but they cannot give higher damages than the amount laid in the declaration

(Cheveley v. Morris, 2 Bl. 1300; Tidd, 870—897, 927; see the different heads throughout the work.

Money Demand.] Where the action is brought for a *mere money demand*, a jury can hardly be warranted in giving more or less than the amount of that demand, if deft. does not by his defence show it may be reduced (Bac. Abr. Damages, D, 1; James v. Morgan, 1 Lev. 111). In some cases, interest will be added to the principal (*post*, “INTEREST”).

Liquidated Damages or Penalty.] Where the parties stipulate for a *liquidated sum* to be paid as damages, the jury are bound to give damages to the full amount of that sum (Farrant v. Olmuis, 3 B. & A. 692; Barton v. Glover, Holt, C. 43—46; Lowe v. Peers, 4 Burr. 2292). But, where they stipulate merely for a *penalty* to be paid, the jury may give less than the amount of such penalty; or, if plt. do not proceed for the penalty, they may even give more (Harrison v. Wright, 13 East, 343; Barton v. Glover, Holt, C. 44; Winter v. Trimmer, 1 Bla. 395; but see Wilbeam v. Ashton, 1 Campb. 78). It should be observed, that by proceeding for the penalty which plt. recovers, he cannot recover beyond that penalty (*Ib.*). With respect to what stipulation amounts to an agreement to consider the sum more as liquidated damages than a penalty, it has been said, by Heath J., in Astley v. Weldon, 2 B. & P. 353: “It is very difficult to lay down any general principle in cases of this kind; but I think there is one which may be safely stated. Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty; but where it is agreed that, if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages.” And, Chambre, J., observed: “There is one case in which the sum agreed for must always be considered as a penalty, and that is where the payment of a smaller sum is secured by a larger.” Where the word “*penalty*” is introduced, and there is no other term explaining it, it is in general clear that the sum is only to be treated as a penalty (Smith v. Dickenson, 3 B. & P. 630; Harrison v. Wright, 13 East, 345). On the other hand, where the words “*liquidated damages*,” or their equivalent, are used, and there are no other explanatory words, the sum can scarcely ever be considered as a penalty (Barton v. Glover, Holt, C. 43). In deciding the point, however, the whole of the agreement, and the evident intention of the parties, must be regarded (Davies v. Penton, 6 B. & C. 222; 9 D. & R.); the courts always inclining to treat the sum rather as a penalty (Holt, C. 43). In a late important decision on this subject, *where A. agreed with B. to sell him the good-will of A.’s business, and to demise him his [*240] house in which the business was carried on, for which B. was to pay 800*l.*, and to take furniture and fixtures at a valuation, and they were afterwards valued at 174*l.*, 400*l.* was paid to A. at the time of executing the agreement, and B. agreed to accept and pay two bills of exchange, one for 400*l.*, payable twelve months after date; and the other for 174*l.*, payable two months after date; and A. agreed not to carry on the business within five miles of the house: and, for the true performance of this agreement, each of them did thereby bind himself to the other of them in the *penal* sum of 500*l.*, to be recovered for breach of the agreement in a court of law, as and by way of *liquidated damages*: it was held, that this sum was a penalty (Davies v. Penton, 6 B. & C. 216). And where it was agreed “by and between the parties, that either of them neglecting to perform this agreement according to the true intent and meaning hereof, shall pay to the other of them the full sum

of 200*l.* of lawful, &c., to be recovered in any of his majesty's courts of record at Westminster," the court held this more as an agreement for a penalty than liquidated damages (*Astley v. Weldon*, 2 B. & P. 346). On the other hand, where it was agreed between plt. and deft. that the latter should take an assignment of the house of the former, and that either party not fulfilling all and every part of the agreement should pay to the other 500*l.*, "thereby settled and fixed as liquidated damages," the court held, that, on breach of the agreement, by omission to take an assignment, the deft. was liable to pay the whole 500*l.*, and that it was not a mere penalty (*Reilly v. Jones*, 1 Bing. 302; S. C. 8 Moo. 244). Where the agreement was, "I do hereby promise Mrs. C. L., that I will not marry with any other person besides herself: if I do, I agree to pay her 1000*l.* within three months next after I shall marry any body else," it was held, that the sum specified formed the sole measure of damages, as fixed and liquidated between the parties (*Lowe v. Peers*, 4 Burr. 2225). A reservation of "50*l.* per acre for every acre converted into tillage, &c." is in the nature of liquidated damages (*Farant v. Olmius*, 3 B. & A. 692; 4 Burr. 2228; *Birch v. Stephenson*, 3 Taunt. 498). And so, where two persons agreed to perform certain work in a limited time, "or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished," it was held, the jury must give such weekly payments, they being in the nature of liquidated damages (*Fletcher v. Dyche*, 2 T. R. 32).

Unliquidated Damages.] Where the action is brought for the recovery of general and unliquidated damages, and not for a mere money demand, the amount of such damages is entirely in the province of the jury, who may take into consideration any consequential injury arising from the breach of the contract. If the damages given be excessive, the court will sometimes grant a new trial (*Tidd*, 940); but not so if they be too small; at least, it seems very unusual so to do, unless, indeed, in actions on mere money demands, or on inquisitions (*Ib.*). Where several distinct causes of action, one of which is not ascertainable, are stated in one count in assumpsit, general damages may be given (*Ring v. Roxbrough*, 2 C. & J. 418).

Consequential Damages.] With respect to what consequential damages the jury may take into consideration, they must be such as will be warranted by the fair, legal, and natural result of the breach of deft.'s agreement (*ante*; *Vicars v. Wilcocks*, 8 East, 1; *Flower v. Adam*, 2 Taunt. 314; *Richardson v. Mellish*, 2 Bing. 229; S. C. 9 Moo. 435). They must, if they be not the necessary *result of such breach, appear upon the declaration, and [*241] be proved accordingly (*Ward v. Smith*, 11 Pr. 19). If the buyer of a horse, with a warranty, relying thereon, re-sell him with a warranty, and, being sued thereon by his vendee, offer the defence to his vendor, who gives no direction as to the action, the plt. defending that action is entitled to recover the costs thereof from his vendor, as part of the damage occasioned by his breach of warranty (*Lewis v. Peake*, 7 Taunt. 153; S. C. 2 Marsh. 431). But not where he might, by a reasonable examination, have discovered the unsoundness before he sold it (*Wrightson v. Chamberlain*, 7 Sc. 598; see *Pennell v. Woodburn*, 7 C. & P. 117; *Penley v. Watts*, 3 B. & C. 533; S. C. 5 D. & R. 442; *Walker v. Halton*, 10 M. & W. 249; S. C. 2 D. N. S. 263; *Short v. Kalloway*, 11 Ad. & E. 28). In such action, if the horse is returned, the measure of damages is the price paid for him (*Caswell v. Coare*, 1 Taunt. 566); or perhaps the actual value, supposing it had been sound (*Cox v. Walker*, cited 6 Ad. & E. 523); if not returned nor resold, the measure is the difference between that and the real

value; if it has not been tendered, plt. cannot recover for its keep (Caswell v. Coare, 1 Taunt. 566); but, if it has, he may recover such expenses for such time as would be reasonably required to resell it to the best advantage (M'Kenzie v. Hancock, R. & M. 436; Ellis v. Chinnock, 7 C. & P. 169); and, if he has resold it, he is entitled also to recover the difference of price (Chesterman v. Lamb, 4 N. & M. 195; 2 Ad. & E. 129). But he cannot recover the profit which he would have made if the warranty had been true (Walker v. Moore, 10 B. & C. 416); at least, not without showing *mala fides* in deft. (Ib.), nor the expense of a certificate of unsoundness from the veterinary college (Clare v. Maynard, 1 N. & P. 701; 6 Ad. & E. 519; S. C. 1 W. W. & H. 274; King v. Rice, 2 Chit. Rep. 416). So, where the deft., a broker, contrary to the orders of the plt., his principal, purchased goods of an inferior quality, *per quod* one J. S., who had commissioned the plt. to purchase the goods for him, sued the plt. for the bad quality of the goods, and recovered damages and costs, it was held that the measure of damages was not the mere difference in price between the two kinds of goods, but the amount of the damages and costs recovered in the action against the plt. (Mainwaring v. Brandon, 8 Taunt. 202; S. C. 2 Moo. 125). The court, however, compelled the plt. to give this undertaking: namely, that he should assign the goods to the deft., or sell and account with him for the net proceeds thereof. And, in an action for the breach of a warranty of a chain cable, the plt. may recover the value of the anchor to which the cable was attached, on proving that the cable was broken, and that the crew slipped it, in order to avoid danger (Borradaile v. Brunton, 2 Moo. 582; S. C. 8 Taunt. 535). In an action for not accepting goods sold, plt. may, after a reasonable time, resell them, and the measure of damages will be the difference of price (Maclean v. Dunn, 4 Bing. 722; 1 M. & P. 761); or, if not resold, the difference between the contract-price and the market-price on the day when they were tendered for acceptance (Philpotts v. Evans, 5 M. & W. 475). In an action for not delivering goods, the measure is the difference between the contract-price and that which goods of a similar quality and description bore on the day when they ought to have been delivered (Gainsford v. Carroll, 4 D. & R. 161; S. C. 2 B. & C. 624; Leigh v. Paterson, 2 Moo. 588; Humble v. Mitchell, 3 P. & D. 141; 11 Ad. & E. 205; S. C. 3 Jur. 1188; Startup v. Colazzi, 2 C. M. & R. 165; S. C. 5 Tyrw. 697; Boorman v. Nash, 9 B. & C. 145); and, in some cases, warehouse-room, &c. (Greaves v. Ashlin, 3 Camp. 427). Where a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by *auction, and engaged to make a good title by a certain day, which he was unable to do, as [*242] his vendor never made a conveyance to him: held, that a purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect (Hopkins v. Grazbrook, 6 B. & C. 31). On the other hand, where the vendor on a similar contract had some, though not a sufficient, title to the estate, and, on an objection being made to the title, offered to convey the estate with such title as he had, or to return the purchase-money with interest, it was held that no damages for the loss of the bargain were recoverable (Flureau v. Thornhill, 2 Bla. 1078; commented on in 6 B. & C. 33; and see Johnson v. Johnson, 3 B. & P. 167; Palm. 364). So, extra costs are not recoverable as consequential damage (Hathaway v. Barrow, 1 Camp. 151-2; Sinclair v. Eldrid, 4 Taunt. 7; Webber v. Nicholas, M. & M.; Jenkins v. Biddulph, 4 Bing. 160; and see other instances, *post*, "CASE")

When an agreement contains several stipulations, some of them touching

matters of great importance to the parties, and others matters of little or no importance, a stipulation for liquidating damages *generally*, upon any violation of the agreement, shall not be carried into effect. *Aliter*, if the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined (*Kemble v. Farren*, 6 Bing. 14; recognised in *Horner v. Flintoff*, 9 M. & W. 678).

Measure of Unliquidated Damages.] With respect to the measure of the damages, it has been held, in an action on a warranty, if there has been no offer to return the goods warranted, the measure of the damages is the difference between the price fixed and the real value (*Caswell v. Coare*, 1 Taunt. 566; *Germaine v. Burton*, 3 Stark. 32). In an action of assumpsit for not delivering goods upon a given day, the measure of damages is the difference between the contract-price and that which goods of a similar quality and description bore on or about the day when the goods ought to have been delivered (*Gainsford v. Carroll*, 2 B. & C. 624; S. C. 4 D. & R. 161; *Startup v. Corlazzi*, 2 C. M. & R. 165; S. C. 5 Tyrw. 697; *Leigh v. Paterson*, 2 Moo. 588; S. C. 8 Taunt. 540). In an action against the vendor of land, for refusing to complete, the plt. is entitled only to such damage as he has actually sustained, and not the amount of the purchase-money (*Laird v. Payne*, 7 M. & W. 474; S. C. 8 Dowl. 860). And on a failure of a contract to replace stock, it seems, though the measure of damages is the price at the day when it ought to have been replaced, or at the day of the trial, at the option of the plt. (*McArthur v. Seaforth*, 2 Taunt. 257; *Shepherd v. Johnson*, 2 East, 211; *Harrison v. Harrison*, 1 C. & P. 413; *Forrest v. Elwes*, 4 Ves. 493; *Vaughan v. Wood*, 1 M. & R. 403); yet the highest price at any intermediate day cannot be given (*McArthur v. Seaforth*, 2 Taunt. 257). And if, after the appointed time to replace the stock, and while the market was rising, deft., offered to replace the stock, the criterion of damages would be the value of the stock at the time of the tender, and not the increased value at the time of the trial (*Shepherd v. Johnson*, 2 East, 211). In an action for not replacing stock, it is no legal damage that plt. was prevented completing an advantageous contract he had entered into (1 Ch. Pl. 296). Upon a contract to replace stock and pay dividends in the mean time, although the jury give damages for the value of the stock and the amount of the damages, yet, on affirmation of the judgment

in error; the measure of increase is not the further damages that [*243] may have accrued, but interest upon the *damages given as the value of the capital stock (*Dwyer v. Gurry*, 7 Taunt. 14; see "*Stock*").

In an action for not accepting railway shares, the measure of damages is the difference between the price on the day when they ought to have been accepted, and that on the day when they were re-sold by the vendor, such re-sale being within a reasonable time (*Stewart v. Cassidy*, 8 M. & W. 160). Where the contract was for *about* 300 quarters (*more or less*) foreign rye, shipped on board a particular vessel coming from Hamburg: the vessel brought 345 quarters, and the seller refused to deliver any part, unless the purchasers would accept the whole: held, that they were not bound to accept the whole (*Cross v. Eglin*, 2 B. & Ad. 106).

If the deft. have pleaded a set-off, but at the trial fail to prove it, or offer no evidence in support of it, the plt., if he think proper, may deduct the amount of it from the sum he proves to be due to him, and take a verdict for the balance. But there is no necessity for him to do this, and though no such reduction be made the deft. is ever after estopped from bringing an action for the demand included in his plea of set-off (*Eastmere v. Lawes*, 7 Sco. 461; but see *Laing v. Chatham*, 1 Camp. 352). If the deft. have not

pleaded a set-off no deduction should be allowed for any demand which he may have against the plt. (1 Ch. Arch. 414, 439, n. *d*). If the deft. prove part of the plea of set-off, or other plea which cannot be construed distributively, the deft., except in certain cases, is not entitled to a verdict upon the issue raised upon such plea, but though this is the case the jury should allow the part proved in reduction of damages (*Eastmere v. Lawes, supra*; *Moore v. Batten*, 7 Ad. & E. 485; *Barnes v. Butcher*, 9 C. & P. 725; *Lord v. Ferrand*, 1 D. & L. 630).

As to what deft. may prove in reduction of damages, *post*, p. 244.

Under Special Plea or Defence.] Where an issue is taken on a special plea, and the general issue is also pleaded, the plt. must not only be prepared to prove all that is required of him by the general issue, but also what is required of him on the issue taken on the special plea. When the special plea is pleaded without the general issue, so as to admit all the other facts but what are denied by such special plea, then no proof of such admitted facts need be adduced (see *ante*, 39, 40); and the proof will, in general, then consist of an answer to the special plea and the amount of damages.

Who to begin to prove Issue.] With respect to when the burden of proving the issue lies on the plt., these general rules may be laid down: that the party who asserts the affirmative is bound to prove the issue (*Calder v. Rutherford*, 3 B. & B. 302; *Ross v. Hunter*, 5 T. R. 33); that, when the presumption of law is in favour of the affirmative, it is not necessary for the party asserting it to prove the same, and the disproof of it lies on the other party, although it involve a negative (2 Selw. N. P. 709); that, when the issue involves a charge of culpable omission, the party making the charge must prove it, although he must prove a negative; for the other party shall be presumed innocent till proved guilty (1 Roll. 83; *Williams v. E. I. Comp.*, 3 East, 193-9; *Rex v. Hawkins*, 10 East, 216). And, lastly, that where a party seeks to support his case by a particular fact which lies peculiarly within his own knowledge, the *onus* of proving such fact, though it involve a negative, will lie upon him (*Apothecaries' Company v. Bentley*, R. & M. 159; *Spieres v. Parker*, 1 T. R. 144; *Rex v. Stone*, 1 East, 650; see further, *post*, "EVIDENCE").

The proofs under, and in answer to, a special plea or defence, must *necessarily depend on its nature and the particular issue [*244] taken; they will be found under the different titles of defences throughout the work (see those titles).

Evidence for Defendant.

We have already seen under what plea deft. may avail himself of his defence (*ante*, p. 226); and the evidence should be adduced accordingly. We have also seen upon whom the burden of proving the issue lies (*ante, supra*).

Defences.] The usual defences consist in denying, or rather disproving:—
1. The *plt.*'s ability to sue, as being a bankrupt, alien enemy, under coverture (see those titles); or, legal interest in the contract (*ante*, p. 226); or, that others should have been joined with him in the action (*ante*, p. 161, *post*, "PARTNERS"); or, that too many parties, *plts.*, have sued (*ante*, p. 66, *post*, "PARTNERS"); or, that plt. is a mere assignee of the contract (*ante*, p. 167; and see as to what deft. may successfully show, as a defence in this respect, in actions at the suit of executors and administrators, heirs, devisees, assignees of bankrupts, insolvents, and husband and wife, *post*, those titles). 2. The deft.'s inability to contract, or personal protection from the contract sued on, as

being an infant, *feme covert*, lunatic, or, drunk (see those titles); or, that he never entered into the express or implied contract (*ante*, p. 226); or, that the defts., in an action against several, did not jointly contract (*ante*, p. 722; *post*, "PARTNERS"); or, that the plt. and deft. were partners in the contract sued on (*ante*, p. 226, *post* "PARTNERS"); or, that he is a mere assignee of the contract (*ante*, p. 167; and as to what defences of this nature deft. may avail himself of, in actions against executors and administrators, bankrupts, insolvents, husband and wife, see those titles). 3. That the action is misconceived, and should not have been in assumpsit (*ante*, p. 231); or, that it is brought too soon (*Mussen v. Price*, 4 East, 146; *Lee v. Risdon*, 2 Marsh. 495; *post*, "GOODS SOLD, &c."). 4. That the contract or consideration was not such as that stated in the declaration, or what is proved in evidence (see *ante*, p. 272, and *post*, "VARIANCE"); or that it is not binding for want of a stamp (*post*, "STAMP"); or for want of consideration (*ante*, p. 266, *et infra*); or that the contract or consideration was illegal at common law or by statute (*ante*, p. 228, and *post*, "ILLEGAL CONSIDERATION," and the various titles referred to). 5. That the plt. has not performed a condition precedent, or that he has not performed it as stated in the declaration (*ante*, p. 201, &c.); or that the deft. has not been ever requested to perform an act which he ought to have been (*ante*, p. 210); or has not had a notice he ought to have had (*ante*, p. 213). 6. That the deft. has performed the contract, as by payment, or tender (see those titles.) 7. That deft. has been excused performance by reason of the contract being altered (*ante*, p. 230, and "ALTERATION"), or rescinded (*post*, "RELEASING CONTRACT"), or released or discharged by award and satisfaction, a negotiable security given, award, judgment recovered, former recovery, foreign attachment, releases, &c. (see those titles); or higher security given (and *post*, "DEED"); or that it has become impossible or illegal to perform the contract (*ante*, p. 224); or that deft. is discharged by his bankruptcy and certificate (*post*, "BANKRUPTCY"); or under the Insolvent Act (*post*, "INSOLVENT"); or by the Statute of Limitations, or set-off (see those titles).

Since the Pleading Rules, H. T. 4 Will. IV. the deft. must by plea expressly deny the consideration, or plead specially the want of adequate consideration (see *Graham v. Pitman*, 3 Nev. & M. 37; **Kinder v. [*245] Smedley*, 5 Nev. & M. 138); so also the illegality of consideration (*Barnett v. Glossop*, 1 B. N. C. 633). *Ante*, p. 288, see "ILLEGAL CONSIDERATION."

Reduction of Damages.] The deft. should be prepared, as far as he can, to reduce the plt.'s damages, in the event of his being entitled to any. We have already seen as to what proofs plt. may show for the purpose of supporting his damages, and deft. should therefore be prepared, as much as possible, to disprove them. He should show all he can as to his having complied with the contract; as, by having offered to complete it before action brought, or the like (see *Rawson v. Johnson*, 1 East, 211). He may, it seems, reduce the damages by showing a partial failure by plt. of the consideration. Thus, though there be an agreement that a specific sum of money shall be paid for the performance of a work or act, the claim may be reduced by showing that the work or materials or act were not according to the agreement; and it appears, indeed, that the damages may be reduced *in toto*, and the whole demand defeated, by showing that the work is not so adequate, or totally inadequate, to answer the purpose for which it was undertaken to be performed, and that the deft. has derived little or no benefit from the act (*Duncan v. Blundell*, 3 Stark. 6; and see *ante*, p. 226). But, in such cases,

and where the plt. does not go on a *quantum meruit*, and especially where the object is only to reduce the damages, the deft. should give the plt. notice of the intended defence, so that he may not be taken by surprise (*Basten v. Butter*, 7 East, 479; *Germaine v. Burton*, 3 Stark. 32); but, if he sue on a *quantum meruit*, the very form of his own declaration gives him notice that the adequacy of the consideration may be disputed (see *Basten v. Butter*, *supra*; per *Ellenborough* (Lord), C. J.). Proving the service of such notice, see *post*, "NOTICE."

In the case of a sale of goods, where there is a stipulated price, and a warranty as to the quality, the vendee may retain the goods, and set up their inferiority in reduction of damages, although he has not offered to return them or given any notice to vendor (*Cormack v. Gillis*, 7 East, 480; *Fielder v. Starkin*, H. Bl. 17). Where the claim is on a *quantum meruit*, the deft. may, without notice, reduce the damages, by showing that the work or act was improperly done, and he may entitle himself to a verdict by showing its total inefficiency, and that he has derived no benefit from it (*Farnsworth v. Garrard*, 1 Campb. 38; *Fisher v. Samuda*, ib. 191; *Denew v. Daverell*, 3 Campb. 451; *Okell v. Smith*, 1 Stark. 108; Ch. Contr. 169; 2 *Smith's Leading Cases*, 14). If, however, a bill of exchange have been accepted for the work done, the bad quality and partial insufficiency do not form a ground for reducing the amount claimed (1 Camp. 40, n.; *Tye v. Gwynne*, 2 ib. 346; 3 ib. 38; *Moggridge v. Jones*, 14 East, 486; *Archer v. Bamford*, 3 Stark. 175; Ch. Contr. 169). And, according to the case of *Hopkins v. Appleby*, 1 Stark. 477, if a vendee, &c., of goods deprive the plt. of the means of ascertaining their real value, by using them or otherwise, the deft. cannot reduce the damages. But see *Poulton v. Lattimore*, 9 B. & C. 259; 2 *Smith's Leading Cases*, 17. In an action for use and occupation, where there has been a partial eviction or deprivation by the landlord of the full enjoyment by the deft. of the property demised, the deft. should be prepared to prove that fact, for the plt. will only be entitled to damages commensurate with the advantage the deft. may have actually derived from the occupation of the estate (*Tomlinson v. Day*, 5 Moo. 558; *Hall v. Burgess*, 5 B. & C. 338; 8 D. & R. 67).

To prevent a circuity of action and unnecessary litigation in cases *of *partial failure* of consideration, defts. have been allowed [*246] of late, instead of being compelled to resort to a cross action, to show; in reduction of damages, such partial failure of consideration, particularly in cases where the party has had notice of such intended defence (*Basten v. Butter*, 7 East, 484; *Havelock v. Geddes*, 10 ib. 564; *Wilbeam v. Ashton*, 1 Campb. 78; *Fisher v. Samuda*, ib. 190; *Denew v. Daverell*, 3 ib. 451, 452; *Germaine v. Burton*, 3 Stark. 32; *Okell v. Smith*, 1 Stark. 108—9; *Lewis v. Cosgrave*, 2 Taunt. 2; *Templar v. McLachlan*, 2 N. R. 136; *Bragg v. Cole*, 6 Moo. 114; Ch. Contr. 464, 568, 569, 743; 2 *Smith's Leading Cases*, 14, n.; *Poulton v. Lattimore*, 9 B. & C. 259; *Cousens v. Paddon*, 2 C. M. & R. 547; *Groundsell v. Lamb*, 1 M. & W. 353; *Baillie v. Kell*, 4 B. N. C. 638; *Street v. Blay*, 2 B. & Ad. 459; see *Dicken v. Neale*, 1 M. & W. 556); under the general issue, since the N. R. H. T. 4 Will. IV. (*Hill v. Allen*, 2 M. & W. 283, p. 226); but this principle does not extend to an independent tort (*Francis v. Baker*, 10 Ad. & E. 643). And this defence, it seems, will not be allowed in an action on an attorney's bill, or for freight, unless it goes to the extent of denying that any benefit at all had been derived (see *Mondell v. Steele*, 8 M. & W. 871); and the measure of damages will be to the extent of the difference between the agreed price or alleged value at the time of the delivery as reduced by the breach of contract, but if there be any further damages besides those so allowed in abatement of the

price, plt. must bring a cross action (*Mondell v. Steele*, 8 M. & W. 858; and see *Rigge v. Burbidge*, 15 M. & W. 598). Thus, where in an action on a contract to build a ship the deft. gave in evidence, in reduction of damages, the breach of contract by the plt.; he was not allowed to give evidence of any claim for damages on account of necessity for subsequent repairs; which must be sued for in another action (*Mondell v. Smith*, *supra*).

With respect to the quantum of reduction, "where a party engages to do certain specified work on certain specified terms, and in a certain specified manner, but, in fact, does not perform the work so as to correspond with the specification, he is not of course entitled to recover the price agreed on in the specification, nor can he recover according to the actual value of the work, as if there had been no special contract. What the plt. is entitled to recover is the price agreed on in the specification, subject to a deduction, and the measure of that deduction is the sum it would take to alter the work, so as to make it correspond with the specification" (*Thornton v. Place*, 1 M. & Rob. 219). The rule is, that if the contract be not faithfully performed, the plt. shall be entitled only to recover the value of the work, and the materials supplied (*Chapel v. Hicks*, 2 C. & M. 214; see *Street v. Blay*, *supra*; see *Farnsworth v. Gerrard*, 1 Camp. 38, where it is said that the claim shall be co-extensive with the benefit, see *ante*, "COMMON COUNT," p. 225). Where a servant or agent having been wrongfully dismissed, waits till the expiration of the term for which he was hired, and then sues in *indebitatus assumpsit*, the master may show in reduction of damages, that he hired himself in the mean time to another master (see *Cumming v. Columbine*, 6 Dowl. 373; *Speck v. Phillips*, 5 M. & W. 279): as to how far he is entitled to his intermediate earnings, see *Thompson v. Havelock*, 1 Camp. 529; *Diplock v. Blackburne*, 3 Camp. 43; see *Patmore v. Colburn*, 1 C. M. & R. 65.

Plt.'s count alleged a readiness and willingness to adopt a contract which was to be performed on the 1st July, 1835, but it appeared that no steps were taken by them until January, 1838; held, that the length of time was unreasonable, and the abandonment of the contract might be inferred (*Lawrence v. Knowles*, 5 B. N. C. 399). In *an action by an attorney [*247] for his fees, negligence by him is no answer to the action, and is only the subject of a cross-demand (2 N. R. 136); unless, indeed, the negligence has been such as to deprive the plt. of all benefit, and the charges sought to be recovered have been incurred by the plt.'s want of proper caution (*Montriou v. Jeffries*, 2 C. & P. 113; *S. C. R. & M.* 317; *Dax v. Ward*, 1 Stark. 409; *Mondell v. Steele*, *supra*; *post*, "ATTORNEY"). In an action by a surgeon, &c., for his bill, if the deft. can prove that he was rather injured than benefited in his health, in consequence of any gross unskilfulness or carelessness on the part of the plt., the latter cannot succeed (*Duncan v. Blundell*, 3 Stark. 6; *ante*, "APOTHECARY"). And an agent cannot recover his commission if the principal derive no benefit whatever from the acts of the plt. (*Stewart v. Kahle*, 3 Stark. 161; *ante*, "AGENT").

Judgment.] The judgment in favour of the plt. is that he recover a specified sum assessed by a jury, or on reference to the master, for his damages, which he hath sustained by reason of the deft.'s non-performance of his promises and undertakings, and for full costs of suit, to which the plt. is in all cases entitled in this action, though the damages be under forty shillings, unless the judge certify to take away costs under the statute 43 Eliz. c. 6, or unless the plt. ought to have proceeded in an inferior court (see the County Court Act); and although it is a rule that the court will look to the whole record, and give judgment according to the truth there disclosed, however irregular the mode of pleading may be, yet the court cannot pick out of vari-

ous parts of the record a different cause of action from that for which the plt. proceeds (*Le Brett v. Papillon*, 4 East, 502; *Chumley v. Winstanley*, 5 East, 266; *Head v. Baldrey*, 6 Ad. & E. 469).

AMENDMENTS.

See "VARIANCE."

ASSURANCE.

See "POLICY OF ASSURANCE."

ATTAINDER.

See "ABATEMENTS."

ATTESTING WITNESS.

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*ATTORNEY, ACTIONS BY AND AGAINST.(a) [*248]

I. ACTION, BY, FOR HIS BILL.

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Form of Remedy.

AN attorney has various remedies for his costs. 1. He has a lien on all the deeds, papers, &c., of his client which come to his hands professionally (Stevenson v. Blakelock, 1 M. & S. 535; Rex v. Sankey, 6 N. & M. 839); and this right continues though the claim be barred by the Statute of Limitations (Spears v. Hartley, 3 Esp. 81; Higgins v. Scott, 3 Esp. 413 *j*); and extends not only to the debt, but also to the costs of an action brought for its recovery (Lambert v. Buckmaster, 2 B. & C. 616). 2dly. Having procured his bill to be taxed, (if it be in a court of Common Law,) he may obtain an order for judgment for the amount certified to be due (stat. 6 & 7 Vict. c. 72, s. 43); or, if the order direct the client to pay the amount found to be due, he may make such order a rule of court, and issue execution thereon (1 & 2 Vict. c. 110, s. 18; see Neale v. Postlethwaite, 4 P. & D. 623; 1 Q. B. 245; S. C. 5 Jur. 747). 3dly. By action of *debt* or *assumpsit*.

For costs in bankruptcy incurred after the choice of assignees, the solicitor has an alternative remedy by petition to the Court of Review (Ex parte Hartop, 1 Rose, 449); but not for costs before the choice of assignees (Anon. Buck, 475; but see 1 G. & J. 35, *contra*).

Until the statute 6 & 7 Vict. c. 72, an attorney or solicitor need not have delivered his bill prior to commencing an action, unless such bill contained charges for business done at *Law* or in *Equity* (as to what items were taxable, see Lush's Pr. Index, "Costs;" 1 Archb. Pr. Index, "Costs"); [*249] nor need an executor or assignee of an *attorney have previously delivered a bill (*Ib.*); but, by that stat. (sec. 37), it is enacted, "that from and after the passing of the act (22 Aug. 1843), no attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit, for the recovery of any fees, charges, or disbursements, *for any business done by such attorney or solicitor*, until the expiration of one month (calendar, sec. 48) after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to, or left for him, at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements; and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or in the case of a partnership, by any of the partners, either with his own name or with the name and style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be enclosed in, or accompanied by, a letter subscribed in like manner, referring to such bill," &c.

"Provided, that it shall be lawful for any judge of the superior courts of law or equity to authorize an attorney or solicitor to commence an action or suit for the recovery of his fees, charges, or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the said judge that there is probable cause for believing that such party is about to quit England" (*Ib.*).

An attorney's demand may, as before this statute, be the subject of *set off*, although it has not been delivered at all (Martin v. Winder, Doug. 189, n.; see Lester v. Lazarus, 2 C. M. & R. 665).

Form of Pleadings.

The declaration, &c., is now in the same form as in actions by other persons. Sect. 35 of 6 & 7 Vict. c. 73, does not prevent a country attorney,

admitted and enrolled in the Courts of Queen's Bench and Common Pleas, but not in the Court of Exchequer, from recovering his fees for business done in the Court of Exchequer in the name of his London agents, who were duly admitted and entitled to practise as attorneys in that court (*Hulls v. Lea*, 2 New Prac. Cas. 362; 11 Jur. 891). An attorney may still sue in the superior courts of law at Westminster for business done by him as an attorney, and will be entitled to his full costs of suit, though the amount recovered be less than 20*l*. (*Nixon v. Johnson*, 10 Law T. 232, Q. B.). It is usual to describe shortly the nature of the business done, as in the following precedent; but the common count for work and labour, or work, labour, and materials, will probably, in most cases, suffice (*Skin*. 217; *Ambrose v. Rowe*, 2 Show. 421; *Fisher v. Snow*, 3 Dowl. 27). It is usual to state the plt.'s capacity of attorney, and that he did the work in that character (*Sid*. 9 Ed. 325; Ch. Contr. Index). An attorney may, if he sues in person and in his own court, always lay and retain the venue in Middlesex (*Yardley v. Roe*, 3 T. R. 573; *Pye v. Leigh*, 2 W. Bl. 1065; *Mounsey v. Watson*, 7 B. & C. 683); but, if he sues by attorney (*Harrington v. Page*, 2 Dowl. 164; *Lawless v. Timms*, 3 Dowl. 707), or jointly with an unprivileged person, or as executor, assignee, &c. (*Newton v. Rowland*, Raym. 533; *Robarts v. Mason*, 1 Taunt. 254; *Newton v. Harland*, 4 Bing. N. C. 406), the deft. may change the venue as in other cases.

Since the 2 & 3 Will. IV., c. 39, the Uniformity of Process Act, an attorney does not waive his privilege of laying the venue in Middlesex by omitting to describe himself as an attorney in the declaration **Williams v. Powell*, 10 Jur. 966, Q. B.); nor by suing in person, without [*250] naming himself as attorney on the record (*Cutts v. Surridge*, 4 D. & L. 373, Q. B.; 16 Law J. 2, Q. B.). And, if the venue be laid in any other county, though by inadvertence, the court will not allow the attorney to change it to Middlesex (*Lewis v. Shelley*, 7 Taunt. 146; S. C. 2 Marsh. 426); but the deft. may change it on the common affidavit (2 Vent. 47; *Seamen v. Ling*, 2 Salk. 688; *Bradshaw v. Burton*, 7 Dowl. 329). Where the business was done on deft.'s credit for a third person (see *Hayward v. Fiott*, 8 C. & P. 59; *Grissell v. Robinson*, 3 B. N. C. 10); see *Scarce v. Whittington*, 2 B. & C. 11), the question of credit is one for the jury, and it is not a question of usage (*Hayward v. Fiott*, *supra*). If a third party were responsible in the first instance, he is only liable on a special count upon a written guarantee under the statute of Frauds (*Noel v. Hart*, 8 C. & P. 200).

Precedents.

Indebitatus count for an attorney's fees.

(*The commencement of this count in Assumpsit is as ante; in Debt, as post, "DEBT"*) for the work and labour, care, diligence, journeys, and attendances of the plt., by him before then done, performed, and bestowed, as the attorney and solicitor of and for the deft., and upon his retainer in and about the prosecuting, defending, and soliciting of divers causes, suits, and business of and for the deft., and for certain fees due and of right payable to the plt., in respect thereof; and also for other the work and labour, care, diligence, journeys, and attendances of the plt., by him, before then done, performed, and bestowed in and about the drawing, copying, and engrossing of divers conveyances, deeds, documents, and writings, for the deft., and in and about other the business of the deft., for him, and at his request. (*Conclusion in assumpsit as ante*, p. 225; *in debt, post, "DEBT."* *The above form should be altered, if there were no suit, &c. prosecuted, or no deeds, &c., prepared, according to the facts*).

Indebitatus count by an agent against an attorney.

(*The commencement in Assumpsit is as ante*, p. 225 ; *in Debt, as post*, "DEBT,") for the work and labour, care and diligence, journeys and attendances, of the plt., by him, the plt., before that time done, performed, and bestowed, for the deft., as the agent of the deft., and upon his retainer, and at his request, in and about the prosecuting and defending of divers suits, causes, and business, for the deft., and for fees due and of right payable to the plt., in respect thereof.

Pleas.

General Issue.] The plea of *non assumpsit*, or *nil debet*, is proper where it is intended to put the plt. on proof of his retainer, and that the business charged for was in fact done for the deft. ; also, to raise the defence that the business was done so negligently and unskillfully as to be useless (*Hill v. Allen*, 2 M. & W. 283 ; 5 Dowl. 471 ; 1 Jur. 44 ; see, as to the nature of this defence, *Shaw v. Arden*, 9 Bing. 287 ; *Hill v. Featherstonehaugh*, 7 Bing. 569 ; *Temple v. McLacklan*, 2 N. R. 136 ; *Cliffe v. Prosser*, 2 Dowl. 21), or, that it was done under an indemnity against costs (*Hill v. Allen*, *supra*), or gratuitously (*Ashford v. Price*, 3 Stark. 185) ; and, where deft. paid into court a sum sufficient to cover the expenses out of pocket, it was held, that he might, on the issue of damages ultra, show that the work was agreed to be done on those terms (*Jones v. Reade*, 5 Dowl. 216 ; 5 Ad. & E. 529 ; S. C. 1 N. & P. 18).

The objection that no special bill, or no such bill as the statute requires, was delivered a month before action, must be specially pleaded, and cannot be taken advantage of on the general issue * (*Taylor v. Hodgson*, [*251] 14 Law J. 310, Q. B. ; *Lane v. Glenny*, 7 Ad. & E. 83 ; *Robinson v. Rowland*, 6 Dowl. 271). It is an issuable plea (*Wilkinson v. Page*, 1 D. & L. 913 ; see *ante*, p. 248, 6 & 7 Vict. c. 73, s. 37). But if the deft. have given a bill or note for the charges, the above plea would afford no defence to an action on the bill (*Jeffreys v. Evans*, 14 M. & W. 210). The deft. pleaded that the plt. did not deliver "one month" before bringing the action, a signed bill of his fees, "pursuant to the statute in such case made," "contrary to the form of the statute." The 6 & 7 Vict. c. 73, s. 37, requires a bill to be delivered "one month" before bringing an action, and by the interpretation clause "month" is declared to mean "calendar month." Held, on special demurrer, that the word "month" in the plea was to be taken to mean "lunar month ;" that the words "pursuant to the statute," &c., would not enable the court to construe it as a "calendar month ;" and that as the act required a delivery a "calendar month" before the action, the plea was bad as tendering an inconclusive and immaterial issue. *Quere*, if the plea was not also bad as being an argumentative averment, that the plt. did not deliver, one "calendar month" before bringing the action, a signed bill, &c. (*Parker v. Gill*, 3 D. & L. 21, Q. B.) So, the defence that no bill was delivered, or not a proper bill ; or, that the month had not elapsed, must be pleaded (*Lane v. Glenny*, 2 Nev. & P. 258 ; 7 Ad. & E. 83 ; 1 Jur. 475 ; *Robinson v. Rowland*, 6 Dowl. 271 ; S. C. 2 Jur. 136 ; see *Shearman v. Hay*, 5 Ad. & E. 388). Under statute 6 & 7 Vict. c. 73, s. 37, a plea which asserts the non-delivery of an attorney's bill, &c., but does not also assert that it was not sent by post, is insufficient on special demurrer (*Flower v. Newton*, 11 Jur. 875, Q. B. ; 9 Law T. 312) ; or, that the plt. was uncertificated. A plea that an attorney had not *obtained* or *entered* his certificate is bad on demurrer, as involving two distinct allegations (*Eyre v. Shelley*, 6 M. & W. 274 ; see also *Williams v. Jones*, 1 G. & D. 649 ; and see 6 & 7 Vict. c. 73, s. 35) ; so that he was not an attorney of the court must

be pleaded (Hill v. Sydney, 7 Ad. & E. 956; 3 Nev. & P. 161; S. C. 2 Jur. 416; Arden v. Tucker, 4 B. & Ad. 815); or, that the business was done in furtherance of an illegal transaction (Potts v. Sparrow, 3 Dowl. 630; Tabram v. Warren, 1 Tyrw. & G. 153), &c. must be specially pleaded. Maintenance must be specially pleaded (Fidson v. Parker, 11 M. & W. 675; see "ILLEGALITY"). See a plea to an action by indorsee against acceptor of a bill that it was given to drawer, an attorney, for work; that he was not admitted, and that it was indorsed to plt. after it was due, Middleton v. Chambers, 1 M. & G. 97.

Where the costs, for recovery of which the action was brought, were incurred for bringing an action, and preparing an assignment at deft.'s request, evidence was offered to show that the deed, which was an assignment of goods from S. to the deft., was fraudulently antedated, in order to gain a priority over a *bona fide* execution against S.'s goods; and that the action was one of trespass, brought, in consequence of this deed, against the sheriff, for seizing under the execution against S. Pearson objected that this evidence was not admissible under *non assumpsit*; but Tindal, C. J., admitted it, as it went to show that plt.'s services were entirely useless, and he left it to the jury to say whether the plt. was aware of the facts when he prepared the deed (Roberts v. Barber, Ch. Pl. by Pearson, 226).

Evidence for Plaintiff.

The plt. must, upon *non assumpsit* or *nil debet*, prove his retainer by deft., and that he has performed the work and business charged *for. He should also be prepared with evidence of the reasonableness of [*252] the charges, or prove that the bill was delivered a month before action, and, in this case, as the deft. might have had it taxed, he will not be allowed to question the fairness of the charges at the trial (Williams v. Frith, 1 Doug. 189; Hooper v. Till, 1 Doug. 198; Anderson v. May, 2 B. & P. 237); where two bills had been delivered, the latter of which contained additional items, as well as increased charges, it was held that the delivery of the first bill was conclusive evidence against an increase of charge on any item contained in it, and strong presumptive evidence against any additional items (Loveridge v. Botham, 1 B. & P. 49).

Proof of Plaintiff's Retainer by Defendant.] The plt. should prove that deft. retained him as an attorney, to do the business in question. This may be done by the production of deft.'s written instructions, by letter or otherwise, and proving the handwriting, &c.; or, by calling plt.'s clerk, or other person who heard deft. give instructions, or admit the retainer. But in an action against a corporation the plt. must show a retainer under seal (Arnold v. Poole (Mayor), 4 Man. & G. 860). It will be sufficient evidence of a retainer, that, after an award made, deft. directed plt. to do the needful, though plt. was not employed in the first instance (Dawson v. Lawly, 4 Esp. 65). Proof of a retainer to commence a suit which is afterwards abated by a plea of nonjoinder, is sufficient evidence of a retainer to commence another action against the parties named in the plea of abatement (Crook v. Wright, R. & M. 278). The retainer may sometimes be inferred from the deft.'s acquiescence in the plt.'s services; or, from his voluntarily availing himself of such services. If the father of the deft. employed the plt. to defend a suit for deft., to prove that fact, and that deft. knew of the retainer, and does not disapprove of it, is sufficient (Cameron v. Baker, 1 C. & P. 268). Proof of a judge's order, referring the bill to be taxed, and of the deft.'s undertaking to pay what shall appear to be due, and the master's *allocatur*, is suffi-

cient evidence of the retainer and of the business having been done (*Lee v. Jones*, 2 Camp. 496). So, proof of deft.'s attending the taxation of the plt.'s bill, and not objecting to the items, is sufficient (*Warren v. Cunningham*, Gow, 71). Where one attorney does business for another, the attorney who does the business universally gives credit to the person who employs him, and not to the client for whose benefit it is done: if, therefore, the attorney in such case intends not to be personally responsible, it becomes his duty to give express notice that the business is to be done on the credit of the client, and it furnishes no defence that the business was known by the plt. to be done for the benefit of the client (*Scrace v. Whittington*, 2 B. & C. 11; 3 D. & R. 195). In an action against two defts., it seems that, if the business was not done for the *joint* benefit, the mere proof of a joint parol employment, and a joint promise to pay, will not suffice, as the case would fall within the Statute of Frauds, requiring such retainer to be in writing (*Hellings v. Gregory*, 1 C. & P. 627). Plt. should, therefore, in such action, be prepared to prove that there was a joint benefit: and see further, as to proof in actions on guarantees, *post*, "GUARANTEE." But, if A. and B., being arrested on a bill of which one is drawer, and the other acceptor, go to an attorney, and request him to defend them, and he does so on their joint application, there is sufficient consideration to support a joint promise to pay; consequently, to sustain a joint action against them (*Hellings v. Gregory*, 1 C. & P. 627).

In an action by A. and B., who were attorneys, against surveyors of highways of a parish for business done in procuring an order of *ma-
 [*253] gistrates to divert highways in the parish, and on an appeal against that order, it appeared that A. and B. in their bill charged for drawing a resolution of a parish meeting held before the order was applied for, which resolution stated that the order was to be applied for "at the instance and at the expense of the B. and C. Railway Company:" held, that A. and B. must be considered to have undertaken the business on these terms, unless there was an express employment of them by the defts., and on their credit, of which there ought to be direct proof (*Spurrier v. Allen*, 2 C. & K. 210). One partner has no implied authority to retain an attorney to appear and defend an action for himself and co-partners (*Hambridge v. De La Crouce*, 10 Jur. 1096).

No proof of plt.'s actually being an attorney, or of his having taken out the annual certificate, is required (*Berryman v. Wise*, 4 T. R. 367). Proof of his being retained as such suffices (*Pearce v. Whale*, 5 B. & C. 38; 7 D. & R. 512). The disproof lies on deft. (*Ib. post*). See further, as to proof of the deft.'s retainer, *post*, "WORK AND LABOUR;" *ante*, "ASSUMPSIT," "ADMISSION."

For costs, &c., in bankruptcy, *before* the choice of assignees, the petitioning creditor is liable (*Hartop v. Jukes*, 2 M. & S. 438; *Ex parte Hartop*, 1 Rose, 449; *Hart v. Biggs*, Holt, C. 245; *Hart v. White*, ib. 376; *Bowles v. Per-ring*, 5 Moo. 290; 2 B. & C. 457); the assignees are not (*Ib.* 4 D. & R. 621; 1 G. & J. 35); and, where the petitioning creditor was afterwards made assignee, and the action was brought against him and the other assignee jointly, it was holden the plt. could not recover (*Finchett v. Howe*, 2 Camp. 278; *Tarn v. Heys*, 1 Stark. 278). So, where the solicitor who sued out the commission was retained by the assignees, and (having made out and delivered his bill to them, as well for the business done before the choice of assignees as for that done after) was paid by them a sum of money on account generally, it was holden that he was bound (as the assignees themselves would have been) to appropriate the sum so received to the payment of that portion of the bill for which the petitioning creditor was liable; and that, therefore,

in an action by the petitioning creditor against him for the amount of a private debt, he could not, under those circumstances, set off the amount of the petitioning creditor's costs of the commission, for they were already satisfied (*Phillips v. Dicus*, 15 East, 248). In another case, indeed, it was holden at *nisi prius*, that where assignees retain the same solicitor that sued out the commission, they make themselves liable to him for the costs, as well before as after the choice of assignees, as upon an original retainer (*Tarn v. Heys*, Holt, 378; S. C. 1 Stark. 278; Arch. B. L. 219). He may recover his bill for issuing a fiat in bankruptcy against a person who employed him so to do, but was not petitioning creditor, although no assets are received (*Pocock v. Russen*, M. & M. 357).

Justices in quarter sessions having confirmed an order of removal, made from the parish of C. to parish of L., upon a preliminary objection a rule *nisi* was obtained to enter continuances, and hear appeal, a copy whereof was served upon two of the defts., B. D. and R. T., who at the time, and at the commencement of the suit, were the churchwardens of C. R. T. afterwards signed a retainer to plt. to act for parish of C., but subsequently countermanded it; R. D. did not interfere. Before argument of the rule J. D. and W. E., the other defts. were elected overseers, and R. D. and R. T. churchwardens. Before argument, plt.'s clerk saw J. D. repeatedly about the rule; he also saw the other deft., W. E., who was not so active about the rule. The bill of costs was delivered to one of the defts., and they all expressed a readiness to pay, but said there was a grudge in the parish: held, that the defts. were not liable (*Marsh v. Davies*, 1 Exch. 668).

In a declaration against a public officer of an insurance and loan company, the second count stated, that it was agreed between the company and the plt. that, from the 1st of January then next, the plt., as the attorney of the said company, should receive a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business, &c.; and, in consideration that the plt. had promised to fulfil the agreement on his part, the company promised to fulfil the same on their part, and to retain and employ the plt. as such attorney. Breach, that the company refused to employ the plt. as such attorney, and wrongfully dismissed him, and thence refused to employ him, or to pay him the salary: held, by the Court of Exchequer Chamber, reversing the judgment of the Court of Common Pleas, that such count was good upon motion in arrest of judgment; and that the agreement therein set forth was one which created the relation of attorney and client, and amounted to a promise, on the part of the defts., to continue that relation at least for one year (*Elderton v. Emmings*, 4 C. B. 498, n. (17); Law J. 307, C. P.; 6 C. B. 150).

Proof of the Work and Business being done.] After proof of the retainer, the performance of the work and business must be proved. This may be done by the plt.'s clerk, or other person who has acted and can speak of the causes and business in respect of which the charges are made, and who can prove the main items (*Esp. Dig.* 10). It is not the practice to require proof of every item. It seems, however, the plt. should adduce the best possible proof of the main items; and, therefore, in an action to recover the expenses of procuring the execution of a bail-bond, and other charges connected with it, the court held the plt. could not recover any part of his claim, without producing the bond itself in evidence (*Swinford v. Green*, 3 Stark. 135). In some cases, the necessity of actual proof *of the business being done may be dispensed with, as by proving the deft.'s admis- [*254] sion of it: thus, proof of a judge's order referring the bill to be taxed, and the deft.'s undertaking to pay what shall appear to be due, and of

the master's *allocatur*, will be sufficient evidence of the business having been done (*Lee v. Jones*, 2 Camp. 496; see further, *post*, "WORK AND LABOUR;" *ante*, "ADMISSIONS."

Proof of Delivery of Bill, when necessary.] If the action was commenced before the passing of the late act, 6 & 7 Vict. c. 73, for the recovery of *any fees, charges, or disbursements at law or in equity*, the plt. must prove the delivery of a bill thereof to deft., or that it was left for him at his dwelling-house, or last place of abode one month before the action was commenced; the bill being written in a common legible hand, and in the English tongue (except the law terms and names of writs), and in the words at length (except times and sums), the bill being also inscribed with the proper hand of the plt. (2 Geo. II. c. 23, s. 23; 30 Geo. II. c. 19, s. 75, &c.).

With respect to what items rendered a bill necessary to be delivered under the above acts, they were all such as were incurred in respect of business done in any *court* of law or equity (see *Harpur v. Williams*, *infra*).

In an action by the solicitors of a proposed railway company against A., a member of the provisional committee, for work done by them for the company before, whilst, and after A. was a member, a delivery of a signed bill, addressed to the committee to B., an earlier member of the committee, at *his* place of business, and containing some items incurred before A. became a member, is not a sufficient delivery to charge A. (*Edwards v. Lawless*, 6 C. B. 329; 5 Railw. C. 357; 6 D. & L. 105).

An action was brought by an attorney against a provisional committee for the amount of his bill of costs. The offices of the company were in Moorgate Street, and upon the office door was a plate with their name on it. On the 5th of January, 1846, none of the deposits having been paid, the company died a natural death, and it did not appear that the deft. was ever at the office after that date. On the 28th of September following the plt. delivered his bill, directed to the company, at the offices. The plate was then on the door; and the bill was given to a person who appeared to be a clerk: held, by Wilde, C. J., and Williams, J., that this was not a delivery of the plt.'s bill at the deft.'s office of business, and by Coltman, J., and Maule, J. *contra*, that it was (*Blandy v. De Burgh*, 5 Railw. C. 361; 18 Law J., C. P. 2; 12 Jur. 1005).

Whether in an action for business done by an attorney, there has been a sufficient bill and delivery thereof unto the party to be charged therewith, depends upon the circumstances of each case (*Gridley v. Austen*, 13 Jur. 680; 18 Law J., Q. B. 337).

The plt., an attorney, proved the delivery of his bill to the deft., accompanied by the following letter to him:—"As Mr. J. H. has left your house, I beg to hand you my account, which I hope will be found satisfactory." Mr. J. H. was a relation of the deft., and the business done had reference to procuring a separation between her and her husband: held, not a sufficient delivery to the party to be charge (*Ib.*). But, where the deft. was one of the managing committee of a railway company, and the plt. an attorney, having applied to the managing committee for payment of his bill was by them referred to the solicitor of the company, to whom, after some correspondence, he sent his bill, headed, "Northampton, Lincoln, and Hull Railway to R. D. (the plt.), debtor:" held, a sufficient delivery of the bill within the statute (*Daubney v. Phipps*, *ib.*).

In an action on an attorney's bill where the issue was, that no signed bill had been delivered to the deft., a delivery of the bill at the dwelling-house of the deft. to his servant, is evidence of a delivery to the deft. (*M'Gregor v. Kelly*, 18 Law J., Exch. 391).

What Bill taxable.] A charge merely for suing out a writ of *dedimus potestatem* (Ex parte Prickett, 1 N. R. 266), or "for taking instructions, drawing affidavit, *swearing the same*, and *money for oath*" (Winter v. Payne, 6 T. R. 646); or, for business done in the Insolvent Court, in procuring the discharge of an insolvent (Smith v. Whattleworth, 4 B. & C. 364); or obtaining a bankrupt's certificate (Collins v. Nicholson, 2 Taunt. 231; Ford v. Webb, 3 B. & B. 241); or for business done at quarter sessions (Ex parte Williams, 4 T. R. 496; Clarke v. Donoyan, 5 ib. 694; Silvester v. Webster, 1 Dowl. P. C. 708); or in a criminal suit at the Court of Great Sessions in Wales (Lloyd v. Manna, Tidd, P. 330; but see 2 Mer. 500); or in the Court of Review (Ware v. Adams, 1 W. W. & H. 77); or in the County Court (Wardle v. Nicholson, 1 N. & M. 355; 4 B. & Ad. 469); or in holding a court leet as steward of a manor (Lethbridge v. Luxmore, 1 D. & R. 511; 5 B. & A. 398); or, for business done under an extent (R. v. Collingridge, 3 Price, 280; R. v. Bartridge, 1 Tidd, P. 330); or for attending and advising on an action that had been brought against the client (Smith v. Taylor, 1 Dowl. P. C. 212; 7 Bing. 259); or for "attending and examining deft.'s proposed bail," and "attending the plt. in several actions commenced against deft., and arranging with him to take cognovits therein" (Watt v. Collins, R. & M. 284; S. C. 2 C. & P. 45); or for attending a lock-up-house, and obtaining deft.'s release, and filling up the bail-bond (Fearne v. Wilson, 6 B. & C. 86; 9 D. & R. 157); or for drawing a warrant of attorney, and attending deft. respecting it, although deft. never executed it (Wilson v. Gutteridge, 3 B. & C. 157; S. C. 4 D. & R. 738; Weld v. Crawford, 2 Stark. 538; 4 Camp. 68; Painter v. Tonsell, 8 Sco. 453; *sed vide* Burton v. Chatterton, 3 B. & A. 488); rendered a bill necessary to be delivered within the statute; and it made no difference, though the plt. proceeded only for the costs out of pocket (Miller v. Towers, Pea. 102).

What Bill not taxable.] On the other hand, the plt. needed not to prove a delivery of his bill to recover a charge not taxable, or where the court had not power to tax; as where a charge was wholly for conveyancing (Tidd, P. 329; Hooper v. Till, Doug. 199, n.; B. N. P. 145); or for *preparing* an affidavit of petitioning creditor's debt and bond, &c., the affidavit not having been sworn, and no commission ever having *issued (Bur- [*255] ton v. Chatterton, 3 B. & A. 488; Wilson v. Gutteridge, 3 B. & C. 158); or for searching at judgment office to ascertain whether satisfaction of a judgment had been entered on the roll, whether issue had been entered, and whether it had been docketed, in an action between A. and B. (Fenton v. Correa, R. & M. 262; S. C. 2 C. & P. 45); or for parliamentary business (Tidd, P. 329; 3 Ves. & B. 21; 4 Price, 279); *aliter*, as to judicial business before the House of Lords (4 Price, 279); or for negotiating an annuity (Weld v. Crawford, ib.; 2 Stark. 532); or for paying debt and costs pursuant to undertaking (Prothero v. Thomas, 1 Marsh. 539; S. C. 6 Taunt. 196); or for proceedings before the Lord Chancellor, as a visiter upon a royal foundation (Ex parte Dann, 9 Ves. J. 547); or for business in the Middlesex Court of Requests (Becke v. Wells, 1 C. & M. 75; 3 Tyr. 193); or under a commission of bankruptcy (Hamilton v. Jones, 4 Moo. & P. & P. 868; 7 Bing. 232; 1 Dowl. P. C. 209; Crowder v. Davies, 3 Y. & J. 433); or, for attending upon and concerting measures with the attorney of an opposing creditor to resist the discharge of an insolvent (Crowder v. Davies, 3 Y. & J. 433); or for serving subpœnas (Presidder v. Smith, 2 Jur. 205; 1 W. W. & H. 51); or for procuring an appearance to be entered by a proctor in the Consistory Court (In re Morris, 2 Ad. & E. 582); or for attendances to advise on matters subsequent to the conclusion of an action,

i. e., as to an execution upon a judgment (*Pepper v. Yeatman*, 5 Dowl. P. C. 155); or for preparing the certificate of a married woman's acknowledgment under the 3 & 4 Will. IV. c. 74; (*In re Branson*, 5 Dowl. P. C. 623; 4 Sco. 539; 3 B. N. C. 783); or for inquiries respecting the transfer of stock, and preparing a notice to the solicitor of the bank to file a bill in consequence of a distringas being entered to prevent a transfer (*Nicholas v. Hayter*, 2 Ad. & E. 348); or for working a country commission of bankruptcy (*Harpur v. Williams*, 9 Dowl. P. C. 618; 2 M. & G. 815; 3 Sco. N. R. 97; or for disbursements in a cause in respect of which he does not mean to make any charge to his client (*Sparrow v. Johns*, 3 M. & W. 600; 6 Dowl. P. C. 554).

The 12 Geo. II. c. 13, s. 6, having enacted that the 2 Geo. II. c. 23, should "not extend to any bill of fees, charges, and disbursements due from any attorney, or solicitor, or clerk in court;" but that they may use such remedies between themselves as before, an attorney was not bound to deliver a signed bill a month before he sued another attorney (*Ford v. Maxwell*, 2 H. Bl. 580); provided the deft. was an attorney at the time of the commencement of the action, though not so at the time of the work being done (*Windsor v. Herbert*, 7 M. & W. 375; 9 Dowl. P. C. 237). For the same reason a town agent was not bound to deliver a signed bill a month before he sued thereon (*Hill v. Sydney*, 7 Ad. & E. 956; *Dixon v. Plant*, Dougl. 199, n.; *Bridges v. Francis*, Pea. 1; *Nelson v. Garfuth*, 1 Esp. 221; *Sandys v. Hornby*, 4 C. & P. 520); nor was it taxable (*Weymouth v. Knipe*, 3 Biag. N. C. 387; *Carden v. Bull*, 4 Q. B. 611; 7 Jur. 847). But, though where the deft. was an attorney, the plt. was exempted from the operation of the 2 Geo. II. c. 23; yet he was bound to deliver a signed bill some time before the commencement of the action, pursuant to 3 Jac. I. c. 7 (*Milner v. Crowdall*, 1 Show. 338; *Hemming v. Wilton*, 4 C. & P. 318; cor. *Tenterden*, C. J.). In the cases *In re Geddye*, 2 D. & L. 915, and *In re Simons*, 3 D. & L. 156, it has been held that agency business is still virtually excepted out of 6 & 7 Vict. c. 73. But where one attorney employed another to defend an indictment, the bill delivered by the latter to the former was held taxable (*Billing v. Coppock*, 1 Ex. 14); so that it would seem the bill ought to be delivered. The 2 Geo. c. 23, was confined to the business done in the King's courts of record at *Westminster (*Regnal v. Smith*, 2 B. & Ad. 469; 1 Dowl. P. C. [*256] 334), and the 2 Geo. II. c. 23, to the attorney himself; and therefore his personal representatives were not bound to deliver a signed bill for business done by him (1 *Barnard*. 423; *And*. 276; *Barrett v. Moss*, 1 C. & P. 4; *Lester v. Lazarus*, 2 C. M. & R. 667; *Williams v. Griffith*, 10 M. & W. 125). But now assignees and personal representatives are bound to deliver bills (see 6 & 7 Vict. c. 73, s. 37, *ante*, p. 248).

Damages.] The plt. undertook a prosecution for perjury on deft.'s behalf and agreed not to charge him full costs except money out of pocket. He disbursed 105*l.* towards carrying on the proceedings, but by negligence preferred a defective indictment, and the prosecution failed: held, that he could not recover against deft. for disbursements (*Lewis v. Samuel*, 8 Q. B. 685). Deft. in the course of the proceedings advanced plt. 100*l.* for carrying them on, and he applied it accordingly: held, that deft. could not set off the 100*l.* as money received by plt. to his use (*Ib.*). Where by consent of parties a verdict is taken for a sum named for damages, and also all costs to which plt. had been put relating to the subject-matter of the cause as between attorney and client without being subject to taxation, that agreement is to pay such a sum for costs as would be considered fair and reasonable on taxa-

tion in a liberal way, and not by the ordinary rule (*Young v. Walker*, 16 M. & W. 446).

Where Items in Bill do not require delivery.] There appeared to be, till lately, some uncertainty as to whether the plt. may recover for items which did not require a delivery of a bill, where there were also other items which did require it; but the distinction appears to be that he might recover such items, where they had *no reference to the business of an attorney*, and he had *delivered no bill at all* before action, but that he could not where they had such reference, and he had delivered a bill before action (see *Mowbray v. Fleming*, 11 East, 285; *Winter v. Payne*, 6 T.R. 645; *Hill v. Humphreys*, 2 B. & P. 343; 1 Camp. 439, n.). Therefore, where plt. had delivered no bill at all before the action brought, but afterwards delivered a bill of particulars, he was held entitled to recover for money paid to his client's use, having no reference to his business of an attorney, although other items in the particulars were taxable (*Mowbray v. Fleming*, 11 East, 285). So, where he could not recover for professional business on account of not having delivered a bill pursuant to 3 Jac. I. c. 7, he was allowed to recover for money lent (*Hemming v. Wilton*, 4 C. & P. 318); but if he lent it for the purpose of paying costs he could not recover (*Smith v. Taylor*, 7 Bing. 259). And a disbursement by an attorney, in consequence of his undertaking to pay the debt and costs, is not a disbursement in reference to his business of an attorney (*Prothero v. Thomas*, 6 Taunt. 196; S. C. 1 Marsh. 539); nor is money lent (*Hemming v. Wilton*, 4 C. & P. 318). On the other hand where a single item in the bill delivered required such delivery, the bill should, be proved to have been regularly delivered before plt. could recover any item in it, having reference to the business of an attorney (*Wilson v. Gutteridge*, 3 B. & C. 157; S. C. 4 D. & R. 738; *Winter v. Payne*, 6 T. R. 545; *Hill v. Humphreys*, 2 B. & P. 343; 3 Esp. 254; *Margerum v. Sandysford*, 3 Bro. C. C. 233). And, where no bill was delivered before action, but after action brought, particulars of demand containing some taxable items were delivered, it was held that the plt. could not recover for an item not taxable, if such item were in respect of business done, or money paid to the client's use in his character of attorney (*Wardle v. Nicholson*, 4 B. & Ad. 469). But it seems now settled that where a bill is delivered according to the statute, containing various taxable items, some items of which are sufficiently described according to the statute, the plt. may still recover the residue of his bill (*Drew v. Clifford*, R. & M. 280; 2 C. & P. 69; *Waller v. Lacy*, 1 Sco. N. R. 186; 1 M. & G. 54). Where an attorney did business of a taxable nature, and other business clearly not so, he ought to make out only one bill for both (*Doe d. Palmer v. Roe*, 4 Dowl. P. C. 95); and he cannot bring an action for the non-taxable business alone, but must deliver his whole bill under the statute (*Thwaites v. Mackerson*, 3 C. & P. 341; M. & M. 199, per Tenterden, C. J.; *S. P. Benton v. Garcia*, 3 Esp. 149); and if he receive payments on account generally, without specific appropriation, he cannot apply them to the taxable items only, so as to deprive the deft. of the benefit of taxation *quoad* the residue of the bill (*James v. Child*, 2 C. & J. 678; 2 Tyr. 732).

*But, as we have seen, *ante*, p. 248, by 6 & 7 Vict. c. 73, s. 37, the power of taxing bills *now* extends to bills for *any business* [*257] done by an attorney or solicitor, therefore in all such cases a bill must be delivered, sent, or left in manner required by that section. But it would seem, by analogy to the old act, the plt. is not put upon proof of the delivery of a bill without a special plea (see *Lane v. Glenny*, 7 Ad. & E. 83).

An agreement by a client with his attorney to pay him at a certain speci-

fied rate for business to be done is not binding, or, at least, is not conclusive upon the client (*Drax v. Scroope*, 2 B. & Ad. 581).

An attorney's bill cannot be recovered on an account stated, though the amount has been admitted without proof of the delivery of the bill (*Eicke v. Nokes*, 1 Moo. & R. 359; *Brooks v. Bockett*, 16 Law J., N. S., Q. B. 178). He may, however, recover on a promissory note given for the amount (*Jeffreys v. Evans*, 14 M. & W. 210).

Proof of Delivery of Bill a Month before Action.] The deft. pleaded plea to this effect. The stat. 6 & 7 Vict. c. 73, interpretation clause, requires a delivery a calendar month: held, on special demurrer, that the word month in the plea meant lunar month, and that the words pursuant to the statute would not enable the court to construe it a calendar month, and that the plea was bad (*Parker v. Gill*, 5 D. & L. 121).

Set-off.] A bill, in order to be set-off, need not be delivered a month before trial, but merely in time for the plt. to tax it before trial (*Martin v. Winder*, Doug. 198, n.; *Bulmer v. Birkett*, 1 Esp. 149); in *Murphy v. Cunningham*, 1 Anst. 198, a regular delivery was held necessary, though *Martin v. Winder* was cited. The deft., under a plea of set-off, put in an account rendered to him by plt., by which he charged himself with items due to deft. On the other side of the account were items due to plt. for costs as an attorney, but for which no signed bill was proved to have been delivered, and which left a balance due to plt.: held, that the plt. was entitled to avail himself of the amount of the bill of costs, as the non-delivery of a signed bill did not extinguish the debt, but only prevented an action being brought to recover it (*Harrison v. Turner*, 16 Law J. 295, Q. B.; 11 Jur. 817).

By the late act, 6 & 7 Vict. c. 73, s. 37, it is enacted, "That from and after the passing of this act, no attorney or solicitor, nor any executor, administrator, or assignee of any attorney, or solicitor, shall commence or maintain any action, or suit, for the recovery of any fees, charges, or disbursements, for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, or administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor," &c., &c. (See *infra*).

Few questions can arise, under this act, as to what items require the delivery of a bill, as the act includes all "fees, charges, and disbursements for any business done by such attorney or solicitor."

By this clause, also, the personal representatives of an attorney or solicitor are bound to deliver a bill.

This act repeals (schedule 1), among other acts, the 3 Jac. I. c. 7; 2 Geo. II. c. 23; and 12 Geo. II. c. 13; and, therefore, a bill must be delivered in the usual way, though the deft. is an attorney or solicitor (see p. 255).

But an agency bill is not taxable now, any more than it was before the late statute (per *Coleridge, J.*, in *Simons v. Peacock*, 9 Jur. 711; 14 Law J., N. S., Q. B. 296; and *In re Gedge*, 2 D. & L. 915; 9 Jur. 470; see *ante*, p. 255).

[*259] *Mode of proving Delivery of Bill.*] The delivery is usually *proved by the person who delivered the bill, or by deft.'s admis-

sion of the receipt of it (*ante*, "ADMISSIONS"). Where a bill was produced, with an indorsement upon it, in the handwriting of a deceased clerk of the plt., whose duty it was to have delivered the bill, purporting that he had delivered a copy on a particular day, and the indorsement was proved to have existed at that date, it was held that the entry was *prima facie* evidence of the delivery of the bill (*Champneys v. Peck*, 1 Stark. 404; *ante*). Proof that the bill was enclosed in a letter, and put into a box in the office from which the postman invariably took letters every day, is sufficient evidence of sending (*Skilbeck v. Garbett*, 7 Q. B. 846; see "HEARSAY EVIDENCE," "SECONDARY EVIDENCE"). The delivery may be proved by a copy or duplicate original, without any notice to produce the bill delivered (*Anderson v. May*, 2 B. & P. 237); for the bill delivered is in the nature of a *notice* of demand and action (*Colling v. Treweek*, 6 B. & C. 399; *Vincent v. Slaymaker*, 12 East, 377); and a copy of the bill, though not signed by the plt., the original of which only was signed, and delivered to the deft., is admissible in evidence, without proof of notice to produce the original (*Colling v. Treweek*, 6 B. & C. 399); but, in a case where no copy of the bill was either proved to have been made, or produced in evidence, and the plt. attempted to prove the delivery by reading the items of charge from plt.'s books, from which the bill was stated to have been copied, such mode of proof was held inadmissible (*Philipson v. Chace*, 2 Camp. 110). In the late act of 6 & 7 Vict. c. 73, s. 37, there is a proviso in these words: "Provided also, that it shall not in any case be necessary, in the first instance, for such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, in proving a compliance with this act, to prove the contents of the bill he may have delivered, sent, or left, but it shall be sufficient to prove that a bill of fees, charges, or disbursements, subscribed in the manner aforesaid, or enclosed in, or accompanied by, such letter as aforesaid, was delivered, sent, or left in manner aforesaid; but, nevertheless, it shall be competent for the other party to show that the bill so delivered, sent, or left, was not such a bill as constituted a *bona fide* compliance with this act."

Contents of Bill.] The bill may be proved by a copy or duplicate original, without any notice to produce the bill delivered (*Anderson v. May*, 2 B. & P. 237; *Colling v. Treweek*, 6 B. & C. 394). Under the 2 Geo. II. c. 13, s. 5, the bill should be written in a common legible hand, in English, and in words at length, except, &c., as *ante*, 254. The 6 & 7 Vict. c. 73, contains no provisions of this kind. Under the former act, however, such abbreviations as were "common and intelligible" might be used (*Reynolds v. Caswell*, 4 Taunt. 194), as "declon.," "instrons.," "confee.," "afft.," "attg.," (*Froud v. Stillard*, 4 P. & C. 51). The bill must state the items severally, and not charge a sum in the lump, as, "an action brought," &c., and costs of, taxed at 57*l.* 13*s.*" (*Drew v. Clifford*, R. & M. 280; *Reynolds v. Taplin*, 6 Dec. 1826, cor. Abbott, C. J. Guildhall; *Waller v. Lacy*, 1 Sco. N. R. 186; 8 Dowl. P. C. 563). A mistake in the date of items, which does not mislead, will not render the delivery ineffectual, "as the object of the act is, that the bill might be capable of being taxed" (*Williams v. Barber*, 4 Taunt. 806). And, though plt. cannot recover a particular item, because it is not sufficiently described according to the statute, yet he may recover for those which are (*Drew v. Clifford*, R. & M. 280; 2 C. & P. 60; *Waller v. Lacy*, *supra*). Under the 2 Geo. II. c. 23, the bill should specify by name the cause in which the business was transacted (*Lewis v. Primrose*, 8 Jur. 982; *13 Law J., N. S., Q. B. 268; 6 Q. B. 265; *Englehart* [*259] *v. Moore*, 15 M. & W. 598; *Martindale v. Falkner*, 2 C. B. 706; *Ivimey v. Marks*, 17 Law J. 165, Ex.: this was formerly doubted, see *Lester*

v. Lazarus, 4 Dowl. P. C. 397; Lane v. Glenny, 2 Nev. & P. 258); and show, either by the heading or by the accompanying letter, the party charged (Taylor v. Hodgson, 3 D. & L. 115).

A solicitor's bill of costs directed to E. Gannon, headed "Yourself v. Round," but indorsed "Hancock v. Round," contained various items referring to the purchase of property under a decree of the Court of Chancery, in a cause of Hancock v. Round. Some of the items referred to proceedings in Chancery, and no proceedings in any other court were alluded to: held, that by reasonable intendment, the name of the cause, and the court in which the business had been done sufficiently appeared in the bill, and that it was sufficient under the 6 & 7 Vict. c. 73, s. 37 (Sargent v. Gannon, 18 Law J., C. P. 220). An attorney is bound to specify in his bill as well any court as the name of any suit in which the business charged for was done (Ivimey v. Marks, 16 M. & W. 843). Such bill is an entire thing, and if the same bill blend charges for work done, in a court of equity, with charges for that apparently done in some court of common law, without pointing out which, the charges in such bill for equity business, though correctly stated, cannot be recovered (Ib.).

Signature to Bill.] Before the late act the bill should be subscribed by the plaintiff, in his own name (Tomlinson v. Clark, 4 Moo. 4; Wild v. Crawford, 2 Stark. 583); or, in the case of a partnership, by one of the partners, in the name of the firm (Smith v. Brown, 1 Cr. & J. 542); or, "for self and partner" (Owen v. Scales, 2 Dowl. N. S. 304). Under the 6 & 7 Vict. c. 73, s. 37, it will be sufficient if it "shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name or with the name and style of such partnership); or of the executor, administrator, or assignee of such attorney; or be enclosed in, or accompanied by, a letter subscribed in like manner, referring to such bill."

Under this act, where an unsigned bill of costs was sent by an attorney which did not on the face of it charge any person, but was accompanied by a letter signed by the attorney, referring to the bill, and charging the debt with the amount of it, it was held that the letter and bill should be read together, and that this was a sufficient delivery (per. Wightman, J., in Taylor v. Hodgson, 14 Law J., N. S. Q. B. 310; S. C. 3 D. & L. 115; 10 Jur. 355).

Proof of Delivery of Bill to Defendant.] Before the late act, if plt. rested his case on proving a delivery to debt.; he should prove a personal delivery to him, or his agent expressly authorized by him to receive it (Finchett v. How, 2 Camp. 277). Where the bill was delivered to debt.'s attorney, and debt. afterwards attended the taxation in person, it was held that he thereby recognized the attorney as his agent (Warren v. Cunningham, Gow, 73). And where a party in a cause, having changed his attorney in the progress of it, a judge's order was afterwards obtained by the second attorney for the delivery to him of a bill signed by the first attorney, a delivery to him was held sufficient (Vincent v. Slaymaker, 12 East, 372; and see further proof as to agency, *post*, "PRINCIPAL AND AGENT"). It should be proved that the bill was left with the debt., or his authorized agent; for, where the plt. delivered the bill at due time to debt., who acknowledged the debt, and said he would pay it, but that he did not know what to do with the bill, upon which the plt. took it back again, it was held he could not recover (Brooks v. Mason, 1 H. Bl. 290). But it should seem, if plt. proved debt.'s refusal to receive the bill, or his request to take it back, the enactment of the statute would be

satisfied (Ib.). Showing and explaining the bill without a regular delivery is not sufficient (Crowder v. Shee, 1 Camp. 437).

Delivery at Defendant's Abode.] If the plt. could not prove a personal delivery to the deft., or to his authorized agent, he should prove that the bill was left for deft. at his *dwelling-house, or last place of abode*. Proof of the bill having been left at deft.'s counting-house will not suffice (Hill v. Humphreys, 2 B. & P. 342; S. C. 3 Esp. 254). Proof of delivery at deft.'s last *apparent* place of abode will suffice; and it is no answer for deft. to show that he had left that place of abode, unless he prove that he had a later *known* place of abode (Wadson v. Smith, 1 Stark. 324). But proof of delivery at a particular place not *shown to be his abode, [*260] and that he afterwards gave the bill to his present attorney, who attended the taxation of costs, is not enough (Eirke v. Nokes, M. & M. 303). But see Eggington v. Camberledge, 1 Exch. 271, where it was held that the delivery of a bill by a local attorney to the general attorney of a company, who submitted it to the provisional committee a month before action, was sufficient. It is now sufficient if the plt. shall prove that he has delivered the bill "unto the party to be charged therewith, or sent it by the post to, or left it for him at his counting-house, office of business, dwelling-house, or last known place of abode," &c. (see *ante*, pp. 248, 257).

Where, under this clause, an attorney sent a bill for parish business to the deft., who had been an overseer, when the law-suit commenced, and who directed it to be commenced, but had been out of the office for two or three years before the suit was over, and the bill was not headed against him, and was accompanied with a letter which merely stated, "I enclose you a bill against your parish for the costs in (*naming the matter*). I have several other bills against the parish, and shall be obliged by their early discharge." The Court of Exchequer held, that as neither the bill nor the letter pointed to the deft. as the party to be charged with the payment of the costs, there had not been a delivery "to the party to be charged therewith" (Upton v. ———, Michaelmas Term, 1846).

In an action on an attorney's bill, a new trial will not be granted on the ground that the bill was misdirected (Welsh v. Silwell, 11 Jur. 471, Q. B.).

Delivery to one of several Defendants.] When there are several defts., it will be sufficient to prove a delivery to one of the acting parties, jointly liable, as it will be presumed that he had authority from the others to receive the bill (Crowder v. Shee, 1 Camp. 437); and therefore it is sufficient for him to deliver his bill to the person who gave the instructions (Finchett v. How, 2 Camp. 277); but, if he deliver the bill to a party who never intermeddled in the retainer, it will be insufficient (Ib.). Where an attorney has been jointly retained by several defts., to defend several suits brought against each, but in the subject-matter of which they had a joint interest, a delivery to one will be sufficient in an action against all (Oxenham v. Lemon, 2 D. & R. 461); and a plea by one of the want of delivery to him is bad on special demurrer (Kiteley v. Schofield, 6 Jur. 1059, Q. B.). It is apprehended that the late act, in requiring a delivery of the bill "unto the party to be charged therewith," has not altered the law in this respect. If an attorney be retained by the surveyor of highways, the bill should be delivered to him and not to the rate-payers, it seems (In re Barber, 14 M. & W. 720).

Proof of Delivery of Bill one Month before Action.] Plt. must prove the delivery of his bill one month at least before bringing his action. The former statute required a *lunar month* (Hurd v. Leach, 5 Esp. 161, Crook v. M'Tav-

ish, 1 Bing. 167), exclusive of the day on which the bill was delivered, and of the day on which the month expired (Blunt v. Heslop, 3 Nev. & P. 553; 8 Ad. & E. 577; 9 Dowl. P. C. 982). The 6 & 7 Vict. c. 73, ss. 37 & 48, requires a calendar month.

The writ of summons, which, by the 2 Will. IV. c. 39, s. 12, and 1 & 2 Vict. c. 110, s. 3, must bear date on the day on which it is issued, is now to be considered the commencement of the action for all purposes (Alston v.

Underhill, 2 C. & M. 492; Thompson v. Decas, 1 C. & M. 768; [*261] 3 Tyrw. 427; Rees v. Morgan, 3 Nev. & M. 205): and, as the exact date of its issuing is mentioned on the *nisi prius* record *(R. G. H. T. 4 Will. IV. c. 22, s. 1), the time of commencing the action cannot be disputed at *nisi prius* (3 Chitty's Gen. Prac. by Lush. 678).

As to the mode of proving the commencement of the action formerly, see Webb v. Pritchett, 1 B. & P. 263; Rhodes v. Gibbs, 5 Esp. 163; Harris v. Orme, 2 Camp. 497, n.; 2 Saund. 1 b, n.

Proof of Reasonableness of Charges.] The bill cannot be taxed at the trial. As to when it may be taxed *now*, see 6 & 7 Vict. c. 73, ss. 37, 38, &c.; as to when it might be taxed formerly, see Tidd, 333; *ante*, p. 254. If the action was commenced before the passing of this statute the plt. should prove the reasonableness of his charges, as in other actions for work and labour (*post*, "WORK AND LABOUR"). But, if the charges be for business done in court, *and they be taxable*, this does not seem necessary: for, if the business was really done, and which must be proved at the trial, the delay of the deft. for more than a month in objecting to the *quantum*, is an admission that he thinks it reasonable; and he will not be allowed to dispute the reasonableness of the items at the trial (Williams v. Frith, 1 Doug. 197; Hooper v. Till, 1 Dougl. 198; Anderson v. May, 2 B. & P. 237; 7 Price, 234; Lee v. Wilson, 2 Ch. R. 65).

This principle applies to *every* action commenced since the passing of the above act. If the bill has been taxed, it is sufficient to give in evidence a judge's order to tax it, the deft.'s undertaking to pay what should be due, and the master's *allocatur* (Lee v. Jones, 2 Camp. 496); but, if the order to tax were obtained by the plt., it is not evidence against the deft. (King v. Kype, 1 W. W. & H. 87). The plt.'s delivery of his bill is conclusive evidence against him as to an increase on any of the items charged in it (Lee v. Jones, 2 Camp. 496); and it is strong presumptive evidence against additional items; but, if there are any real errors or omissions they may be explained and rectified (Leveridge v. Botham, 1 B. & P. 49). If no bill have been delivered, and the plt. plead *non assumpsit* only, or pay money into court, it should seem that the reasonableness of the charges may be disputed; so, if the action be brought before the lapse of a month from the delivery, the reasonableness of the charges may be considered as open to dispute, but the verdict in such case would be taken subject to taxation.

The Master's *allocatur* is strong but not conclusive evidence under the plea of *nunquam indebitatus*, that no more is due (Beck v. Cleaver, 9 Dowl. P. C. 111). Where the plt. charged for specific attendance on certain days, and a further sum for several attendances, Lord Tenterden, C. J., directed the jury to deduct the latter sum from the amount of the bill (Rawson v. Earle, 4 C. & P. 44). The jury may discard an item for work entirely useless; though not, if only partly useless (Shaw v. Arden, 1 Dowl. P. C. 705; 2 Moo. & S. 341).

Evidence for Defendant.

Under the general issue (*non assumpsit*, or *nunquam indebitatus*), the

deft. may show that the plt. has conducted the business with such want of care or skill (see *post*, "ACTION AGAINST ATTORNEY FOR NEGLIGENCE"), as to be altogether useless to him (Hill v. Allen, 2 M. & W. 283; 5 Dowl. P. C. 471; Symes v. Nipper, 12 Ad. & E. 337, n.; Bracey v. Carter, 12 Ad. & E. 373; Hill v. Featherstonhaugh, 7 Bing. 569; 5 Moo. & P. 541); or, that he has not exercised "reasonable diligence and skill;" and whereby plt. has, through his inadvertence and want of proper caution, incurred the costs sought to be recovered (Montriau v. Jefferys, R. & M. 317; Farnsworth v. Gerrard, 1 Camp. 38; Denew v. Daverell, 3 ib. 452); or that the plt. agreed only to charge the money out of pocket (Parker v.

*Harcourt, 5 East, 249; and see Jones v. Reade, 5 Ad. & E. 529; [*262] and he is bound by such agreement although he was misled by his client's statement as to his right of action (Thwaites v. Mackerson, 3 C. & P. 341; see Lewis v. Samuel, 10 Jur. 429; 15 Law J. 218, Q. B.). If an attorney undertake to charge a plt. only costs out of pocket "in case the damages or costs should not be recoverable," and the plt. recover, but the deft. becomes insolvent, the attorney is not limited to costs out of pocket (In re Stretton, 14 M. & W. 806). An attorney is not entitled to recover even for money paid, if he have agreed to do the work on the terms of no cure no pay (Taylor v. Tenant, 6 Law T. 413, Q. B.); or, that plt. conducted the cause for nothing; and evidence that, when the attorney's agent went before the master to have the bill taxed, he admitted such was the case, will suffice for this purpose (Ashford v. Price, 3 Stark. 185); or, that the work was done under an indemnity from the plt. against costs and expenses (Hill v. Allen, p. 261); or, that plt. agreed to be paid in gross for prosecuting the action in respect of which the charges which plt. seeks to recover were incurred, as such agreement would be champerty (Com. Dig. Attorney, B, 14; Hob. 117; Tidd, 326); or, that he did not retain the plt., and have the benefit of his advice and judgment. Thus, where the plt. had an office at a distance from his own residence, at which he carried on business by a clerk, who practised in his name, and to whom he allowed one-third of the profits, and the deft. knowing nothing of the plt. employed the clerk to conduct an action for him, it was held that the plt. was rightly nonsuited in an action to recover the costs of that action which had been so carried on by his clerk, as the deft. had never seen or communicated with the plt. on the subject, and the plt. lived at such a distance from the clerk, as to prevent his conferring with and directing the clerk, who was therefore left *without instructions*, and acted according to his own judgment (Hopkinson v. Smith, 7 Moo. 237; S. C. 1 Bing. 13; Taylor v. Glassbrook, 3 Stark. 75); and see *post*, "ACTION AGAINST AN ATTORNEY FOR NEGLIGENCE". If a client sue *in formâ pauperis* he can only recover money out of pocket (Philips v. Baker, 1 C. & P. 533). He may show that the work was done by an unqualified person in the plt.'s name (Parker v. Riley, 3 M. & W. 230). A corporation may object that the retainer is not under the corporate seal, as no corporation can appoint an attorney by parol, except the Corporation of London (Arnold v. Poole, 4 M. & G. 860); and the appointment by the latter corporation is enrolled in the several courts at Westminster on each 9th November.

Where Negligence is not a Defence.—But negligence is not a defence, unless the work is *altogether* useless (Templer v. McLachlan, 2 N. R. 136; Shaw v. Arden, 1 Dowl. P. C. 705; 9 Bing. 287); the client's remedy in such case being only by cross action (Ib.); and useless in consequence of plt.'s negligence *solely* (Dax v. Ward, 1 Stark. 409); or the charges have been created by plt.'s want of proper caution (Huntley v. Bulwer, 6 N. C.

111; *Bracey v. Carter*, 12 Ad. & E. 373); and this is evidence on *non assumpsit* (Ib.); even though the promise was to pay costs out of pocket (*Lewis v. Samuel*, 8 Q. B. 685). And so, if the deft.'s object in the former suit were unjustifiable delay, as not filing a plea in abatement, plt.'s neglect is no defence (*Johnson v. Alston*, 1 Camp. 175).

A declaration in *assumpsit* for negligence by attorneys, alleged the retainers of the deft.'s as the attorneys of the plt., and the breach of a promise by them "to use due and proper care and diligence in and about ascertaining the title of the said G. R. to the said lands, tenements, and premises, and to take due and *proper care that the same should be sufficient [*263] security for such repayment of the said sum of 610*l.* 6*s.*;" and assigned for damage, "that the said supposed title and estate, and interest of the said G. R. in and to the said lands, tenements, &c. by reason of the negligence and improper conduct of the defts. in the premises, were not, nor are, nor will be, any sufficient security for the said sum," &c. Held, that the meaning of the word "security" was to be determined by the fact that the defts. were retained as attorneys, that it therefore imported, not sufficiency of present value, but sufficiency of present title; and, consequently, that a nonsuit, ordered by the judge who tried the case, on the ground that evidence of a promise to ascertain value was not given, must be set aside, and a new trial had (*Hayne v. Rhodes*, 8 Q. B. 342; 15 Law J. 137, Q. B.; 10 Jur. 71). The plt. had been retained by the deft. to bring an action for a false imprisonment against a constable and a person who had acted as a magistrate. The action was brought against the constable only, and not within the time limited by the statute. The constable pleaded not guilty, by statute, but the record was made up without the words "by statute" being inserted in the margin. The then plt. in consequence obtained a verdict at the trial, but which was subsequently set aside by the court, as it appeared that the plea had contained the words "by statute" in the margin. The plt.'s attorney, the now plt. had thereupon consented to a nonsuit, and a moiety of the costs had been levied upon the now deft. In an action by the attorney for his costs in that action, it was held, that he was not entitled to recover, on the ground of the gross negligence in the matter (*Saffery v. Wray*, 6 Law T. 183).

It is said to have been determined in the C. P., that, though the deft. has neglected to supply the plt. with money to conduct a cause, and for which reason the plt. would not proceed in it, and quitted the suit before trial, still the plt. could not bring an action for his bill (14 Ves. 272). But it has been held that it is no defence that plt. refused to go on with a suit in Chancery if deft. did not supply him with money (*Rowson v. Earl*, M. & M. 538); for if the attorney give reasonable notice he is at liberty to discontinue the conduct of a cause on a refusal to supply him with money, and may recover for the work done (*Vansandau v. Browne*, 9 Bing. 402; see *Wadsworth v. Marshall*, 2 Cr. & J. 665; *Hoby v. Built*, 3 B. & Ad. 350). But it lies on the attorney to show satisfactorily why he has abandoned the cause (*Nicholls v. Wilson*, 11 M. & W. 106). If an attorney, through inadvertence or inexperience, incur useless trouble, he cannot recover for it (*Hill v. Featherstonhaugh*, *supra*; *Hill v. Allen*, *supra*). Negligence is not a defence, if the error committed was such as a cautious man might fall into (*Montrieu v. Jefferys*, 2 C. & P. 113, *Abbott, C. J.*); as, where the attorney had brought an action on an agreement which a conveyancer had advised to be valid (*Potts v. Sparrow*, 6 C. & P. 749, *Tindal, C. J.*). So, where an attorney prepares a document which is illegal, but with regard to the legality of which there was reasonable doubt, he may recover for preparing it (Ib.); at all events the illegality must be pleaded (*Potts v. Sparrow*, 1 B. N. C. 594);

unless the work thereby becomes wholly useless (see *Tabram v. Warren*, 1 Tyw. & G. 153; *Roberts v. Barber*, Ch. Pl. by Pear. 225). So, where a dispute, between A., a married woman, and C. D., was referred to arbitration; and, after the reference had proceeded some time, additional matter was submitted by the attorneys for the parties, C. D.'s attorney signing the submission in his presence, and A. B.'s attorney in the presence of C. D.'s attorney, but without any authority from her, and the award was afterwards set aside, it was held that C. D.'s attorney was not guilty of such negligence, in not requiring to see the *authority of A. B.'s attorney, as to disentitle him to recover the costs of the arbitration (*Edwards v.* [*264] *Cooper*, 3 C. & P. 277, and see *post*, "ACTION AGAINST AN ATTORNEY FOR NEGLIGENCE"). An attorney employed generally has no power to sue, merely to defend (*Wright v. Castle*, 3 Mer. 12).

We have already seen how far deft. may dispute the reasonableness of the plt.'s charges *ante*, p. 260). By 6 & 7 Vict. c. 73, s. 3, no person shall act as attorney, or solicitor, or as such, shall commence, or carry on, or defend any action or proceeding in his own name, or the name of another, in any court of law, or equity, or act as attorney or solicitor in any cause or matter heard before judges of assize, oyer and terminer, quarter sessions, justices, or commissioners of revenue, unless duly admitted, enrolled, and qualified.

As to the defence, under the plea of want of certificate under the 37 Geo. II. c. 90, s. 31, see *ante*, p. 264, and *Pearce v. Whale*, 5 B. & C. 38; 7 D. & R. 512; or, under the 6 & 7 Vict. c. 73, s. 26, by which it is enacted that no attorney or solicitor practising without a stamped certificate shall maintain an action for any fee, reward, or disbursements for business done by him as attorney whilst without such certificate (*Hill v. Sydney*, 7 Ad. & E. 596; as to form of such plea see *Eyre v. Shelly*, 6 M. & W. 274; *Williams v. Jones*, 1 G. & D. 649); or, under the plea of being in prison, under 6 & 7 Vict. c. 73, s. 31, by which it is enacted that no attorney or solicitor shall prosecute or defend suits in his own or another's name whilst in prison, nor sue for fees, rewards, or disbursements, in respect of any business done by him whilst such prisoner. Before this act, an attorney might recover his fees for *continuing or defending* an action while he was in prison (*Noel v. Hart*, 8 C. & P. 230; *Noel v. Parkes*, 2 Jur. 108, Q. B.).

It was not, before the late act, a defence to a bill for suing out a commission of bankrupt that an attorney of Q. B. was not a solicitor in Chancery (*Wilkinson v. Diggell*, 1 B. & C. 158). But, by s. 27 of the above act, solicitors only can now practise in bankruptcy. A solicitor of the equity side of the Exchequer could not practise in Chancery, nor recover for business done there (*Vincent v. Holt*, 4 Taunt. 452, where the case of *Meddowcroft v. Holbrooke*, 1 H. Bl. 50, was denied to be law). An attorney may recover a bill for issuing a fiat in bankruptcy against a person who employed him so to do, but was not petitioning creditor, although no assets are received (*Pocock v. Russen*, 1 Moo. & M. 357).

By section 36 no person not duly admitted as attorney or solicitor shall sue for fees, &c., on account of any proceedings carried on by him in the county court.

An attorney of one court may, with the consent, and in the name of an attorney of another, practice in the latter court. But if he practise there in his own name he cannot recover his fees (*Latham v. Hyde*, 1 C. & M. 128; *Hockley v. Bantock*, 2 Myl. & K. 437). Nor can partners recover a bill of costs for work done in a court of which one of them is not an attorney (*Arden v. Tucker*, 1 Moo. & R. 191).

Liability for Acts of Negligence.] The declaration stated that plt. employed deft. as attorney to sue H. for a sum of money, and that it was his duty to use proper care in conducting the suit; yet he did not use proper care in this, that having as such attorney sued out writs for the recovery of the said money, and for the purpose of saving the Statute of Limitations, he did not "duly file" the said writs with the proper officer according to the practice of the court, whereby the action was barred: held, that although the 2 & 3 Will. IV. c. 39, s. 10, did not in terms require such writs to be filed, yet the word "file" in the declaration might have the sense of bringing the writs to the office, and in that sense would be included in the word returned in the statute, and such filing would be a necessary part of the practice in saving the statute, and that such direction was right (*Hunter v. Caldwell*, 10 Q. B. 69). That the question of negligence in not complying with the practice of the court was a question of fact for the jury under the judge's direction as to the law (*Ib.*). That there was no ground for arresting the judgment, as if there could be any sense in the word "file," in which case it was deft.'s duty to file the writs, the declaration was good after verdict (*Ib.*; 12 Jur. 285); that the duty was sufficiently shown, and the breach well assigned (*Ib.*). The declaration contained the usual allegation of retainer, &c., to use due care in ascertaining the title of R. to lands which were to be charged as security, for payment of 600*l.* by R. to plt., and to take due care that the same should be sufficient security for the payment of the 600*l.*, and in consideration, &c., defts. promised plt. to use due care, &c.: held, that the undertaking of deft.'s as laid, did not comprehend any inquiry into the value of the lands (*Hayne v. Rhodes*, 8 Q. B. 342).

Agency Business.] In cases of agency the agent universally gives credit to the attorney who employs him, and not to his client; in such cases, therefore, it is the duty of the attorney in order to limit his liability to give express notice that the business is to be done on the credit of the client, and it will be no defence that the agent knew that the business was done for the benefit of the client (*Scarce v. Whittington*, 2 B. & C. 11; *ante*, p. 252).

Statute of Limitations, see *post*, "LIMITATIONS, STATUTE OF."] The *contract to conduct a suit is entire, and where the suit ended [*265] within six years, the statute is no bar for the business which was done more than six years ago (*Harris v. Osborn*, 2 C. & M. 629; *Martendale v. Falkner*, 2 C. B. 706; *Rothery v. Munnings*, 1 B. & Ad. 17).

Deft. employed plt. an attorney, in several transactions, and among others in procuring him money to pay off a mortgage. In an action on plt.'s bill of costs, it appeared by items in the bill that he had made applications in several quarters for this purpose but without success, after which he wrote to plt. informing him what had been done, and requesting to know his wishes. This item bore date more than six years before the action brought. The next, dated within six years, was, "Paid the postage of your answer." By subsequent items it appeared that further endeavours were made by plt. to raise the money. Ultimately it was obtained: held, that the transaction was not one in which the attorney's employment was continuous: and that the latter items did not draw after them the previous ones, so as to take these out of the Statute of Limitations (*Phillips v. Broadley*, 9 Q. B. 744).

II. ACTIONS AGAINST, FOR NEGLIGENCE.

Form of Remedy, p. 265.*Form of Pleadings*, p. 266.*Precedents*, p. 268.*Declaration*, p. 268.*Pleas*, p. 268.*Evidence for Plaintiff*, p. 268.*Retainer*, p. 268.*Inducement*, p. 269.*Defendant's Negligence*, p. 269.*Damages*, p. 272.*Evidence for Defendant*, p. 272.

Form of Remedy.

The form of remedy against an attorney or solicitor, for negligence, is by action of assumpsit for breach of promise, or case for violation of the implied duty, though the former is the more usual remedy (*Reece v. Rigby*, 4 B. & A. 209; *Swannell v. Ellis*, 1 Bing. 347; *Russell v. Palmer*, 2 Wils. 328; *Pitt v. Yalden*, 4 Burr. 2060; *Shilcock v. Pasma*, 7 C. & P. 289; *Lampkin v. Phipos*, 8 C. & P. 478). It was formerly thought, where the deft.'s conduct was grounded in fraud, and where he could avail himself of the Statute of Limitations, that case was the proper and more advisable form of remedy (*Brown v. Howard*, 2 B. & B. 73; *S. C.* 4 Moo. 508, 532; *Short v. M'Carthy*, 3 B. & A. 626); but the decision, in *Howell v. Young*, 5 B. & C. 259, that the statute runs from the time of the misconduct, not from the time its consequences are discovered, shows that such a defence is equally available in either case. Assumpsit is also often advisable for the sake of inserting the money-counts, which may, in some cases, enable the client to recover back the money he has paid for the business done, when there is a total failure of consideration (5 Pet. R. 602). In some cases, where the negligence or unskilfulness has been very gross, the court whereof deft. is an attorney will interfere (*Sayer*, 50, 169; *Tidd*, 81). It seems that an action for negligence lies, though there is no proof of special damage (*Godefroy v. Jay*, 7 Bing. 413; 5 M. & P. 284).

Where the attorney of a deft., in custody on final process, obtained the consent of the plt.'s attorney not to charge him in execution in the term in which that step ought to have been taken, on the false representation that he had the deft.'s authority to take no advantage of it, and gave an undertaking to that effect; which, however, did not state the proceedings were stayed at deft.'s request, pursuant to the rule of court; and the deft., not being charged in the proper term, was afterwards discharged on the ground of the above omission in the undertaking; it was held, that the deft.'s attorney was not liable to the plt. for the damages accruing from the false representation, as the damages laid arose from the informality of the undertaking (*Hewitt v. Melton*, 1 C. M. & R. 232; 4 Tyr. 1003).

The personal representative of an attorney is liable in case for his negligence (*Wilson v. Tucker*, 3 Stark. 154; *D. & R. N. P. C.* 30).

**Form of Pleadings.*

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The observations as to the declaration in assumpsit (*ante*, p. 179 to 226) must be here attended to. It is necessary, in the declaration, either to state that deft. was retained for reward, or that deft. was retained at his request, or that he was retained as an attorney, which, of itself, implies a considera-

tion (*Dartnell v. Howard*, 4 B. & C. 345; 6 D. & R. 438; *Bourne v. Diggle*, 2 Ch. R. 312; *Elsee v. Gatward*, 5 T. R. 143; *Coggs v. Bernard*, 2 Ld. Raym. 909). A count in a declaration against an attorney stated that the plt. was desirous of lending 400*l.* on good security; that the deft. had notice of such desire; and that he falsely and fraudulently representing that a certain security was good and sufficient, induced and persuaded the plt. to lend the said 400*l.* upon such security, whereby the plt. lost a large sum of money. Held, sufficient, after verdict, without stating any employment by the plt. of the deft. as an attorney for the purpose (*Williams v. Jay*, 11 Law T. 85, Q. B.).

A declaration in *assumpsit* stated that the deft. was an attorney, and that in consideration that the plt. would retain him as such attorney in action of tort of B. against L. the deft. promised to fulfil his duty as such attorney, and about prosecuting the said action and recovering damages. That the deft. did, under the said retainer, commence an action against L. in which judgment was obtained against him for 56*l.* That the deft. afterwards, as such attorney for obtaining satisfaction of the said damages, sued out a *fi. fa.* against L. to which the sheriff returned that he had levied 9*l.* part of the damages, *nulla bona* as to the residue. That the deft., as such attorney as aforesaid, for obtaining satisfaction of the said residue, issued a *ca. sa.* under which L. was imprisoned, and paid the residue of the damages to the gaoler, who paid the same to the deft., as such attorney as aforesaid; and before he received the same, he sent, as such attorney as aforesaid, to the gaoler a discharge of L. out of custody, by virtue whereof he was discharged. Breach, that though the deft. received the said damages, and plt. paid to him, as such attorney as aforesaid, his costs of prosecuting the said action, he did not pay over to B., or the plt., the residue of the said damages: held, that this declaration was bad on special demurrer, for not showing distinctly that the money was received by the deft. under his original retainer by the plt. in his action against L. (*Bevins v. Hulme*, 15 M. & W. 88; 3 D. & L. 722; 15 Law J. 226, Ex.).

Where the declaration in *assumpsit*, by an administrator, stated that the intestate had retained the deft. as his attorney, to investigate and procure a good title of an estate about to be purchased by him, and assigned for breach that he did not do so, but accepted a bad and defective title; on demurrer to the declaration for not alleging that he undertook to ascertain and procure a good title in his professional character as an attorney, it was held, that it being alleged that the intestate employed him as an attorney, it must be implied that he was bound to fulfil his duty as such (*Knight v. Quarles*, 4 Moore, 532; 2 B. & B. 102). So, if the declaration state that the plt. retained the deft., an attorney, to see if a certain security was good; that he accepted the retainer, neglected his duty, and represented the security to be good; that the plt. advanced his money upon it; that it was bad; by means of which the plt. lost his interest, it is sufficient (*Howell v. Young*, 5 B. & C. 259; 8 D. & R. 14): and, where the declaration in *assumpsit* stated the plt. having retained the deft. at his request to lay out 700*l.* in the purchase of an annuity, the deft. promised to lay it out securely; that the plt. delivered the money to him for that purpose; and that he laid it out insecurely; [*267] it *was held, after verdict, that the consideration for the promise was sufficiently laid (*Whitehead v. Greetham*, 2 Bing. 464; 10 Moo. 183).

It is unnecessary to state of what court the deft. was an attorney, and, if stated, it must be strictly proved (*Green v. Jackson*, Pea. 237); and this, though the deft. plead as an attorney of the court (*Browne v. Diggles*, 2 Ch. R. 311). It is also unnecessary to state any more of the former proceedings

than absolutely necessary, and a variance will be fatal (*Lee v. Ayreton*, Pea. 119; *Brown v. Jacobs*, 2 Esp. 726; *Green v. Rennet*, 1 T. R. 656; 2 Ch. Pl. 274). In one or more counts, it is advisable to state the particular act which it was deft.'s duty to have performed (2 Ch. Pl. 372, n.); and other counts should be added, stating the duty generally (Rep. t. Hardw. 309). Plt. must show that the injury sustained resulted from the negligence of deft. In a declaration, stating that plt. had employed deft. to conduct an action of ejectment for the recovery of premises forfeited to the plt., by the tenant's neglect to repair, and it was alleged that it was referred to an arbitrator, who was to decide what repairs should be done, &c., and that the arbitrator was ready to proceed, but that deft. neglected to attend him, and it was objected that it was not shown that the arbitrator would have found repairs to have been necessary, or have awarded it in favour of the plt., if the reference had proceeded, the declaration was held sufficient, as it appeared that the arbitrator was competent to decide what repairs ought to have been done, but was prevented by deft.'s negligence (*Swannell v. Ellis*, 1 Bing. 347). In 2 Ch. Pl. 274, n., it is said, "though usual, it is not advisable or necessary to allege that the party against whom the action was depending was indebted," &c. But if it should seem that it cannot be the duty of an attorney to exercise his skill and diligence against a party who was not indebted, or unless the party was indebted, it would seem that a count would be bad for not alleging that the plt. had sustained any damage (*Dartnell v. Howard*, *supra*).

Formerly, the declaration, instead of the usual conclusion, concluded with the words, "and, therefore, he prays relief, &c.;" the omission of these words, however, was not a cause for demurrer (*Andr. 247*). They are not now inserted. The new rules prohibit the use of two counts for carelessness, &c., in the one transaction; it is therefore expedient to lay the cause of action in a general form.

As to when the heir or executor should sue for negligence, in investigating the title to an estate, see *Knights v. Quarles*, *ante*, p. 266; 2 Lev. 26; 1 Ventr. 176.

As to where the venue should be laid against an attorney or solicitor, for improperly instituting proceedings in Chancery, see *Lyde v. Rodd*, 1 Bro P. C. 60.

See a count for negligence in defending a cause at the trial (*Hoby v. Built*, 3 B. & Ad. 350; *Reece v. Righy*, 4 B. & A. 202; *Godefroy v. Jay*, 7 Bing. 413); for investing plt.'s money upon an insufficient annuity security (*Whitehead v. Cheetham*, 2 Bing. 464; *Treson v. Pearson*, 3 B. & C. 799; *Wilson v. Tucker*, 3 Stark. 154; *Kemp v. Burt*, 4 B. & Ad. 424); for suffering a client to execute an unusual covenant on assigning a term (*Hansard v. Ullithorne*, 10 Bing. 491); for not taking proper measures to obtain a prisoner's discharge from custody (*Shilcock v. Pasman*, 7 C. & P. 289). By an executor of an executor of an attorney for his carelessness in the investigation of the sufficiency of an annuity purchased by plt.'s testator (Ch. Pl. by *Pearson*, 70).

Precedents.

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Declaration.

(*Commencement, ante*, "ASSUMPSIT"). For that whereas heretofore, to wit, on, &c. [day of retainer or about it], in consideration that the plt., at the request of the deft., had then retained and employed the deft., as then being an attorney, to prosecute and conduct a certain action of [trover] in the court of, by, and at the suit of the plt., against one E. F., for a certain cause of action, to wit, for taking away and converting to his own use certain goods and chattels of the plt.; for reasonable fees and reward

to be therefore paid by the plt. to the deft., he, the deft., then promised the plt. to use due and proper care and skill in and about his prosecuting and conducting the said action for the plt.; nevertheless, the deft., not regarding his said promise, did not, nor would, use due and proper care and skill in and about his prosecuting and conducting the said action for the plt., but, on the contrary thereof, prosecuted and conducted the same action to trial in so careless, unskilful, and improper a manner [to wit, in not having a certain instrument before then prepared by the deft., and purporting to be a sale and assignment of the said goods and chattels by the said E. F. to the plt., stamped according to law, so that the same might have been given in evidence on the said trial of the said action]; that the plt. by the said neglect and default of the deft. in that behalf, was hindered and prevented from giving the same instrument in evidence upon the trial of the said cause, and by reason thereof was afterwards, to wit, on, &c. [*day of nonsuit or about it*], compelled to suffer himself to be nonsuited in the said action, whereby he was not only hindered and prevented from recovering his damages from the said E. F., by reason of his taking away and converting the said goods and chattels as aforesaid, but hath also been forced and obliged to pay, and hath paid, to the said E. F., a large sum of money, to wit, the sum of £ , for his costs and charges in and about his defence of the said action; and hath also paid to the defendant another large sum of money, to wit, the sum of £ , for his costs and charges for the prosecution and conduct of the said action.

Special counts.

The declaration must so necessarily agree with the peculiar facts of each particular case, that it would be of little or no practical utility to give other forms. See precedents of declaration against an attorney for negligently conducting a cause to trial without evidence, 2 Ch. Pl. 273, 500; for not obtaining judgment as soon as he ought, Ib. 276; for not giving note to a prisoner, whereby he was discharged, Ib. 278; for not examining the title to an estate bought by plt., Ib. 279; for taking a defective security from the grantor of an annuity, Ib. 280, 501; for not putting in bail, whereby plt. was obliged to pay the debt, Ib. 276; for not putting in a sufficient plea to an action, Ib. 277; for not appearing, and for suffering judgment, Ib. 278; for negligence in investing a security, Ib. 282, 502; the like at the suit of an administrator, 4 T. B. Moore, 532; for allowing a client to execute an unusual covenant for title, without explaining the nature thereof, 10 Bing. 491; for disclosing defects in his client's title, 3 Bing. 235; 3 Sco. 614. For other forms, see 2 Went. 290 to 307; for forms of pleas generally, see "ASSUMPSIT" and "CASE."

Pleas.] As to the pleas in assumpsit and case generally, see *ante*, "ASSUMPSIT," and *post*, "ACTION ON THE CASE." Pleas, 1st of *non assumpsit*, and 2ndly, that deft. used due diligence and took proper measures, &c., admit the prefatory averments of the declaration; but throw on the plt. the proof of the retainer and negligence (per Alderson, B., in *Shilcock v. Passman*, 7 C. & P. 289). *Non assumpsit* puts the deft.'s retainer expressly in issue (per Cresswell, J. *Aldis v. Gardner*, 1 C. & K. 564). The plea of not guilty in case would deny the breach of duty charged as neglect, misconduct, &c., but not the retainer of the deft. in the character alleged.

Evidence for Plaintiff.

[*239] *Retainer.*] The plaintiff, in general, must prove his retainer, the *purpose for which deft. was retained, the deft.'s negligence, and plt.'s damages. The plt. must prove that he retained the deft. to act as his attorney in the business. This may be done by evidence of a direct retainer, or from deft.'s conduct in the business, or from his admission. If the declaration alleges deft. to be an attorney of a particular court, such allegation must be strictly proved by direct evidence, either by proof that deft. acted as an attorney of the court (*Berryman v. Wise*, 4 T. R. 366); or proof of an examined copy of the roll of attorneys (Ib.; *Rex v. Crossley*, 2 Esp. 526); or by the book of admissions from the Master's Office (Ib.); or, under 6 & 7 Vict. c. 73, s. 21—24, by the register kept by the Law Society.

Where the plt. alleged that deft., then being one, &c., of the Court of Great Sessions of Chester, and gave notice to deft. to produce his admission, and

it not being produced, the attorney's bill was offered to prove the averment; per *Ld. Kenyon*, "had *plt.* stated him *generally* to have been employed as an attorney. the evidence would have been sufficient, but this bill does not prove him to be an attorney of *that court*," (*Green v. Jackson*, *Pea.* 237; *Berryman v. Wise*, 4 *T. R.* 366); nor would it, in such case, be sufficient proof that the *deft.* put in his plea as an attorney of that court; but it is not necessary to prove that *deft.* has taken out his certificate (*Jones v. Stevens*, *Stark. Ev. App.* 130).

Proof of Inducement and Purpose of Retainer.] The proof as to this must necessarily depend on the particular averment (*ante*, p. 252) and the nature of the pleadings (see *ante*, p. 250, and *Shilcock v. Passman*, 7 *C. & P.* 289). In an action for negligence, whereby *plt.* lost his debt, and was nonsuited, if it be averred that the *deft.* in the former action was indebted to the *plt.*, it must be substantially proved, and it would be a fatal variance if it appear that such *deft.* was a married woman (*Lee v. Ayrton*, *Pea.* 119). If proceedings in an action are alleged to have taken place prefatory to the *deft.*'s retainer, the same must be substantially proved (*post*, "RECORD," "PROCESS"); unless admitted by the pleadings. Formerly, great strictness was required in the proof; as, where in an action for negligence in not prosecuting the *plt.*'s debtor to judgment, the return of the writ on which the debtor was arrested was laid in the 24th year, whereas the writ appeared, on being produced, to be returnable in the 25th year, it was held a fatal variance, though the day of the return was laid under a *videlicet* (*Green v. Rennett*, 1 *T. R.* 656); so, where, "to prove an allegation that the said Southal was arrested," &c., a writ was produced with the name Suthall, it would seem to have been a fatal variance, as the doctrine of *idem sonans* is only applicable to pleas in abatement (*Brown v. Jacobs*, 2 *Esp.* 726); so, if there was an addition to the name stated in the declaration, which was not in the writ, it was fatal; *aliter*, if in the writ, and omitted in declaration (*Ib.*). These objections are now only the ground of amendment (see *post*, "AMENDMENT"). In actions for negligence in business not in a court, as taking defective securities or the like, the prefatory inducements should be proved substantially as stated; unless admitted (*ante*) by the pleadings. See "ADMISSIONS."

Proof of Negligence.] The *plt.* must prove *deft.*'s neglect, or breach of duty. The principal duties of an attorney or agent, are care, skill, and integrity, and if he be not deficient in any of these essential requisites, he is not liable for any error or mistake arising in the exercise of his profession (*Tidd*, 80). There must be gross negligence, or unskilfulness, otherwise the attorney is not liable (*Purvis v. Landell*, 12 *Cl. & Fin.* 91; *Bulmer v. Gilman*, 4 *Man. & G.* 108; **Godefroy v. Dalton*, 6 *Bing.* 461; [*270] *Kemp v. Burt*, 4 *B. & Ad.* 424; *Frankland v. Cole*, 2 *C. J.* 590; see *Arch. Pr.* 8th ed. 68; *Ch. Contr. Index*, "Attorney"), and the fact of his having acted on counsel's opinion is not conclusive that there was not gross negligence, &c. (*Ravenga v. Mackintosh*, 2 *B. & C.* 693; *Kemp v. Burt*, *supra*; *Godefroy v. Dalton*, *supra*). An attorney is not liable in case of reasonable doubt, for a mere error in judgment, and where he has not been guilty of *lata culpa* or *crassa negligentia* (*Pitt v. Yalden*, 4 *Burr.* 2060; *Raikie v. Chandless*, 3 *Camp.* 17; *Kemp v. Burt*, 1 *Nev. & M.* 262; 4 *B. & Ad.* 424; *Laidler v. Elliott*, 5 *D. & R.* 635; 3 *B. & C.* 738). Thus, before the point had been fully settled, that the grant of an annuity is void, unless the trusts of the annuity-deeds be recited in the memorial, it was held that such an omission did not amount to *prima facie* evidence of a gross negligence (*Raikie v. Chandless*, *supra*). So, where in order to prove an allegation "that judg-

ment had been signed by default, and such other proceedings had, that final judgment was signed and execution issued," the attorney, under the advice of counsel, produced only the prothonotary's book, and not the record, or a proper copy of the judgment, whereby the plt. was nonsuited (*Godefroy v. Dalton*, 6 Bing. 460; 4 M. & P. 149). So, where he drew up an agreement, under the advice of a conveyancer that it was valid, and he afterwards sued upon it, and it was then upon demurrer declared void on the ground of champerty (*Potts v. Sparrow*, 6 C. & P. 749). On the other hand, as the attorney undertakes to bring to the exercise of his profession a reasonable degree of skill and diligence (*Lamphier v. Phipos*, 8 C. & P. 475), he is liable for any injury arising from the want of a reasonable degree of either skill or diligence (*Hart v. Frame*, 3 Jur. 547; 1 Rob. 595; 6 Cl. & Fin. 193); as, for proceeding against apprentices for misconduct upon the wrong section of a statute, which applied to servants and not to apprentices (*Ib.*); or, for neglecting to have a witness in court, previous to the trial whereby plt. was nonsuited, as it was held he ought to have ascertained that the witness was in attendance, or, if he knew that he could not attend, to have withdrawn the record (*Reece v. Righy*, 4 B. & A. 202-4). So, where deft. was employed to ascertain the sufficiency of securities, and he relied upon a partial extract from a will, without examining the original, and thereby a damage accrued to plt., he was held liable (*Wilson v. Tucker*, D. & R., N. P. C. 30; S. C. 3 Stark. 154). So, where he took on himself to exercise *his own judgment* upon difficult points of law, as arising on an intricate conveyance, &c., for it was his duty "to state the deeds to counsel, &c., otherwise he must draw conclusions at his peril" (per Bailey, J., *Ireson v. Pearman*, 3 B. & C. 812-3; 5 D. & R. 687). It seems, he ought himself to peruse a title on the part of his client before he sends it for counsel's opinion (*Drax v. Scroope*, 1 Dowl. P. C. 69; 5 B. & Ad. 581). Where he neglected to charge a deft. (a prisoner) in execution, whereby the deft. was superseded, or where he neglected to declare in due time, he was held liable (*Russel v. Palmer*, 2 Wils. 325; *Pitt v. Yalden*, 4 Burr. 2061); so, he is liable for not entering or docketing a judgment within a reasonable time, whereby the presumption arises that the debt was satisfied (*Flower v. Bolinbroke*, 1 Str. 639); or, for bringing an action within a court of limited jurisdiction, knowing that the circumstances which gave the right of action arose out of the jurisdiction (*Williams v. Gibbs*, 6 Nev. & M. 788; 2 H. & W. 241). Where deft. is employed as an attorney to invest money on a copyhold security, he is liable, if such security turns out defective and invalid *semble* (*Brown v. Howard*, 4 Moo. 508).

[*271] So, where he was employed by a vendor to settle on his part the *assignment of a term, and he allowed the vendor to execute an unusual covenant without explaining the liability thereby incurred, he is responsible for consequent loss, notwithstanding that the vendor himself was aware at the time of the assignment of the fact, in respect of which he afterwards incurred liability on the covenant (*Stannard v. Ullithorne*, 10 Bing. 401; 4 MoB. & S. 359). So, he is responsible for not taking steps to set aside an irregular order to dismiss his client's bill in Chancery, though the order was obtained while the cause was in the hands of another solicitor, whom he was appointed to replace (*Frankland v. Cole*, 2 C. & J. 590). So, he is liable for disclosing defects in his employer's title (*Taylor v. Blacklow*, 3 Bing. 235; 3 Sc. 614).

Not liable.] An attorney is always liable if he act contrary to the plt.'s express or implied instructions, as he may defend, but not institute, a suit, without express instructions (3 Mer. 12). But an attorney is not liable to an action for not filing a dilatory plea, when instructed so to do, merely for

delay (Johnson v. Alston, 1 Camp. 176; Pierce v. Blake, 2 Salk. 515); nor is he liable for the absence, neglect, or want of attention of counsel (Lowry v. Guilford, 5 C. & P. 234); nor is he liable if his diligence would have been ineffectual: thus, he is not liable for negligence in conducting a suit against excise officers for a seizure, if it appear that such seizure was lawful (Aitchison v. Madock, Pea. 162); nor for negligence in suing a married woman (Lee v. Ayrton, Pea. 119). But deft. must show the diligence would have been ineffectual (Bourne v. Diggles, 2 Ch. R. 311). Thus, in an action against an attorney for negligently letting judgment go by default, it lies on deft. to show that there was good ground for so doing, and not on the plt. to show that there was a good defence to the action (Godefroy v. Jay, 7 Bing. 413; 5 M. & P. 284). The attorney is not liable if his client took the responsibility on himself (Wilson v. Tucker, 3 Stark. 154; S. C., D. & R., N. P. C. 30). The question of negligence is for a jury (Reece v. Righy, 4 B. & A. 202; Shilcock v. Passman, 7 C. & P. 289).

Mode of proving Negligence.] The proof of the negligence must vary according to the statement of the facts of plt.'s case in the declaration, and which must always be consulted in framing the evidence. The parties to the transaction in which the negligence took place, are good witnesses (Hunter v. King, 4 B. & A. 209). Where the question is, whether the deft. has been guilty of gross negligence, contrary to the known and usual practice, those who are conversant in the same kind of practice may be examined as witnesses on either side (Russell v. Palmer, 2 Wils. 328). If there have been express instructions to deft., the same should be proved. Where the proceedings in a former action form the ground-work of the action against the attorney, such proceedings should be produced, or the necessary steps taken to give secondary evidence of them (Parry v. Collis, 1 Esp. 399; *post*, "SECONDARY EVIDENCE"). To prove a judgment by default, a writ of inquiry, final judgment, and execution, the prothonotary's book and *allocatur* are not sufficient, but an examined copy of both judgments should be produced (Godefroy v. Jay, 5 M. & P. 149; 6 Bing. 460). So, in support of an action for neglecting to have a witness at a trial where plt. was nonsuited, the plt. must prove, by calling such witness or otherwise, that the witness was a necessary and material one, that his attendance might have been procured, and that plt. was nonsuited (Reece v. Righy, 4 B. & A. 202). And, in an action for the loss of a debt through deft.'s negligence, plt. must establish the existence of such debt, and, if he has obtained a judgment to recover it, that will be evidence of the debt, and he should prove the judgment by an examined copy of it from the judgment-roll. If the [*272] former deft. has been arrested on *mesne process*, and the action is against the deft. for negligence, whereby the former deft. was superseded, besides proving the debt, the writ should be produced, or an examined copy, if it has been returned, and the actual time of commitment should be proved by the books of the prison: the grounds of the discharge will be shown by means of the *supersedeas* or order of discharge (2 Stark. Ev. 134-5). If the action is against the deft. for neglecting to charge the former deft. in execution, whereby he was superseded, besides the evidence of the retainer and the judgment, the plt. should prove he was committed to prison, and which is evidenced by the books from the prison where deft. was in custody. The plt. should also prove the grounds upon which deft. was superseded, and which will be done by producing the *supersedeas*, or order for his discharge (Russell v. Palmer, 2 Wils. 327). If the action be for negligence in completing a conveyance, where there is a defect in the memorial of an annuity, in consequence of which it is set aside, the plt., to prove the defect, after

having proved the retainer of the deft., his conduct of the business, and the execution of the deeds which should be produced, should prove the rule of court, or deny it to be set aside, and an annexed copy of the affidavits used upon the motion (2 Stark. Ev. 135). So, if the plt. has been evicted in consequence of a defect in title, arising from the deft.'s negligence, he should produce the deeds, and prove the execution of them, and the payment of the money, and show that he has been evicted by proof of the judgment in ejectment, the execution of the writ of possession, producing the writ, or an examined copy, if it has been returned (Ib.).

Damages.] As the question of negligence is a question to be collected by the jury from the facts, under the direction of the judge, it will be for them to measure the compensation in proportion to the plt.'s injury sustained from the deft.'s breach of duty (Reece v. Righy, 4 B. & A. 202; Russel v. Palmer, 2 Wil. 328; Swannell v. Ellis, 1 Bing. 347). If plt. has been put to any costs or expenses in consequence of deft.'s negligence, the plt. should prove the payment of them, as stated in the declaration (*post*, "PAYMENT"). In an action for negligence, whereby the plt. lost his debt, he should, if possible, be prepared to show the probability that he would have recovered the whole of the debt, if the deft.'s negligence had not prevented it, as by giving evidence of the circumstances and solvency of the party indebted to him.

Evidence for Defendant.

This will depend much on the nature of the pleadings. The deft. ought to bring forward all the evidence he can, to meet the charge in the declaration. It is a good answer to the action, that deft.'s diligence would have been ineffectual, but the burden of such proof lies on the deft. (Bourne v. Diggles, 2 Ch. R. 311; *ante*, p. 271). An attorney may show that he acted from such an error or mistake as a cautious or prudent man might make, and that he was not deficient in reasonable skill and diligence (Montriou v. Jefferys, R. & M. 320; *ante*, p. 270); so, it is a sufficient defence that a mistake in practice arose from the ambiguous meaning of a rule of court (Laidler v. Elliott, 3 B. & C. 738; 5 D. & R. 635); or, from a doubtful construction of a statute, as whether the trust in an annuity-deed must be particularly set forth in the memorial, before the point had been decided (Raikie v. Chandless, 3 Camp. 17). And it would be a sufficient defence for an attorney to show that his neglect was occasioned *merely by not [*273] following instructions for unjustifiable delay, or some illegal object, as for not filing a plea in abatement for that purpose (*ante*, p. 271; Johnson v. Alston, 1 Camp. 176; 4 Moo. 508); or, for not giving previous notice of the commencement of a suit against excise-officers, it being proved that the seizure was legal (Aitcheson v. Madock, Pea. 162). As to other defences, see the various titles throughout this work, and *ante*, p. 262, as to what degree of negligence does not prevent an attorney from recovering his fees.

ATTORNTMENT.

See *post*, "LANDLORD AND TENANT."

AUCTIONEER, ACTIONS BY AND AGAINST.

I. ACTIONS BY, AGAINST EMPLOYER.

Form of Remedy, p. 273.*Auction Duty*, p. 273.*Compensation for Services*, p. 273.*Precedents*, p. 273.*Declaration*, p. 273.*Pleas*, p. 274.*Evidence for Defendant*, p. 274.*Form of Remedy.*

The form of the remedy, pleadings, and evidence, are, for the most part, the same as those in actions of this nature by an agent ("AGENT," *ante*, p. 86).

Auction Duty.] He is not bound to demand the auction duty at the close of each particular bidding (*Wilson v. Carey and Cunningham*, 11 M. & W. 368); and may recover it on knocking down a lot to a person who bid in collusion with the seller and unknown to the plt., for the purpose of enhancing the price, and at the close of the day's sale refused on that ground to complete the purchase (*S. C.* 10 M. & W. 641).

Compensation for Services.] He cannot recover, except by special agreement, a per centage which exceeds a fair remuneration for his trouble (*Maltby v. Christie*, 1 Esp. N. P. C. 340). Where being employed by a party in possession of goods to sell them, he does so, and pays him the proceeds, and is afterwards sued by the real owner, who recovers the value against him, he may recover over from the party who employed him the sum which he was obliged to pay to the real owner for debt and costs (*Adamson v. Jarvis*, 12 Moo. 241; 4 Bing. 66).

Precedents.

Assumpsit by, for his services.

In the Q. B. (or C. P., or Ex. of P.) On the day of A. D. 1850.

London, } A. B., by E. F. his attorney, or ("in his own proper person"), complains of
to wit. { C. D., who has been summoned to answer the said A. B., for that, whereas the
def., on the day in the year of our Lord was
indebted to the plt. in the sum of £ for work and labour, care, diligence, and attendance of plt., done, performed, and bestowed as an auctioneer and appraiser, in
and *about the selling and disposing of, and endeavouring to dispose of, by auc- [*274]
tion, and otherwise, divers goods, lands, houses, buildings, hereditaments and
premises (or chattels, and effects), for the def., and on his retainer and request, and in
and about the appraising and valuing divers other goods, chattels, and effects, for the
def., and at his request, and in and about other business of the def., for him, and at his
request, and for divers journeys, and attendances before then made, performed, and given
by the plt., in and about the business of the def., and for him, and at his like request;
and whereas the def. afterwards, on the day and year aforesaid, in consideration of the
premises respectively, promised the plt. to pay him the said money on request, yet he hath
disregarded his promise, and hath not paid the said sum, or any part thereof, to the plt.'s
damage of £ , and therefore he brings suit, &c.

Auction Duty.] See declaration in debt for (Wilson v. Carey, 10 M. & W. 641). An auctioneer who paid the duties on a sale of lands by auction (where the lands were bought in at the sale, and the commissioners of excise refused to remit the duties), was held entitled to recover back the amount from his employer, in an action for money paid. That action is maintainable in every case in which the plt. has paid money to a third party at the request, express or implied, of the deft. with an understanding express or implied to repay it; and it is not necessary that the deft. should have been relieved from a liability by the payment (Brittain v. Lloyd, 14 M. & W. 762). In an action on the case for employing to sell property which deft. had no right to sell, receiving the proceeds, and not reimbursing plt. when afterwards compelled, after action, to pay the real owner the value and costs, &c.; see Adamson v. Jarvis, 4 Bing. 66; 12 Moo. 241.

Pleas.] To debt for auction duty, that it was a condition of sale that the purchaser should pay down the auction duty immediately after the sale, and that the plt. neglected to demand it. (See form in Wilson v. Cary, *supra*, and, replication, *ib.*)

Evidence for Defendant.

If the action be for commission for the sale of an estate, proof by deft. of plt.'s negligence or unskilfulness, whereby the sale becomes nugatory, will defeat the plt.'s claim to recover any compensation for his services (Denew v. Daverell, 3 Camp. 451; McCle. 25; see further, "AGENT," *ante*, p. 86; "ATTORNEY," "WORK AND LABOUR").

II. ACTIONS BY, AGAINST THIRD PERSONS.

The form of the remedy, pleadings, and evidence, are mostly the same as those in actions of this nature by an agent ("AGENT," *ante*, p. 86 *et seq.*). An auctioneer, however, having possession, coupled with an interest in the goods which he is employed to sell, arising from his lien and responsibility &c., is thereby invested with a special property in them, and may maintain assumpsit for the proceeds of the sale, even though he sold them at the house of the owner of the property, and advertised them as his (Williams v. Millington, 1 H. Bl. 81; Farebrother v. Simmons, 5 B. & A. 333; Coppin v. Walker, 7 Taunt. 237; S. C. 2 Marsh. 497, 501; "AGENT," *ante*, p. 90). But where being employed by a supposed executrix, he sold goods of a testator but before payment the real executrix demanded payment from the buyer, it was held that he could not recover from the buyer, though the latter had promised expressly to pay him on being allowed to take away the goods, and was so allowed (Dickenson v. Naul, 4 B. & Ad. 638). Where h
[*275] sells *premises, and obtains a cheque for £100 as a deposit, which the purchaser subsequently refuses to pay, there having been a wilful misrepresentation in the description of the premises, he cannot, if there be a proper plea of want of consideration, recover on the cheque (Mills v. Oddy, 3 Dowl. P. C. 728; 2 C. M. & R. 103; 6 C. & P. 728; 5 Tyr. 571).

III. ACTIONS AGAINST, BY EMPLOYER.

The form of remedy, pleadings, and evidence, are for the most part the same as those in actions of this nature against an agent ("AGENT,"

ante, p. 91). Where the conditions of sale, were "that the goods should be sold to the best bidder," and a party, who had no other connexion with the sale, sent a horse to the auctioneer with written directions not to let him go under 15*l.*, but he was sold for less, the owner could not recover the difference from the auctioneer, as a buying in of the horse for him would have been a fraud upon the sale; but it would have been otherwise if the auctioneer were directed to set him up at 15*l.* and not lower (*Bexwell v. Christie*, Cowp. 395).

Bound to Account.] Where the plt., being in possession of the goods of an intestate, under a bill of sale, employed the deft. to sell them, and he did so, and upon receiving notice from the widow of the deceased not to pay the plt. until all the creditors came in, he refused to account: he was held bound to account to the plt., and even if he would have been at liberty to set up the *jus tertii*, yet he was liable, no title being shown by him in any third person: administration had not been taken out (*Crosskey v. Mills*, 1 C. M. & R. 298); see a form of assumpsit for selling on credit, *Ferrars (Earl) v. Robins*, 1 Gale, Rep. 70. An auctioneer who delivered goods without receiving the price from the purchaser, was held liable in the above form for the full produce of the goods (*Brown v. Staten*, 2 Ch. Rep. 353). He cannot sell on credit without express authority (*Brown v. Staten*, *infra*).

IV. ACTIONS AGAINST, BY THIRD PERSONS.

The form of remedy, pleadings, and evidence, are, for the most part, the same as those in actions of this nature against agents ("AGENT, *ante*, 103).

In Action to recover Deposit received by him, and Interest thereon.] The form of remedy, and pleadings, and evidence, are nearly similar to those in actions by and against vendor and purchaser (*post*, "VENDOR AND PURCHASER"). An auctioneer employed to sell an estate, who receives a deposit from the purchaser, is a mere stakeholder, liable to be called upon to pay the money at any time, and therefore, though he may make interest by it, he is not liable to pay it to the vendor on the completion of the contract (*Harrington v. Hoggart*, 1 B. & Ad. 577). An auctioneer is the agent of both parties, and a deposit on a sale that goes off may be recovered from him personally, but if it be paid to the vendor's solicitor, who receives it as such, the action should be against the vendor and not the solicitor (*Bamford v. Shuttleworth*, 11 Ad. & E. 926). An auctioneer, though he is authorized to receive the deposit, has no general authority to receive the purchase-money (*Sykes v. Giles*, 5 M. & W. 645). Where a sale by auction is advertised or stated by the auctioneer to be "without reserve," the employment by the vendor of a puffer to bid for him, without notice, renders the sale void, *and entitles the purchaser to recover back his deposit from the auctioneer (*Thornett v.* [*276] *Haines*, 15 M. & W. 367; 15 Law J., 230, Exch).

In trover, by the assignees, for selling a bankrupt's property, it would seem that the auctioneer should be allowed for rent paid to the landlord, and a reasonable sum for the expenses of the sale, but not the expenses of carrying the goods away, "as that is part of the aggression complained of" (*Grimshaw v. Atterwell*, 8 C. & P. 6); but is not the sale also "part of the aggression complained of"?)

Declaration.] If the action be merely for the deposit, the common count

for money had and received will suffice (*Burrough v. Skinner*, 5 Burr. 2639; *Flureau v. Thornhill*, 2 Bl. R. 1078; *Gray v. Gutteridge*, 1 Moo. & R. 614). But, if plt. declare on the contract of sale for special damage, as for expenses, whether in examining titles, performing journeys, &c., or for interest, he must state them specially in his declaration (*Maberly v. Robins*, 5 Taunt. 625; S. C. 1 Marsh. 260; *Walker v. Constable*, 1 B. & P. 307; *Richards v. Barton*, 1 Esp. 268; see *form against an auctioneer*, *Lee v. Munn*, 8 Taunt. 54). Where plt. discovers that the vendor had no title, or a doubtful one, to what deft. sold; as, if he furnished an abstract of the estate, which appeared defective on the face of it, or bad in law, plt. may declare generally (*Wild v. Fort*, 4 Taunt. 334; *Maberly v. Robins*, 5 ib. 625).

Evidence for Plaintiff.

Proof of Defendant's Liability.] The liability of an auctioneer to third persons stands on the same principle as that of other agents ("AGENT," *ante*, p. 103; *Spittle v. Lavender*, 2 B. & B. 452; S. C. 5 Moo. 272). His not disclosing his principal renders him personally liable (*Hanson v. Roberdeau*, Pea. 120; though he afterwards offer to give the name of his employer (*Franklin v. Lamond*, 11 Jur. 780; 16 Law J. 221, C. P.); so he is personally liable if he act under a void authority, or knowingly mislead the plt. in the purchase, or the like (*ante*, "AGENT;" *Farebrother v. Simmons*, 5 B. & A. 333; *Waring v. Hoggart*, R. & M. 39; *Stevens v. Adamson*, 2 Stark. 422). The plt. having bought shares of the defts. at an auction, certificates of which were then delivered to him, subsequently applied to them for a transfer of the shares. A letter from the defts. in answer thereto, stating that they acted only as agents in the matter, and offering to give the name of the vendor, was held evidence of exonerating the plt. from tendering a deed of transfer for execution. The declaration described the sale as one sale of three hundred shares to the plt.; the evidence was that the plt., as the highest bidder, purchased, by auction, the shares in three separate lots of one hundred each, at three separate prices. Certificates of all the shares were handed to the plt. with a bill of parcels made out by the defts.'s clerk, in which the shares were described as three hundred, sold at the aggregate price: held, that the evidence showed that it was to be treated as one entire sale, and that there was, therefore, no variance (*Franklin v. Lamond*, 11 Jur. 780; 16 Law J. 221, C. P.).

In an action against the auctioneer to recover back the deposit, which he is bound to retain till a proper title is made out, plt. should adduce the usual evidence of the sale by auction and purchase, the payment of the deposit to deft., pursuant to the particulars delivered by deft., which is usually done by deft.'s receipt (*post*, "VENDOR AND PURCHASER," "RECEIPT"), and the defect of title. The particulars of the sale should be produced and proved, and that they were delivered by the deft. at the time and place of sale, [*277] and they will be sufficient evidence of the terms of the sale; and, if they have not been complied with by the deft., plt. has an immediate right to recover the deposit, as money had and received (*post*, "MONEY HAD AND RECEIVED"); but, if the thing sold were to be delivered by a given time, or a good title shown to an estate within a given period, plt. should prove that he applied for the thing sold, and that the time for delivering it had elapsed; or, for an abstract of the title to the estate at the specified time, and that he could not obtain it (*post*, "VENDOR AND PURCHASER").

If the deft. is not bound to retain the deposit till such title is made out, he may, in answer, show a payment over to the principal; unless, indeed, it appear in evidence that the deft. knew of the defect of title in the premises,

or that his principal had no right to the money (*Edwards v. Hodding*, 5 Taunt. 815; *Horsfall v. Handley*, 8 ib. 136). And, as to what is not a sufficient payment over, see "AGENT," "MONEY HAD AND RECEIVED." Where an auctioneer does not disclose the name of his principal at the time of the sale, he renders himself personally liable to the purchaser, though he has paid over the money to the principal (*Hanson v. Roberdeau*, Pea. 120; see *Franklin v. Lamond*, *ante*, p. 276). "It is of great consequence to the public that auctioneers, who take upon themselves to describe in their particulars the property to be sold, should truly describe it, for the buyers act on the faith of those descriptions" (5 B. & A. 259); per *Abbott, C. J.* So, an auctioneer putting up premises for sale is bound to know how they are circumstanced: and, therefore, where premises were in a dilapidated state, and the landlord had given notice to the lessee that he would re-enter (under such a covenant in the lease) if they were not put into repair, and the auctioneer sold the premises without communicating the notice to the purchaser, he was permitted to recover the deposit from the auctioneer, although he knew the dilapidated state of the premises at the time of the sale, and it did not appear that the auctioneer knew of the notice of re-entry having been given (*Stevens v. Adamson*, 2 Stark. 422). And, where a lessee of lands, subject to a covenant against certain obnoxious trades, with a proviso for re-entry, grants under-leases of houses erected on the land, not containing a similar covenant and proviso: held, that the purchaser thereof might recover back his deposit from the auctioneer, owing to such omission; as it was his duty truly and honestly to represent that which he was to sell (*Waring v. Hoggart*, R. & M. 39).

In an action to recover interest, plt. should be prepared to show, in addition to the usual proof of the sale, payment of the deposit, defect of title, &c.; either that deft. is liable as a principal, or else that he personally made use of the deposit, or a demand made on him to return it, after the defective title discovered (*Lee v. Munn*, 8 Taunt. 45; S. C. 1 Moo. 881; *Farquhar v. Farley*, 7 Taunt. 594; *Edwards v. Hodding*, 5 Taunt. 815; 1 Marsh. 377; *Nelson v. Aldridge*, 2 Stark. 435; *Gaby v. Driver*, 2 Y. & J. 549). As to expenses, see *post*, "VENDOR AND PURCHASER."

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*AVERAGE, GENERAL—ACTION FOR.

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Loss, &c. incurred for general Benefit of all, p. 283.

Benefit derived from Loss, &c., p. 283.

Defendant's Goods, &c., bound to contribute, p. 283.

Defendant's Ownership of such Goods, p. 283.

Value of Defendants Property, p. 283.

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Evidence for Defendant, p. 284.

What it is.] Whatever damage or loss is incurred by any particular part of a ship or cargo for the preservation of the rest is considered general average; that is, the several parties interested in the ship, freight (*Du Costa v. Newenham*, 2 T. R. 407; *Williams v. London Assurance*, 1 M. & S. 318), or cargo, shall contribute their respective proportions to indemnify the owner of the particular part for the damage which has been incurred for the good of all.

What held not to be the Subject of General Average.] Hence, it appears that, in order to constitute a general average, the whole adventure must have been in jeopardy. A ship, laden with coals and wheat (which were the subject-matter of insurance), was forced by stress of weather into a port in Ireland, where the people, who were suffering from a great scarcity of corn at the time, took the government of her from the captain and crew, and weighed her anchor, by which she drove on a reef of rocks where she was stranded; and they compelled the captain to sell all the corn, except about ten tons, at about three-fourths of the invoice price. The ten tons were damaged in consequence of the stranding, and it became necessary that they should be thrown overboard. The ship afterwards arrived at her destination with the remainder of the cargo, which was about 25% worth of coals. It was held that the loss sustained was not a general average, because the whole adventure had never been in jeopardy, there being no pretence for saying that the people who took the corn intended any injury to any other part of the cargo except the corn, and that therefore the plts. could not call on the rest of the owners to contribute their proportion as upon a general average (*Nesbitt v. Kensington*, 4 T. R. 783). Also, the mere suffering a loss will not suffice—there must be something *done*; and therefore, if the goods be cast out of the ship by the violence of the waves, or be damaged in a storm, or the like, or be taken by a pirate or enemy, the owner must bear the loss (*Postw. Dict. tit. "Average;" Marsh. In. 463; Mod. 297*). So the loss must evidently conduce to the preservation of the ship and cargo; and therefore if, upon an apprehension of an enemy, some goods are landed and secured on shore, and the rest taken, the owner of the goods taken shall not have average of the goods saved: for the salvage of these is not the cause *of the

[*279] taking of the rest; nor the taking of those the cause of the salvage of the goods saved (*Show. P. C. 20*). So, if the goods are thrown overboard out of caprice or the like, the owner must bear the loss (12 Co. 63). But there is no occasion for any consultation previous to the jettison (*Berkley v. Presgrave*, 1 East, 228). The jettison must be for the purpose of escape or of saving the ship and cargo, by lightening her and increasing her speed, and so, when the captain of a vessel, in order to prevent dollars from falling into the hands of an enemy, by whom he was about to be attacked, threw them into the sea, and was immediately captured, the loss was considered not to be a general average (*Batter v. Wildman*, 3 B. & A. 398).

So, the ship and the rest of the cargo must be actually saved on that occasion, for if the ship perish in the storm, there shall be no contribution for such goods as may happen to be saved, because the object for which the goods were thrown overboard was not obtained. But if the ship, being once preserved by such means, and continuing her course, should afterwards be lost, the property saved from the second accident shall contribute to the loss sustained by those whose goods were cast out on the former occasion (Marsh. In. 463). If it be necessary to take a part of a cargo out in boats for the general benefit, in order to lighten a vessel and enable her to pass over a bar at the mouth of a river, &c., and such goods be lost, the owner is entitled to contribution; but he would not be liable to contribute if the goods, &c., remaining in the ship be lost during the separation (Sheppard v. Wright, 1 Show. P. C. 18). If the master, for the preservation of the cargo, when in danger of storm or capture, ran his ship on a rock, shallow, or strand, and the ship *be afterwards got off*, the damage, thus voluntarily done to both ship and cargo, and the expense of recovering and unloading her, and the value of the goods thrown overboard to enable her to float and to continue her voyage for the benefit of all concerned, are, properly, general average (Ab. Sh. by Shee, Sergt. 490).

The loss must be occasioned in the *sole* object of preserving both ship and cargo; and this object *must be in view at the time of the loss*. Where a mainmast was broken in a heavy gale, by carrying an unusual press of sail, in order to escape from an enemy to whom the ship had struck, it was held not a subject of general average (Covington v. Roberts, 2 N. R. 371). So, the act causing the loss must not be such as may be fairly considered part of the adventure, nor the property claimed for be used for the very purpose for which it must have been intended; as where a ship, being unable to escape from a privateer, resisted, beat the privateer off, reached her port, and delivered her cargo in safety, it was held, that the expense, neither of repairing the hull and rigging, nor of curing the men wounded in the conflict, nor of the ammunition, was the subject of general average (Taylor v. Curtis, 6 Taunt. 608; 4 Camp. 337). So, where a vessel put into port for safety, in order to repair a damage occasioned by a storm, neither the costs of repair, nor the wages and provisions of the crew during her detention, nor the damage occasioned to the ship and tackle by her standing out to sea with a press of sail in tempestuous weather, which was necessary in order to avoid being driven on shore and stranding, were held the subject of general average (Power v. Whitmore, 4 M. & S. 145).

An injury done by one ship to another, or to its cargo, without fault in the persons belonging to either ship, is to be equally borne by the owners of the two vessels (Ab. Sh. 354).

What held to be the Subject of General Average.] The expenses of repairing and refitting a vessel do not seem to form, strictly, the subject of general average; but it has been held, where a vessel was *in- [*280] jured by collision with another, and the captain was in consequence compelled to cut away part of the rigging, that the repairs absolutely necessary to enable her to complete her voyage are the subject of general average (Plummer v. Wildman, 3 M. & S. 482), a deduction being made on account of so much of the repairs as was of lasting benefit to the ship (Ib.). So, it has been held that the tackle sacrificed for the security of a vessel in a storm, and the expenses incurred in saving her from total destruction, pilotage, port-duties, charges, and expenses incurred by taking a ship into port, to avoid an impending peril, and for the safety of the cargo, and the expense of extraordinary assistance to preserve and secure a ship from the violence

of a storm, at its entrance into the port of destination, are to be sustained by general contribution (*Birkely v. Presgrave*, 1 East, 220). It seems that, in order to determine whether expenses incurred in consequence of a ship being obliged to go into port are to be considered as general average, the *cause* which compelled her, whether it were the violence of the elements, or a collision with another ship, is not material (*Plummer v. Wildham*, 3 M. & S. 482). If it be necessary to unlade the goods, in order to repair the damage done to a ship by collision with another vessel, so as to enable it to complete and prosecute the voyage, it would seem that the expense of unlading, warehousing, and re-shipping the goods, should be sustained by general contribution (*Plummer v. Wildman*, 3 M. & S. 482; 1 Rol. Abr. 289; *Da Costa v. Newnham*, 3 T. R. 438). Articles made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern, and other like expenses, are, it has been said, subjects of general average (*lb.*). But it is said, in a work of authority, if a ship should necessarily go into an intermediate port for the sole purpose of repairing such a damage as is in itself a proper object of general contribution, possibly the wages, &c., during the period of such a detention, may be considered as general average, on the ground that the company should follow the nature of its principal; and that, for the additional expense of the wages, and maintenance of the crew, incurred while a ship has been waiting for convoy, general contribution has been allowed (*Ab. Sh.* 497). The wages and maintenance of the crew during the detention of a ship by the orders of a sovereign power, do not, it seems, form the subject of general average (see *Abbott*, 499; per *Buller, J.*, *Da Costa v. Newnham*, 2 T. R. 407).

Where an average had been settled on a different principle in a foreign port to which the ship was destined, and the merchant had in order to obtain his goods been obliged to contribute to expenses to which he would not have been contributory by the law of England, it being proved that the average was settled according to the law of the country, the merchant was not allowed to recover back from the master the money so paid, though both parties were British subjects, and the ship a British ship (*Simonds v. White*, 2 B. & C. 805; see *Ab. Sh.* 508). A merchant who had paid a contribution to an average settled in Portugal, shall not recover the amount on a policy of insurance in the usual form, it not being proved that the adjustment was made according to the known law and usage of the foreign country, otherwise than by a recital in the decree of the foreign tribunal by which the average had been settled, and which the court did not deem to be evidence of that fact (*Power v. Whitmore*, 4 M. & S. 141).

By a covenant by the owner of a chartered vessel to keep it in repair during the term, it seems he excludes himself from the claim he would otherwise have against the chartered party on a general average, arising out of repairs (*Jackson v. Charnock*, 8 T. R. 509).

*If in the act of jettison, or in order to accomplish it, other goods [*281] are destroyed or damaged, the value of these must be included in the general contribution.

If goods are delivered by way of ransom (when it is legal), the owner is entitled to contribution (*Marsh. In.* 461).

Form of Remedy.

General average may be recovered by action in *assumpsit*, wherein each party must, in general, sue separately (*Birkely v. Presgrave*, 1 East, 220; *Dodson v. Wilson*, 3 Camp. 480; *Price v. Noble*, 4 Taunt. 123). But the parties entitled to it may proceed in a court of equity, which course of pro-

ceeding is frequently advisable, if the account be very complicated; in equity all the parties join (*Dodson v. Wilson*, 3 Camp. 480). As to the lien for it, *Ab. Sh.* 247; *Simons v. White*, 2 B. & C. 811; 4 D. & R. 375.

Form of Pleadings.

Special counts are usually inserted in the declaration, stating the particular circumstances of the loss; but this seems unnecessary, and the *indebitatus count* would suffice. The plea is the general issue; any other defence deft. must plead specially. See "*ASSUMPSIT*," and the various titles of references throughout the work.

Precedents.

Indebitatus assumpsit for general average.

(*Indebitatus assumpsit, or in debt, as usual: "ASSUMPSIT," "DEBT."*) For certain general average then due, and payable from the deft. upon, for, and in respect of, divers goods and merchandises, of him, the said deft., having been before that time carried and conveyed by the said plt. in and on board of a certain ship or vessel, called E—, in and during a certain voyage from F— to G—, for the deft., and at his request; and in respect of certain losses, damages, and expenses, by the said plt. incurred in and about the preservation of the said ship and cargo, and the said last-mentioned goods and merchandises, from damage and loss during the said last-mentioned voyage. And being so indebted, &c. (*Conclusion as ante, "ASSUMPSIT;" post, "DEBT," common counts.*)

See another form, 2 Ch. Pl. 50; special declaration for, by owner of ship, where anchor, &c., cut away, *Ib.* 152; the like where ship entangled in shore, *Ib.* 160; the like where ship, damaged by storms, was laid on beach, and bilged, *Ib.* 161; statement of average losses on policies, *Ib.*

Evidence for Plaintiff.

The plt. must prove his ownership of the vessel or goods upon which the loss or expenses were incurred; that the property lost formed the subject of general average; that such loss or expense arose from something done, for the sole purpose and with the intent (*causâ et mente*) of benefitting and preserving the whole; that the common concern was benefitted by the loss or expense, and that the deft.'s property, in respect of the preservation of which the average is claimed, is of a nature bound to contribute its value, and that deft. was its owner; and, lastly, the damages.

**Proof of the Plaintiff's Ownership of the Ship or Goods.]*

Slight evidence of this would, it seems, suffice, the plt.'s title not [*282] being disputed. It would be evidenced *prima facie* by plt.'s being in possession. Proof of deft.'s delivery of the goods to plt. as the owner of the vessel would suffice. If the deft. should dispute plt.'s title, and he is not estopped from so doing, plt. should be prepared to prove strict legal title. See also title "*INSURANCE*," under the New Rules.

Proof that the Loss or Expense was incurred.] The evidence for which must depend on the nature of the loss or expense. The log-book should be produced and proved, and some witnesses, present at the loss, subpoenaed (see *index*, "*Log-Book*"). The master usually draws up an account of the jettison, and verifies the same by the oath of himself, and some of his crew,

as soon as possible after the arrival at any port. If this has been done, the same should be produced and proved.

Proof that the Property lost formed the Subject-matter of General Average.] Anything that is lost, or expense incurred, for the benefit of the whole concern, will form the subject-matter of general average. Average has been allowed for slaves thrown overboard (*Brown v. Stapleton*, 4 Bing. 122). By the practice of this country and France, goods stowed upon the deck of the ship are excluded from the benefit of general average (Ab. Sh. 487; but see *Da Costa v. Edmonds*, 4 Camp. 142; *Gould v. Oliver*, 4 B. N. C. 134; see also S. C. 2 Sc. N. R. 241; 2 Man. & G. 208; *Milward v. Hibbert*, 3 Q. B. 120). "The practice," says Lord Denman in this case, "appears to have been not to lay it down as a rule of law that, for goods stowed on deck, the owner of them shall be excluded from the benefit of general average, but to receive the evidence of commercial men respecting the usage of the trade, and the general understanding of those engaged in it, and in insuring, which may obviously vary, and require from time to time fresh evidence and different explanations" (see 5 Vict. sess. 2, c. 17). When an entire ship is taken to freight by a merchant, and the master, without his consent, wrongfully takes on board the goods of other persons, and such goods are afterwards cast overboard, to lighten the vessel, the merchant freighter is not bound to contribute to the loss. If, in the act of jettison, or in order to accomplish it, other goods in the ship are broken, or damaged, or destroyed, the value of those also must be included in the general contribution (see Ab. Sh. 487; *Sheppard v. Wright*, 1 Show. P. C. 18). And where goods are delivered by way of ransom, in some cases, the owner is entitled to contribution (Ab. Sh. 487). An injury done by one ship to another, or to its cargo, without fault in the persons belonging to either ship, is to be equally borne by the owners of the two vessels (Ab. Sh. 487).

Expenses incurred in relation to, and for the sole purpose of, the common good and preservation of the whole, frequently form the subject of general average.

Proof that the Loss or Expense was done and incurred for the purpose, and with the intent, causâ et mente, of benefitting the Whole.]—This must be proved in the same way as the last, by the log-book, and witnesses present (*Price v. Noble*, 4 Taunt. 123; *Birkley v. Pesgrave*, 1 East, 220). It would be of little utility to enter into a detail of all the numerous cases on this point; so much depending on the particular facts of each case [*283] (see Ab. Sh. Average; Park. Ins.; Stevens on Average; 3 Ch. Com. L. 433 to 440).

Proof that the Common Concern was benefited.] It need not be proved that the deft.'s property derived an absolute and perfect safety by an arrival or delivery at the port of destination, or the like. Proof of a temporary safety obtained by the losses suffices (Ab. Sh. Average.)

Proof that the Defendant's Property, in respect of which the Average is claimed, is bound to contribute.] The ship and freight gained in the voyage must contribute (*Williams v. London Assurance Company*, 1 M. & S. 318), but not the ammunition of the ship (Ab. Sh. Average); nor its provisions, even where the cargo consists only of passengers or convicts (*Brown v. Stapleton*, 4 Bing. 119; 12 Moo. 334; Park. Ins. 217). It has been held, that the freight should contribute in respect of a loss occurring in an outward voyage, in a case where a ship was chartered out and home,

and the freight was payable according to the quantity of the homeward cargo, and upon the ship's safe arrival (*Williams v. London Assurance Company*, 1 M. & S. 318; 1 Edw. 210). All merchandise conveyed in the ship for the purposes of traffic, and part of the cargo, to whomsoever they belong, and however small their weight or value, are bound to contribute (*Ab. Sh. Average*); but things belonging to, and attached to, the persons of the passengers, and taken on board for private use, do not contribute (*Brown v. Stapyleton*, 4 Bing. 122). It is not, however, every object of value which is liable to a contribution, but only such stores as are termed *merces*, which word has never been held to extend to provisions, but includes only the cargo put on board for the purposes of commerce (*lb.*). Passengers or crew do not contribute for their safety (*lb.*). The owner of slaves must contribute for their safety; but received convicts are not considered as cargo, and cannot be brought into contribution (*Ab. Sh. Average*; *Brown v. Stapyleton*, 4 Bing. 122). Sailors do not contribute from their wages, except for the ransom of the ship (*lb.*). The lenders upon bottomry and *respondentia* do not contribute (1 Holt. Ship. 323; 2 *ib.* 201).

Proof that Defendant was Owner of the Property for which he is to contribute.] General evidence of this will suffice; such as possession, his shipping the goods. &c., or his admissions of the ownership.

Proof of Value of the Defendant's Property.] This must be proved, though slight evidence will suffice to throw the disproof on deft. If the average be claimed in respect of the ship and freight, the contribution must be made according to the value of the ship at the end of the voyage, and the clear amount of the freight or earnings of the voyage, after deducting the wages of the crew, and other expenses of the voyage (*Ab. Sh. Average*). The value of goods at the time of plt.'s loss should be proved.

Proof of Value of Plaintiff's Property, and mode of Contribution.] The value of the plt.'s property at the time of the loss, or the expenses in respect of which the average is claimed, must be proved. The amount of the value of goods must be estimated at the clear price they would have fetched at the place of destination, where the average is adjusted after the ship's arrival at the place of *destination. But if the [*284] ship, in consequence of any misfortune to be sustained by general average, be compelled to return to its lading port, and the average be immediately adjusted, in this case the goods contribute only according to the invoice price, for the price of sale is unknown. And as to the furniture of the ship, inasmuch as the new articles furnished will, in general, be of greater value than those lost, it is usual to compound the difference, by deducting one-third from the price of the new articles (*Ab. Sh. Average*). And the same very learned writer concludes, as to the mode of contribution, with the following example: "Supposing, therefore, a general average to be settled, upon the ship's arrival at the port of destination, according to the above principles, it is necessary, in the first place, to take an account of the several losses which are to be made good by contribution; in the second place, to take another account of the value of all the articles that are to contribute, in which must be included the value of the goods, &c., thrown overboard, &c.; for otherwise, the proprietors of those goods, &c., will receive their full value, and contribute nothing towards the loss." The value of the freight of the goods, &c., thrown overboard, should be included (*lb.*). The loss is to be calculated between the owner of the ship and the owner of the goods, according to the law of the port of discharge, and therefore an action will not lie here

to recover back money paid at St. Petersburg, according to the law of Russia, although the consignor and consignee of the goods, and the owner of the vessel, are British subjects, and by the law of England an average loss would not be payable under the circumstance (*Simonds v. White*, 4 D. & R. 375; 2 B. & C. 805; and see *Smith v. Macneil*, 2 Dowl. 538). The proportion of the amount of the several shares is usually settled by the broker or ship-agent; but such settlement is not conclusive (2 Holt, Ship. 200).

Evidence for Defendant.

The evidence for the defence will consist in the disproof of plt.'s case, the whole burden of the case lying on plt.

AWARD AND ARBITRAMENT, DEFENCE OF.(a)

(For ACTIONS ON, see *post.*)

How Defendant may avail himself of this Defence, p. 284.

Form of Pleadings, p. 285.

Plea, p. 285.

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Replication denying Award, p. 287.

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The Award, §c.. p. 287.

Effect of Award, p. 288.

Evidence for Plaintiff, p. 291.

How Defendant may avail himself of.

In all actions where accord and satisfaction is a good defence an award may be pleaded in bar (Com. Dig. Acc. D 1; *Blake's case*, *6 Rep. [*285] 43 b; Bac. Ab. Arbit. G). In assumpsit, debt on simple contract, and action on the case, this defence might formerly be given in evidence under the general issue, *non assumpsit* or *nil debet* (*Ingram v. Milnes*, 8 East, 445, *Allen v. Harris*, 1 Raym. 122; Bac. Abr. Arbit. G; see also 2 Esp. N. P. C. 504; 2 Moo. 30; and 8 Taunt. 146); but in trespass it should be pleaded specially (*Parsloe v. Baily*, 2 ib. 1039; 6 Mod. 221). But since R. G. H. 4 Will. IV. it must be pleaded specially in all cases (see *Milner v. Allen*, C. & J. 47). It will be a good plea in trespass, though the award be not submitted by the plt. and deft. alone; as where, in an action against A., he pleaded award for the same cause between the plt. on one side, and A. and another jointly on the other side (*Tomlinson v. Ariskin*, Com. Rep. 328); and award made between one of several trespassers and the plt. is a bar to an action against the others (*Peytoe's case*, 9 Rep. 78; Com. Dig. Pleader, 3 M. 13). The award must be pleaded; even where it was made a rule of court a second action would not be stayed on motion (*Decas v. Jay*, 4 Moo. & P. 285; 6 Bing. 319). If a man pay money on a void award, and it be accepted, it may be pleaded as an accord and satisfaction (*Bacon v. Dubarry*, 1 Salk. 70).

(a) See 1 U. S. Dig. Tit. "Arbitrament and Award," p. 193; 1 Supp. U. S. Dig. p. 133; 1 Ann. Dig. p. 43; 2 Id. p. 25; 3 Id. p. 35.

Form of Pleadings.

Plea.] This, as in a declaration, usually commences with a statement of the submission, and includes such other statements, as far as the award, as are necessary to sustain the declaration on it (*post*, see 1 Ch. Pl. 290). Where the award is pleaded in bar of a trespass, a place must be laid as to where the submission was made (*Hare v. George*, Cro. Eliz. 66). Most of the precedents state the deft.'s performance of the award; but this was till lately thought unnecessary where each of the parties had mutual remedies (*Gascoyne v. Edwards*, 1 Y. & J.; *Croft v. Harris*, 19 Carth. 187; *Kyd*, 390, 392; *Allen v. Harris*, 1 Raym. 122. 1032; 6 Mod. 222); but, in *indebitatus assumpsit* for tolls or other *debt*, a plea of award to pay 13*l.* was held bad on demurrer, for want of averring payment or a tender of the sum awarded (*Allen v. Milner*, 2 Tyr. 113; 2 C. & J. 37; *Gascoyne v. Edwards*, *supra*; *Whitehead v. Tattersall*, 1 Ad. & E. 491; see *Edwards v. Baugh*, 11 M. & W. 641); though in *assumpsit* for unliquidated damages, or in trespass for damages, such a plea would seem good, the remedy being changed (*Ib.*). Where the award is for a collateral thing (*Parsloe v. Bailey*, 1 Salk. 76; S. C. 6 Mod. 222); or where it is to be performed at a day not yet arrived (1 Rol. 267, *l.* 30; *Lutw.* 56; *Com. Dig.* Accord. D, 2). But where the time of the performance is past, and the parties have not mutual remedies, deft. must aver a performance (1 Roll. 267, *l.* 25-27; *Dighton v. Whiting*, *Lutw.* 56). It is not enough to say the deft. was always ready to perform it (*Ib.*). Deft. may allege an excuse for the performance, by reason of plt.'s act, as if the deft. tender the money at the day, and plt. refuses to accept it (1 Roll. 267, *l.* 40; *Dighton v. Whiting*, *supra*; *Russell v. Williams*, *ib.* 283); if the award be bad on the face of it the plt. may demur. To an action for not delivering some hops pursuant to contract it was held that an award of mutual releases alone could not on a reference of all matters in difference be pleaded in bar without averring that the deft. had executed a release; a readiness to execute is not sufficient (*Freeman v. Bernard*, 1 Salk. 69; *Clapcott v. Davy*, 1 Ld. Raym. 611). A plea that the causes of action in the declaration have been referred to arbitrators and are still under their consideration, and that a reasonable time for making their award has not yet elapsed, is bad in bar; and if not commencing or concluding in abatement, cannot be treated as a *plea in abatement (*Harris v. Reynolds*, 14 Law J. N. S., Q. B. 241; 9 Jur. 808). [*286] As to pleading *puis darrein continuance*, *Story v. Bloxham*, 2 Esp. 804; *Lowes v. Kermond*, 8 Taunt. 146. In pleading a parol award it is not necessary to set forth the exact words, it is sufficient to show the effect and substance of what was awarded by word of mouth (*Hanson v. Liversedge*, 2 Vent. 242; *Tomlinson v. Arriskin*, 1 Com. Rep. 329). An award which does not extend to the whole of the things demanded, is not a good plea to an action on the demand (*Clapcott v. Davy*, 1 Ld. Raym. 611; *Farrer v. Bates*, Al. 4; *Bac. Arbit. G.*). To an action on a bond for money, the deft. pleaded that after the money became due the plt. and deft. *by parol* submitted to an award, that arbitrator awarded deft. to pay a certain sum, and that he tendered the sum; held bad on demurrer, as the debt was due by specialty (*Luddington v. White*, Sty. 350).

Replication.] The plt. may deny the award, or reply any other matter, which we shall hereafter consider under what the deft. may plead to an action on the award (*post*); or that the subject-matter of his action was not included in the reference, though the terms of such reference were general, of all matters in difference, and the causes of action were subsisting at the time

of the reference (*Ravee v. Farmer*, 4 T. R. 146; and *post*, "JUDGMENT"); or deft. may now assign that the matters in dispute mentioned in the declaration are different to the matters referred. A replication in replevin justifying a distress under a power to distrain given by an award, is a departure from an avowry, relying on the common-law right to distrain for rent-service (*Pascoe v. Pascoe*, 3 Bing. N. C. 898).

Precedents.

Plea of submission to arbitration, and award thereon.

Commence as usual, see "ASSUMPSIT, PLEAS IN.") Saith, that after the making of the said several promises in the said declaration mentioned, and before the commencement of this suit, to wit, on, &c., (*date of submission*),* divers differences having arisen and being then depending respecting the same by and between the plt. and the deft., ** for the settling and adjusting of which said several differences, they, the said plt. and deft., by two several writings obligatory, bearing date, to wit, the same day and year last aforesaid, reciprocally bound each other in the penal sum of £100, to be paid to each other, with conditions to the said bond annexed, to make void the same, if the said plt. and deft., their respective heir and assigns, did, &c., as by the said several respective bonds and conditions, reference being thereunto respectively had, will more fully and at large appear: and the deft. in fact says, that the said arbitrators above named, having taken upon themselves the burden of the arbitration aforesaid, betwixt the said plt. and the said deft.; and having deliberately considered what had been alleged and offered by each of the said parties, afterwards and within the said time above limited for the making of their said award, to wit, on, &c., made their award in writing of and concerning the premises so referred as aforesaid, under their hands in writing, ready to be delivered to the said parties; by which said award, after making all allowances to the plt., they, the said arbitrators, found the plt. to be in arrear to the deft. in the sum of £60; and awarded and ordered the plt. to pay to the deft., or his order, the said sum of £60, in ten days after the date of the said award, as by reference, &c.; and the deft. saith, that though the said ten days had elapsed before the commencement of this suit, the said sum, or any part thereof, has not yet been paid; and this he is ready to verify.

Another form.

Another Form.] (*Commencement as usual down to **), the plt. and deft., by mutual bonds of submission, bearing date the _____, did agree to refer to [*287] A. C. and B. D., as arbitrators, as well as certain differences which had then arisen between them the said plt. and deft., as also all and all manner of actions, (&c. *as in the bonds*); and the said plt., and deft. did thereby then agree in all things well and truly to stand to, obey, abide, (&c., *stating the operative part of the submission*; then *state any enlargements of the time for making the award, as stated in the award*): And the said A. C. and B. D. afterwards, and within the time so limited for making their award as aforesaid, to wit, on _____, having taken upon themselves the burthen of the said reference, and having heard, examined, and considered the allegation, witnesses, and evidences of both the said parties, did make their award in writing, of and concerning the premises, and of and concerning the said premises and undertakings in the said declaration mentioned, and did thereby then award (*here set out the award*); as by the said award, reference being thereunto had, will more fully appear; (then, if the deft. have performed his part of the award, he may aver the performance thus:) And the deft. in fact says, that after the making of the said award, and before the commencement of this suit, to wit, on _____, he the said deft. did _____ (stating the performance): And this he, the deft., is ready to verify, &c.

Another Form.] *Commencement as in 1st Precedent down to ***; they mutually submitted themselves and did then refer the said matters in difference to the award, order, and arbitrament of A. B., and agreed that the decision of the said arbitrator should be final, so as the said award should be made in writing ready to be delivered to the said parties, or such of them as should desire the same on or before the _____ day of _____, then next, and the deft. further saith, that afterwards, to wit, on the day and year aforesaid, in consideration that the deft. had then promised the plt. to perform and fulfil the

said award in all things to be contained therein on the part of the deft. to be performed and fulfilled, he the said plt. then promised the deft. to perform and fulfil the said award in all things to be contained therein on the plt.'s part to be performed and fulfilled, and the deft. further saith that the said A. B. took upon him the burden of the said arbitration, and having duly considered and examined the said subject-matter in difference between the plt. and deft. he the said A. B. did then make and publish his award and umpirage in writing under his hand, of and concerning the premises ready to be delivered to the said parties, and did thereby then award and declare of and concerning the said matters in difference so referred, that the deft. should pay the plt. the sum of £ on the day of then next, as by the said award, reference being thereunto had, will more fully appear. Verify.

See form of a Plea of Reference by Agreement, 3 Ch. Pl. 794.

If the award is to be merely denied, the replication may be thus :—

Replication denying the Award.

Says that the said arbitrators did not make any such award of and concerning the premises, as the said deft. hath, in and by his plea in that behalf alleged; and this he prays may be inquired of by the country, &c.

Replication denying the reference to Arbitration.] That the plt. and deft. did not submit themselves to, or agree to refer or refer the said matters in difference to the award, order, or arbitrament of the said A. B. in manner, &c., as the deft. hath in his said plea alleged; conclude to the country, &c.

Evidence for Defendant.

Award, &c.] The deft. should be prepared to prove the submission, and the award, as directed *post*, p. 303 (see *Spooner v. Payne*, 1 C. B. 628; 16 L. J. 225, C. P.). Some part of this evidence may be dispensed with by the plt., on his replication admitting it. With *respect to the proof of the performance, that depends on the fact whether performance is [*288] necessary, and which may be collected from the preceding observations relative to the plea.

Effect of.] An award, regularly made under the submission of the parties, precludes a party to it from afterwards proceeding on the subject-matter concerning which the award is made (*Campbell v. Twemlow*, 1 Pri. 81; *Bailey v. Lechmere*, 1 Esp. 375). Thus, where the amount of damages on a breach of covenant was submitted to arbitration, the award unimpeached was held conclusive (*Whitehead v. Tattersall*, 1 Ad. & E. 491; see *Day v. Bonnin*, 3 B. N. C. 319; *Bird v. Cooper*, 3 Dowl. 148; *Bac. Abr. Arbit. E.*; *Stonehewer v. Farrar*, 9 Jur. 203; *Price v. Price*, 9 Dowl. 334; *Williams v. Mouldsdales*, 7 M. & W. 134.) It is conclusive of all matters within the scope of the submission, though they were not in fact brought before the arbitrator (*Dunn v. Murray*, 9 B. & C. 780; *Dicas v. Jay*, 6 Bing. 519; *Smith v. Johnson*, 15 East, 213; *Collins v. Powell*, 2 T. R. 756); and cannot become the subject of inquiry under a subsequent submission (*Trimingham v. Trimingham*, 4 Nev. & M. 786). In all actions where accord is a good bar, so is arbitrament, though the converse does not hold (*Com. Dig. Accord. D*; *Bac. Ab. Arbit. G*; *ante*, p. 284). An award of a collateral matter is a good defence (*Parsloe v. Bailey*, 1 Salk. 76; 6 Mod. 221). It is no defence if the award be void (*Dighton v. Whitting*, *Lutw.* 57; *Russell v. Williams*, *ib.* 283; *Carth.* 188); or to do a thing, the performance of which the party cannot be compelled to do (1 Roll. 266, *l.* 35 to 45); or, if the

award does not give a new duty, but only discharges the old demand by release, &c. (*Freeman v. Bernard*, 1 Salk. 69; S. C. 1 Raym. 247). It is no defence in actions real, nor in actions founded solely on a deed, nor solely upon a statute or record (Com. Dig. Accord, D, 2). As arbitrators are not agents to state an account, but judges to decide disputes, an award is not evidence as an account stated (*Bates v. Townley*, 12 Jur. 606; see *Keen v. Batshore*, 1 Esp. 194). Where an award ascertained the value of some furniture, &c., adopted and acted on by the deft., it was held evidence of an account stated (*Salmon v. Watson*, 4 Moore, 73). In an action of ejectment, a previous award respecting the title to the land is conclusive evidence of the right (*Doe v. Horner*, 8 Ad. & E. 235; *Doe v. Rosser*, 3 East, 15; *Doe v. Roper*, Woodf. 788; see *Richards v. Bassett*, 10 B. & C. 657). Assumpsit against executor, plea "*plene administravit*," an award on a submission between the plt. and deft. as executor, respecting the matters in difference between the plt. and the testator, which ascertains the amount due from the testator's estate to the plt., but does not direct the deft. to pay it, cannot be offered by the plt. in evidence as an admission of assets by the deft. to defeat the plea (*Pearson v. Henry*, 5 T. R. 6). But if the arbitrator order the executor to pay the amount, the award will, it seems, be conclusive evidence of assets in his hands, which he will not be permitted to contradict (*Worthington v. Barlow*, 7 T. R. 453). An award will not affect any rights of action, unless such rights were included in the matters referred to the arbitrators; and, therefore, an award made upon a reference of all matters in dispute between the parties, is no bar to a cause of action subsisting against the deft. at the time of the reference, upon proof by plt. that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred (Com. Dig. Accord, D; Al. 6; *Ravee v. Farmer*, 4 T. R. 146; *Golightly v. Jellicoe*, *in notis*, 6 T. R. 610). So, where the deft. owed the plt. a sum of money for arrears of an annuity

*for which he gave him a cognovit, but disputed plt.'s claim to [*289] other sums due on a partnership account between them, and on the same day that a cognovit was given, both parties referred the ac-

counts and all matters in dispute, but no question respecting the arrears was raised before the arbitrators; held, that the claim on the cognovit was not a matter in difference at the time, and that the plt. was not precluded by the award in his favour, or a release of all demands in general terms executed by him pursuant to it, from proceeding to enforce the cognovit (*Upton v. Upton*, 1 Dowl. 400). Where a landlord sued his tenant for rent and on the money counts, and gave particulars for money had and received for a quantity of stone quarried and carried away by the deft., and at the trial took a general verdict, but for the amount of the rent only; and having brought a second action in case for quarrying and carrying away the same stone, delivered a few days before the trial of the first action, a particular exactly corresponding with the particular delivered on the count for money had and received in the action, the recovery in the first was held no bar to recovery in the second action (*Hadley v. Green*, 2 C. & J. 374). But where an action for salary and for damages for dismissal from service was referred, and the plt. gave evidence of dismissal, but claimed no damages for it before the arbitrator who awarded only the amount of the salary, the award was a bar to a second action for damages for the dismissal (*Dunn v. Murray*, 9 B. & C. 780; and see *Bagot v. Williams*, 3 B. & C. 238; *Bowden v. Horne*, 7 Bing. 716; see *post*, evidence for plt., "JUDGMENT RECOVERED"). If it is supposed such an answer will be set up, deft. should be prepared to prove the cause of action was referred, and that the arbitrators took it into their consideration (*Smith v. Johnson*, 15 East, 214, 215). As to the necessity of

proving deft.'s performance, *post*, 299. The effect of an award to pay a sum of money, is to create a debt from one party to the other, and is the subject of an action, or is proveable under a commission of bankruptcy (7 Pri. 309; Bac. Abr. Arbit. G). But neither personal nor real property is transferred by the mere force of an award; and, therefore, where it is awarded that one person shall convey certain land to another, though an action will lie for not conveying the land, it was held that the land itself did not pass by the mere force of the award (1 Roll. 270; Marks v. Marriot, 1 Raym. 115); and where, on a reference by landlord and tenant, the arbitrator awarded that a stack of hay, left upon the premises by the tenant, should be delivered up by himself to the landlord, upon the tenant being paid a certain sum, it was held that the property in the hay did not pass to the landlord on his tender of the money, by mere force of the award, against the consent of the tenant, who refused to accept the money, or deliver up the hay (Hunter v. Rice, 15 East, 100; Gunton v. Nurse, 2 B. & B. 447; S. C. 5 Moo. 259). However, where the arbitrator's powers are created by statute, it will have the effect of a legislative conveyance: as, in the case of commissioners, to set out, allot, and apportion certain land to different persons, the allotments, when duly made, pass an absolute right of property to those persons in whose favour the award is made (Johnson v. Hodson, 8 East, 39); but it must appear that the commissioners have pursued their authority, or it will not be binding; therefore, where the commissioners, under an inclosure act, were directed to make an award respecting the boundaries of a parish, and to advertise a description of the boundaries so fixed, and they were to be inserted in their award, and to be binding, final, and conclusive, but the boundaries mentioned in the award varied from those which had been advertised, it was held that the award *was not binding as to the boundaries, as the commissioners [*290] had deviated from their authority (Rex v. Washbrook, 4 B. & C. 732; 7 D. & R. 221). So, if they go beyond their powers, the award will be void *pro tanto* (Thorpe v. Cooper, 5 Bing. 129). But a right to any species of property may be ascertained, so as to give the party in whose favour it is made a possessory remedy for the recovery of it (Ib.): thus, in an action of ejectment, when the lessor of the plt. and the deft. had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, it was held that the award precluded the deft. from disputing the lessor's title (Doe v. Rosser, 3 East, 15). But parties who submit their right to arbitration, can only bind themselves, and the parties claiming under them, as the award cannot be received as evidence of a right, as against strangers (Rex v. Cotton, 4 Camp. 444). So, an award made on an ejectment brought by A. against a mortgagor, after mortgage, is not evidence for A. on an ejectment brought by the mortgagee against him (Doe v. Webber, 1 Ad. & E. 119); but where the right to a watercourse and a question of boundary were referred by a submission between A. and his tenant B. on the one side, and C. a neighbouring landowner on the other; the award was held admissible evidence on both points in a subsequent action by C. against B., although B. had in the mean time become tenant of the same land to another landlord, under whom he now justified, and who was not shown to be in privity with A. (Breton v. Knight, Winton, S. A. 1837; *cor.* Tindal, C. J., confirmed in Scacc. on motion for new trial (Roscoe, N. P. 153). And, on an issue between plt. and an execution creditor of B., whether growing crops belonged to B., an award made between plt. and B., touching the crops, just before the execution, was held admissible as against the deft. (Thorpe v. Eyre, 1 Ad. & E. 926). And it may be as well to observe, that a prospective agreement to refer all matters in dispute which may hereafter arise, cannot be shown as a defence to an action for the recovery of such disputed

matter, for the superior courts will not suffer themselves to be ousted of their jurisdiction by the private agreement of the parties (*Thompson v. Charnock*, 8 T. R. 139; and see 2 B. & P. 131). The judgment of an usurped jurisdiction is not admissible as an award without proof of mutual submission (*Rogers v. Wood*, 2 B. & A. 245).

But it is only as against the parties to the award, or those claiming under them, that an award has any force at all (*Evans v. Rees*, 10 Ad. & E. 151; *Doe v. Webber*, 1 Ad. & E. 119; *R. v. Fontainebleau*, 17 Law J. 187; Q.B.; see *R. v. Cotton*, 3 Camp. 444; *Manning v. Eastern Counties Railway Company*, 12 M. & W. 237). But in an action of false imprisonment against a servant of East India Company, the deft. was allowed to give in evidence, in mitigation of damages under the general issue, a release given by the plt. to the East India Company, in pursuance of an award between the plt. and the company, in which plt. was awarded a large compensation for injuries done him by the company's servants, particularly by deft., the matters in difference in terms comprehending the claim in the action (*Shelling v. Farmer*, 1 Stra. 646). An award respecting the right to a chattel, deposited with the arbitrator, precludes the party against whom the award is made from suing the arbitrator in trover for refusing to deliver up the chattel to him, for the award deciding against him is evidence that the withholding the chattel is no unlawful conversion (*Gunton v. Nurse*, 5 Moo. 259; see further, *Brett v. Beales*, 1 Moo. & M. 416; *Doe v. Boulter*, 6 Ad. & E. 675). Where a tenant under a lease was served with notice under an award, made [*291] between two parties, who had claimed rights (paramount *to that of his lease) to enter and possess the lands to recover arrears of rent-charge, attorned and paid rent to the one whose claim the award recognised; held, on proof of these facts, that he became tenant to the latter from year to year (*Doe v. Boulter*, *supra*). The parties referred a dispute as to the right to a farm to the decision of an arbitrator, who awarded against the one who had received rent, as landlord, from the tenant, and notice of the award was given to the tenant; and, with the sanction of the other party, the tenant was directed in future to pay his rent to the successful party as his landlord afterwards, the former landlord distrained on the tenant for rent; held, in replevin, that though the tenant is estopped from saying that his landlord had no title, yet he was at liberty to prove these circumstances, to show that his landlord's title had determined, and that the loser was estopped from setting up his title of landlord, having himself induced the tenant to pay rent to another person (*Downes v. Cooper*, 2 B. & B. 256). See more fully as to the effect of an award, *Russell on Awards*, 465—472.

Evidence for Plaintiff.

The plt. must be prepared to support his defence, to defeat the award: see the evidence for deft. in an action on award, *post*, 305. When an award is given in evidence, the opposite party may impeach its validity (*Whitehead v. Tattersall*, 1 Ad. & E. 491). Thus, where deft. offered an award in evidence made on a reference of all matters in difference, the plt. may prove that on some of the matters referred the arbitrator has not awarded (*Ingram v. Milnes*, 8 East, 444); and though a submission by rule of court, referring an action and an award on the action generally, is *prima facie* evidence of a good award; yet the deft., under a plea of no award, may show that there were several issues in the action referred which were not determined by the award (*Dresser v. Stansfield*, 14 M. & W. 822). And the court will award a new trial if the evidence be rejected (*Ravee v. Farmer*, 4 T. R. 146; but see *Shelling v. Farmer*, 1 Stra. 646). And as the mistaken misconduct of the

arbitrator can not be pleaded, so it can not be given in evidence (*Wills v. Macarmick*, 2 Wills. 148; *Dyer v. Dawson*, cited 1 Coop. C. C. 420, n.; *Swinford v. Burn*, Gow. N. P. 5; *Johnson v. Darrant*, 2 B. & Ad. 935; but see *Matson v. Trower*, Ry. & M. 17). Where a submission provided that if the arbitrator should award that the defts. (executors) should purchase the plt. an annuity, he should, and might, award it, with a proviso that in case of the deficiency of assets the sum should abate. The award was made without any proviso. It was held before the new rules, that on *non assumpsit* on the award the defts. might prove a deficiency of assets, as the arbitrator ought to have inserted the proviso (*Crump v. Adney*, 1 C. & M. 355). If the subject-matter of the present action was not included in the reference and award, plt. should be prepared to prove it, either by showing it was not a matter in difference at the time of the reference, or that the arbitrators could not have taken it into their consideration (*Smith v. Johnstone*, 15 Ea. 214, 215; *Ravee v. Farmer*, 4 T. R. 146; *Golightly v. Jellicoe*, 6 T. R. 610). The arbitrator himself may be called to prove the latter fact (*Martin v. Thornton*, 4 Esp. 180).

*AWARD, ACTION ON.

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Form of Remedy.

An award may be enforced by action as of right, whether the submission be by parol, by writing not under seal, by bond, by deed, by judge's order, order of Nisi Prius, rule of Court, or order of Equity (*Hodsden v. Harridge*, 2 Saund. 62 b. n.; *Winter v. White*, 3 Moo. 674; *Ferrer v. Ovin*, 7 B. & C. 427; *Tomlin v. Fordwich* (Mayor), 6 Nev. & M. 594; *Still v. Holford*, 4 Campb. 17; *Stalworth v. Inns*, 13 M. & W. 466; *Wharton v. King*, 1 Moo. & R. 96; *Bonner v. Charnton*, 5 Ea. 139; *Tremenhere v. Tresillian*, 1 Sid. 452; *Carpenter v. Thornton*, 3 B. & A. 52; *Dowse v. Cox*, 3 Bing. 20).

The mode of enforcing an award by the party in whose favour it is made varies according to the form of the submission. Where the submission is made a rule of court, the party may proceed in the summary mode of attachment (Hull v. Mister, 1 Salk. 83; Tidd, 865); and, if a verdict has been taken for the party's security, he may enter up judgment thereon, and take out execution (Ib.; Lee v. Lingard, 1 East, 401; Grimes v. Naish, 1 B. & P. 480; and Hayward v. Ribbans, 4 East, 310). The party has also a remedy, in some cases, by a bill in equity for a specific performance; he has also a remedy by *action*, which is the remedy to be here considered. The party cannot proceed both by action and attachment at the same time (Badley v. Loveday, 1 B. & P. 81; And. 299; Ca. t. Hard. 106). The deft., being taken under an attachment for non-performance of award, went to prison, perversely declaring that he would rather go to gaol than pay. The plt. then commenced an action upon the award; and on motion that he might be compelled to discontinue, or the deft. might be discharged out of custody, the court ordered him to be discharged, on giving a bond to the plt., with sureties to the master's satisfaction, conditioned to the same effect as in the case of a recognizance of bail (Lonsdale (Earl) v. Whinnay, 1 C. M. & R. 591; 3 Dowl. P. C. 263; 5 Tyrw. 203). *An action may be [*293] maintained against executors as such, on an award, directing them to pay money out of deceased's assets (Dowse v. Cox, 3 Bing. 20). It may be as well here to observe, that a party cannot be sued on a prospective agreement to refer all matters in dispute which may hereafter arise, for not so referring, *semble* (Tattersall v. Groote, 2 B. & P. 131; Thompson v. Charnock, 8 T. R. 139).

Assumpsit.] When the submission is by parol, or by writing not under seal, the party failing to perform the award may be sued in *assumpsit*; the submission to refer raising an implied undertaking that each party shall perform his part (Lupart v. Wilson, 11 Mod. 170; 2 Saund. 62. *b. n.*; Purslow v. Bayley, 2 Ld. Raym. 1039; Squire v. Greville, 6 Mod. 34); and *assumpsit* lies whether the submission be by order of *nisi prius* (Bonner v. Charlton, 5 East, 139), or a judge's order (Still v. Halford, 4 Camp. 19; Carpenter v. Thornton, 3 B. & A. 57; Wharton v. King, 1 M. & R. 96). A revocation of a submission to arbitration not under seal is, in effect, a breach of agreement to stand to, obey, abide, perform, &c., an award, and for which *assumpsit* lies (Brown v. Tanner, M'Cle. & Y. 405; Warburton v. Storr, 4 B. & C. 103; 6 D. & R. 213). On an award to do a collateral act, and not for the payment of money, and when the submission is without deed, *assumpsit* is the only remedy (2 Saund. 62 *b. n.* 5); and it is the only remedy on an award, by submission not under seal, for payment of money by instalments, all of which are not due (Rudder v. Price, 1 H. Bl. 554; 2 Saund. 336 *n.* 6; Coke v. Whorwood, *ib.* 547). Where two persons assigned to the plt. all debts due to them, and gave him a power of attorney to receive and compound for them, under which he submitted to arbitration the matters in difference then subsisting between his principals and the defts., he and the defts. mutually promising to abide by the award, and the arbitrators awarded him a certain sum, it was held that he might maintain *assumpsit* on the award in his own name (Banfill v. Leigh, 8 T. R. 571). See *dictum* of Dallas, C. J., that the deft. cannot dispute the validity of an award in an action, Swinford v. Bevin, Gow, 5. Bayley, B., is reported to have said that *indebitatus assumpsit* will lie on an award (Crump v. Abney, 1 C. & M. 355). Where A. and B. jointly and severally promised to perform the award, and the award directed A. to pay one sum, and B. another sum to

the plt., an action of assumpsit was held to lie against A. and B. jointly, for they are jointly liable for the sums awarded to be paid by each (*Mansell v. Berredge*, 7 T. R. 352; see *Genne v. Tinker*, 3 Lev. 24; *Johnson v. Willeson*, Willes, 248; *Cumberland (Duke) v. Errington*, 5 T. R. 522). Where a party dies pending a reference, and the award directed payment to be made by his executors out of his assets, held that assumpsit lay against his executors (*Dowse v. Coxe*, 3 Bing. 20). If a party assign his contingent interest under an award pending the reference, the action must be brought in the name of the original party (*Day v. Smith*, 1 Dowl. 460). But, where the debts due to a firm are assigned to a trustee, with a power of attorney to receive and compound for the same, he may sue in assumpsit on an award made on a submission between himself, as attorney of the firm, and a debtor to it, respecting matters in difference between the latter and the firm, nor need he make profert of the deed in his declaration, as it is pleaded merely by way of inducement (*Banfill v. Leigh*, 8 T. R. 571).

Debt. [*294] "An action of debt lies on an award for a sum of money [*294] *awarded upon a submission, either by rule of court, or by deed, or by writing not under seal, or by parol" (2 Saund. 62 b; n.; *Freem.* 410, 5; *Dilley v. Polhill*, 2 Stra. 923; *Hawkins v. Colclough*, 1 Burr. 276; *Purslow v. Baily*, 2 Ld. Raym. 1039). Six partners entered into two bonds of submission; in one, three of them gave a joint and several bond to the other three, conditioned to perform the award respecting all differences between the partners or any of them, and the three latter gave a similar bond to the former, the arbitrator awarded that one of the three former should pay a certain sum to one of his co-obligors; held, that debt lay on the award at the suit of one against the other, although no action on the bond would so lie (*Winter v. White*, 1 B. & B. 350). Debt now lies against an executor (3 & 4 Will. IV. c. 42, ss. 13, 14; see *Riddell v. Sutton*, 5 Bing. 200). But, to maintain this action on the award, the whole of the money awarded must be due; for, if it be payable by instalments, and any of them are unpaid, it cannot be supported (*Rudder v. Price*, 1 H. Bl. 547); and, on an award for the performance of a collateral act, debt will not lie (*Purslow v. Baily*, 2 Ld. Raym. 1041); nor can it be supported against executors or administrators upon an award made in the lifetime of their testator or intestate, when the submission is not under seal, as they might have waged their law (*Hampton v. Boyer*, Cro. Eliz. 557; *Freeman v. Bernard*, 1 Salk. 69). But, where the parties are bound in a penal sum to perform the award, and it is made within the limited time, an action of debt lies on the bond for the non-performance of the award, whether the award be to pay money, or to perform a collateral act, or for another breach of the condition, as, for a revocation of the submission; and it has been held, that, where the parties bound under a submission by bonds agreed that the time should be enlarged to a future day, and such agreement was, within the period limited for the award, indorsed under seal (*Browne v. Goodman*, 3 T. R. 592), on the bonds of submission, the indorsement operated as a defeasance, and that debt on the bond would lie for non-performance of an award, made within the enlarged time, but after the original time had expired (*Gregg v. Talbott*, 2 B. & C. 179; S. C. 3 D. & E. 446); and that though one of the parties die before the expiration of the period (*Tyler v. Jones*, 3 B. & C. 144; 4 D. & R. 740). By a countermand or revocation of the power of the arbitrator, the bond is forfeited, and debt lies (8 Co. 82; and see *Milne v. Gratrix*, 7 East, 608; *Oliver v. Collins*, 11 ib. 367; *Marsh v. Bulteel*, 5 B. & A. 507; S. C. 1 D. & R. 106). Where the parties entered into an agreement, not under seal, to refer a dispute to the arbitration of C. S., and bound themselves mutually

in a penalty for the true and faithful observance and performance of the award to be made by C. S., it was held, that the penalty was incurred by a revocation of the submission (*Warburton v. Storr*, 4 B. & C. 103; S. C. 6 D. & R. 213; *Brown v. Tanner*, 1 M. & Y. 464).

Where the submission is by bond, debt on the bond is preferable to debt on the award, for it casts upon the deft. the necessity of discharging himself from the penalty by showing performance of the condition, and relieves plt. from proof of a mutual submission which he must allege and prove, if traversed, in order to support the latter form of action (*Ferrer v. Oven*, 7 B. & C. 427). Where the original submission is by bond, though the time be enlarged by deed, an action for non-performance of the award may be maintained on the bond, for the alteration does not defeat the bond (*Greig v. Talbot*, 2 B. & C. 179). If the time be enlarged by agreement not under seal, and the award be made beyond the original time, but within the substituted period, no action lies on the bond, but *assumpsit* *may be brought [*295] on the new submission by enlargement in case obedience to the award be withheld (*Brown v. Goodman*, 3 T. R. 592, n.)

Covenant.] Where the submission is by deed, with covenants to perform the award, covenant lies on such submission for the non-performance of the award; though debt will lie only for the non-payment of the money; or, where the submission has been revoked, covenant will lie against the party revoking such submission (*Marsh v. Bulteel*, 5 B. & A. 512; S. C. 1 D. & R. 106; *Charney v. Winstanley*, 5 East, 266; *Tomlin v. Fordwich* (Major), 6 Nev. & M. 594); Though the judgment on covenant is only interlocutory on a judgment by default in an action of covenant for the non-performance of an award, the court will refer it to the master, to compute what is due for principal and interest on the award (*Meggison v. ———*, cited 1 Tidd, 618). Where deft. has revoked his submission, and the award has not been made, there seems to be no objection in *assumpsit* or covenant on the submission to join a count for the revocation with a count on the award, and the judge at N. P. will not compel the plt. to elect on which count he will rely at the trial, and if deft. prove the revocation, in order to defeat the claim on the count on the award, the plt. will have his damages on the other (*Browne v. Tanner*, 1 C. & P. 651; *Marsh v. Bulteel*, *supra*).

The preferable Remedy.] When the award is merely for the payment of money, and the whole sum is due, debt is the most advisable form of remedy, as the judgment is final; whereas, in *assumpsit*, and covenant, it is interlocutory; and debt on the award itself is in one respect preferable to debt on the arbitration-bond, inasmuch as breaches must be assigned or suggested under the 8 and 9 Will. III. c. 11, s. 8 (*Welsh v. Ireland*, 6 East, 613; see 2 Saund. 61, 127), but as, by declaring on the award, the plt. takes upon himself the onus of proving a mutual submission: whereas, by declaring on the bond, he transfers the burthen of proof to the deft., for it then lies on the latter to discharge himself from the penalty by showing a performance of the conditions, the latter course seems preferable (per Bailey, J., in *Ferrer v. Oven*, 7 B. & C. 427). If there be any other demand more properly the subject of an action of *assumpsit*, which may be joined with the demand on the award, it is as well to declare in *assumpsit*.

Form of Pleadings.

Declaration—In Assumpsit, or Debt, on the Award.] The pleadings in these two actions are so nearly similar that the observations, as to the form,

may be classed under one head. The venue is transitory. The venue cannot be changed on the common affidavit (*Whitburn v. Staines*, 2 B. & P. 355; *Stanway v. Hestop*, 3 B. & C. 9; 2 Arch. P. 958). It is usual to commence the declaration with a concise statement of the existing differences; but it does not seem necessary to state the subject-matter of such differences (2 Saund. 61 h. n. 1; see 2 Ch. Pl. 145, 255). The declaration should state the mutual submission upon which the promise or liability is raised (*ib.*; *Dilley v. Polhill*, 2 Stra. 923; 11 Mod. 170); and the terms thereof, either in its very words or legal effect, should be stated accurately. But, in debt, an averment of mutual promises is bad on special demurrer, since it makes the action an action of debt to perform an award when made, and not an action of debt on the award itself (*Sutcliffe v. Brooke*, 15 Law J., Ex. 118; 3 D. & L. 302). The omission of anything conditional, and affecting the award, as, "that the same shall be in writing," or under the hand and seal, or before *two witnesses, is fatal (2 Saund. 62, n. 3; [*296] *Everard v. Patterson*, 2 Marsh, 304; S. C. 6 Taunt. 625; *Winter v. White*, 1 B. & B. 350; *Henderson v. Williamson*, 1 Stra. 116; *Hinton v. Cray*, 3 Keb. 512; *Wilson v. Constable*, 1 Lutw. 536). It is not, in general, necessary to state the submission was in writing, nor by bond (*Bell v. Simpson*, 2 Wils. 10). In debt, a variance in the statement of the parties to the submission bond would be fatal (3 Moo. 674). The award must be pleaded as made within the time limited, and it will suffice if such time be laid under a *videlicet* (*Skinner v. Andrews*, 1 Saund. 169; *Bissex v. Bissex*, 3 Burr. 1730). In debt, on an award made under a judge's order, with power to enlarge the time for making the award, the enlargement, if any, should be stated according to the facts. The precise day of the enlargement need not, though it is best, to be stated (*Swinford v. Burn, Gow*, C. 6). If the enlargement was irregularly made, the irregularity is waived by the appearance of the parties before the arbitrator after the enlargement (*Re Hick*, 8 Taunt. 694; *Halden v. Glasscock*, 8 D. & R. 161; *Lawrence v. Hodgson*, 1 Y. & J. 16). It must be stated that the award was made, and that according to the effect of the condition and submission (*Hanson v. Liversedge*, 2 Vent. 242; *Bussfield v. Bussfield*, Cro. Jac. 577). No more of the award should be stated than that part, the non-performance of which the plt. complains of and is relative to the case; but a condition precedent, qualifying the terms of the award, should be stated (2 Saund. 62 b, n. 5; *Perry v. Nicholson*, 1 Burr. 278; 2 Ld. Kenyon, 557; *Leake v. Butter*, Litt. Rep. 312; *Wood v. Wilson*, 3 C. M. & R. 241; *Filford v. French*, 1 Sid. 160; *Foreland v. Marygold*, 1 Salk. 72). It would seem unnecessary to show, in the declaration, that the arbitrator has awarded on matters referred on which no breach is assigned (*Tomlin v. Fordwich*, 6 Nev. & M. 594; 5 Ad. & E. 147; 2 H. & W. 172). Where it is alleged that the award was made "of and concerning the premises," the court will presume that the arbitrator has decided all the matters referred, at least until the contrary be shown (*Craven v. Craven*, 7 Taunt. 642; *Doyley v. Burton*, 1 Ld. Raym. 533). Where the submission is according to the ordinary clause, "that the award shall be made in writing, &c., or ready to be delivered to the parties, &c., or such of them as shall require the same, on or before a certain day," it is unnecessary to state that it was ready to be delivered, though usual so to do (*Bradsey v. Clyston*, Cro. Car. 541; 1 Saund. 327 b. n. See *Rousby v. Manning*, 3 Mod. 331; *Doyley v. Burton*, 1 Ld. Raym. 533; *Anon.* 2 Ld. Raym. 989; *Bussfield v. Bussfield*, Cro. Jac. 577; *Freeman v. Bernard*, 1 Ld. Raym. 247; *Robinson v. Calwood*, 6 Mod. 82; *Oates v. Bramhill*, 6 Mod. 176; *Jenkinson v. Allisson*, 1 Frem. 418). Where the submission requires the award to be made in writing, under the hand and seal, &c., it is sufficient to allege it to have been made

under the hand and seal, &c., as it must necessarily be intended to be in writing (Carth. 159; 2 Sid. 38). Where the submission was "so that the arbitrators made their award *in writing under their hands*," it was held insufficient to aver "that the arbitrators duly made their award in writing," and judgment was reversed for want of the words "under their hands" (Everard v. Paterson, 6 Taunt. 625; S. C. 2 Marsh. 304). And where the submission is that the award shall be *in writing under the hand and seal, &c.*, it is not sufficient to aver that it was in writing merely, without alleging that it was under the hand and seal, &c., as the submission required (Henderson v. Williamson, 1 Str. 116; 1 Bulst. 110; Swallows v. Girling, Cro. Jac. 278; 2 Saund. 62, n. 3). The award must appear to be mutual and certain (Gray v. Gwennap, 1 B. & A. 106; 1 Saund. 327 a, n. 2); and, if the defect of the award appear on the declaration, *it will be bad on demurrer, or after verdict. Plt. need [*297] not show the time or place of the award made (2 Brown, 137), nor make a profert of the award (Dod v. Herbert, Sty. 459; Perry v. Nicholson, 1 Burr. 278; Hodsden v. Harridge, 2 Saund. 62 b, n). It is usual to aver that the deft. had notice of the award; but such an averment has been held not to be necessary, because the deft. may take notice of the award, as well as the plt. (2 Saund. 62 a, 4). "If, however, it be provided that the award should be notified to the parties, it is no award until notice be given" (Ib., Child v. Herden, 2 Bulst. 144; see Brooke v. Mitchell, 6 M. & W. 473). The statement of the non-performance of the award must be according to the fact (see further, as to the breach, *post*, 182-3). Where the act, the breach of which is the ground of action, is to be done on a particular day, it ought to be averred that the day had elapsed before the commencement of the suit, for the courts may not set aside a demurrer on this ground as frivolous (Naters v. Sutton, 11 Jur. 87; Owen v. Waters, 2 M. & W. 91; Sheppard v. Sheppard, 3 D. & L. 199; Granger v. Dacre, 12 M. & W. 431; Abbot v. Aslett, 1 M. & W. 209). It is not necessary to aver a demand of payment of the money awarded to be paid, though it is to be paid at a given time or place (Rowe v. Young, 2 B. & B. 233); but where, by the award, the plt., on performing some collateral act, as, on giving a covenant, or the like, is to be paid a sum of money, at a certain time or place, it must be stated in the declaration that the plt. was ready at the place to perform his part of the award (Phillips v. Knightly, Fitz. 53; 1 Barn. 84; see Lambard v. Kingsford, Lutw. 558; Rodham v. Stroher, 3 Keb. 830; Rowe v. Young, *supra*). If the award be to pay a sum "on request," the declaration must allege an express request, the averment "though often requested" is not sufficient (Waters v. Bridge, Cro. Jac. 639; see Birks v. Tippet, 1 Saund. 32). If an action be brought on an award directing one of the parties to pay the expenses of the reference, and that the other should repay them on demand, it would seem that an averment of payment and of a request for repayment is necessary (Driver v. Hood, 7 B. & C., 494). A declaration in debt on an award by the assignees of an insolvent need not allege that the submission to arbitration was with consent in writing of the major part of the creditors (Sutcliffe v. Brooke, 3 D. & L. 303). Where the arbitrator directed payment to be made by the executors of the assets of a party dying during the reference; in *assumpsit* against the executors the declaration stated that they had had notice of the award, and that by reason thereof they became liable as executors to pay according to the tenor of the award, and that being so liable the executors aforesaid (not as executors) promised to pay the amount according to the tenor of the award; held, an averment of a promise by them as executors to pay the amount out of the assets, and not a mere personal promise for which there was no consideration stated, nor is it necessary to aver that the executors had any assets (Douse v. Cox, 3 Bing. 30). Before the

R. G. H. T. 4 Will. IV., which prohibits two counts for the same subject-matter, it was the practice to insert counts on the original debt, and on an account stated, under which it was said plt. might recover if he failed on the other counts (Kingston v. Phelps, Pea. 227; Keen v. Batshore, 1 Esp. 194; Bailey v. Leckmere, ib. 377; Pearson v. Henry, 5 T. R. 6); and he would not be put, at the trial, to elect on which set of counts he would rest his case (Brown v. Tanner, 1 C. & P. 651; M'Cle. & Yo. 464). Bayley, B., is reported to have said, that "It is quite clear that *indebitatus assumpsit* will lie on an award (Crump v. Adney, 1 C. & M. 355. See "*ASSUMPSIT*")."

Pleas in Assumpsit.*] The general issue, as in other actions of assumpsit, will in most cases suffice. As to the general issue in [298*] assumpsit, see *ante*, pp. 226, 227). In the present case it would seem to put in issue only the entering into the submission, though whether under the principle of White v. Beech, 10 Law J. 4, *ante*, it would not throw on the plt. the burden of proving all the facts from which the promise or contract would be implied, is a question deserving of attention. The safe course is to plead the general issue, and also the several special matters on which the deft. relies, unless these come clearly within the general issue. A plea that the arbitrators had made their award, and that the deft. on the last day for making the award required them to deliver it to him, but that they had neglected and refused so to do, was held supported by evidence that the arbitrators had made their award on the day, but had refused to deliver it to the deft. as it was not stamped, and to entitle the deft. to a verdict in his favour in an action on the arbitration bond (Wilson v. Wilson, cited; Veale v. Warner, 1 Saund. 327 *e*, n. *m*); *quare*, whether this might not have been given in evidence under the plea of no award (Dresser v. Stansfield, 14 M. & W. 822).

In Debt.] *Nil debet* being abolished, and *nunquam indebitatus* being the general issue in actions of debt on simple contract other than bills of exchange, &c. (*quare*, whether debt on award is debt on simple contract, Hodsdon v. Harridge, 2 Saund. 64-7), and having only the same operation as *non assumpsit* in *indebitatus assumpsit*, the deft. must plead specially any defence not admissible under that issue (see Riddell v. Sutton, 2 Moo. & P. 345; see more, *post*, "*DEBT*").

Declaration in Debt or Covenant on the Deed of Submission.] The principles which govern these two actions are the same as in other actions on bonds and deeds (see "*DEBT*," "*COVENANT*"). In debt on the bond, plt. may either set out the condition and the award, and assign breaches thereof in his declaration, or simply declare on the bond itself, like a common money-bond, reserving the statement of the award and breach for the replication; and this is the best course, unless it be apprehended deft. will let judgment go by default (1 Saund. 58, n. 1; 2 Saund. 187 *a*, 2). In covenant, the preceding observations on the action of assumpsit and debt on the award itself, will for the most part be applicable. In declaring for revoking the arbitrator's authority, the breach must be stated according to the fact.

Pleas.] As in other actions of debts on bond and covenant, the party should plead specially any matter of defence (*post*, "*DEBT*," "*COVENANT*"). The usual pleas are *non est factum*, no award made, or "*nul agard*," performance, &c.

The plea of *non est factum* can only put the bond of submission in issue.

The plea of *no award* made should be adopted where no award has, in

fact, been made, or even where an award has been made, but not according to the submission, or which is bad from any defects appearing on the face of it (*Fisher v. Pimbley*, 11 East, 188; 2 Rich. C. P. 44; *Dresser v. Stanfield*, 14 M. & W. 822; *Gisborne v. Hart*, 5 M. & W. 50; but see *Præd v. Cumberland* (Duke of), 4 T. R. 588; *Hicks v. Cracknell*, 3 M. & W. 72; *Spooner v. Payne*, 16 Law J. 225, C. P.). If, in debt, on the arbitration bond, it appear on oyer that the condition is to abide by the award of arbitrators, and in case they make no award within a certain time, of an [*299] umpire, the *plea denying the award should allege that neither the arbitrators nor the umpire made an award (*Hinton v. Cray*, 3 Keb. 512).

Matters in *excuse of performance or discharge* should be pleaded specially (*Hanson v. Boothman*, 13 East, 22). Where the deft. impeaches the award for matter extrinsic, as, for not embracing all the matters submitted, the proper course is to add a plea stating such defects (*Fisher v. Pimbley*, 11 East, 188; *Mitchell v. Staveley*, 16 East, 58). If the arbitrators have not decided all matters referred to them, or the award is not final or certain, but such defects do not appear on the face of the award, the facts constituting such defects must be specially pleaded, to show it to be inconclusive or uncertain (*Cargey v. Aitcheson*, 2 B. & C. 170; 3 D. & R. 433; S. C. 2 Bing. 199). A plea that the award did not adjudicate on all matters submitted is not sufficient, unless it aver also that there were other matters in difference besides those adjudicated upon (*Pery v. Mitchell*, 12 M. & W. 792; 14 Law J., N. S. Ex. 88). But in *Dresser v. Stansfield*, 14 M. & W. 822, it was held, that a special plea setting forth that some issues were joined in the cause referred, and showing that the award had not decided them, and was therefore not final, was bad on special demurrer, as being an argumentative plea of no award; at all events for not concluding with a special traverse, "and so, that there was no award of and concerning the premises" (see *Linsey v. Ashton*, Godb. 255). The plea should aver notice to the arbitrators of the matters omitted from decision (*Elson v. Rolfe*, 2 Smith, 459). In debt on arbitration bond, deft. pleaded the condition of the bond, set forth the award in its terms, and averred that a question as the deft.'s right to indemnity from the plt. against certain liabilities was a matter in difference, and brought before the notice of the arbitrators, and that they had not in their award given directions touching the same; held good on demurrer (*Mitchell v. Staveley*, *supra*); distinguished from *Dresser v. Stansfield*, on the ground that in that case the objection came from the party who stated the award (per Parke, B., and per Alderson, B). There was a *prima facie* case by the bond which the deft. had to answer, by showing an award which was invalid. If there are two or more arbitrators, it would seem that the award should be executed by all at the same time, as it is in the nature of a judicial act (*Stalworth v. Inns*, 14 Law J., N. S. Ex. 81). If either of the parties on the last day request the arbitrators to deliver the award, and they refuse and neglect to do so, the bond is void, and the deft. should plead the matter specially (3 Mod. 301; 1 Saund. 327 b, n.). Deft. should also plead a countermand of the submission; and, in such a plea, it need not be alleged deft. gave notice to the arbitrators (*Vynior's case*, 8 Co. 162; *Marsh v. Bulteel*, 5 B. & A. 507; 1 D. & R. 106). It seems that the collusion, or other misconduct of the arbitrators, in avoidance of the award, cannot be pleaded (*Wills v. Maccarmick*, 2 Wils. 148; 1 Saund. 327 a, n. (3); *Grazelrook v. Davis*, 5 B. & C. 534; 8 D. & R. 295); nor can a parol agreement to waive the award (*Braddock v. Thompson*, 8 East, 344; 1 Saund. 327 a, nn. 3, 30, 31; see *Brazier v. Bryant*, 3 Bing. 167). Where the award directed an executrix to pay a sum of money, a plea by her that

there was no admission or evidence of assets before the arbitrator, was held ill on general demurrer, as imputing misconduct to the arbitrator, for directing a personal representative, who had no assets, to pay the debts of the deceased would be unjust (*Riddell v. Sutton*, 5 Bing. 200); nor can a revocation of the arbitrator's authority in breach of the condition of the bond (*Vynior's case*, *supra*); but it has been held that a plea that deft. revoked the authority of the arbitrator before the *award was made, is a good answer to any claim on the award, when the submission is one [*300] that cannot be made a rule of court, and so not within the 3 & 4 Will. IV. c. 42, s. 39, prohibiting revocation in such cases. The marriage of a female party to the submission may be pleaded as a revocation of the arbitrator's authority (*Charnley v. Winstanley*, 5 East, 266). It seems that it is a good plea to an action of debt on an award that a foreign attachment in London issued the same day the money was payable, and that by virtue of it the money awarded was attached in the deft.'s hands the day after, but this would not be a good plea to an action of debt on the bond, because the penalty was due when the money was not paid by the day (*Ingram v. Barnard*, 1 Ld. Raym. 636; see *Robbins v. Standard*, Sid. 327; see *Coppell v. Smith*, 4 T. R. 312; *Bulsteel v. Marsh*, 5 B. & A. 507; and 5 Taunt. 452); nor that the arbitrator has proceeded on a mistake (*Johnson v. Durant*, 2 B. & Ad. 931; *Ashton v. Poynter*, 1 C. M. & R. 738); *Hall v. Hines*, in re, 2 M. & G. 847); nor, where no time is fixed for the arbitrator to make his award, can it be pleaded that he made no award within a reasonable time, as the parties might have revoked their authority after requesting the arbitrators to proceed within a reasonable time (*Curtis v. Potts*, 3 M. & S. 147). Deft. may plead a tender or set-off to this action (*Ingram v. Barnard*, 1 Ld. Raym. 636).

Tender of rent awarded to be paid must be pleaded to have been made on the land, and at the last hour of the appointed day (*Furser v. Prowd*, Cro. Jac. 423; *post*, *those titles*); or the Statute of Limitations (see *post*, *that title*). By 3 & 4 Will. IV. c. 42, s. 3, "all actions of debt upon any award where the submission is not by specialty," shall be commenced and sued within three years after the end of the session in which the act passed, or within six years after the cause of such action, but not after.

The *plea of performance*, after craving *oyer* of the bond, sets out the award without the recitals, according to the terms of the award, and the non-performance of a condition precedent, if any (see *precedents in* *Hanson v. Boothman*, 13 East, 23; 3 Ch. Pl.). Where an award comprehends all things submitted, the plea should state a performance of the whole award on deft.'s part, or a tender and refusal, which is tantamount; as, where, in debt on bond conditioned that the deft. and two others should perform an award, the deft. pleads an award that he should pay 20s. to the plt., and each of the others 20s., and that he paid 20s. to the plt., but says nothing as to the sums to be paid by the other two, which he ought to have done, inasmuch as he is answerable for the whole money, the plea is insufficient, and the plt. has no necessity to assign a breach (1 Saund. 324 a, n. 3, *Genn v. Tinker*, 3 Lev. 24). The deft. cannot plead performance generally, but he must show the award, and how he has performed it (*Anon. F. Moo. 3*, pl. 9; 6 Mod. 3). It suffices for deft. to allege that he performed as much as the award required him to perform (2 Bulst. 93). If the award direct a party to pay the rent mentioned in a certain indenture, a plea of performance need not set forth the indenture, a general reference to it will suffice; but, if the award direct it to be paid in such a manner, and at such times as is expressed in the indenture, then it must be set out at length; so, of an award directing the

payment of money bequeathed by will (Anon. 1 Vent. 87; Hugh v. Chadwick, 2 Keb. 667).

If plt. set out an award bad on its face, as stated in the pleadings, the deft. should demur.

Replication.] If the deft. plead a bad plea, plt. should demur. [*301] *If the deft. show the award imperfectly in his plea, plt. should show it properly in his replication (1 Saund. 326). In a replication to debt on bond to perform an award, if deft. plead no award, the plt. must set forth the whole award, and assign a breach of it (2 Saund. 62; Fisher v. Pimbley, 11 East, 188). A replication showing an award to pay 16*l.* 10*s.* and costs, and assigning as a breach the non-payment of the 16*l.* 10*s.* only, has been held good on demurrer to a plea of no award (Fox v. Smith, 2 Wils. 267). In setting out the award, it must be alleged to have been made according to its form and substance, &c., and in pursuance of the submission (*ante*, p. 296). It is also usual, in stating the award, to allege that it is made of and concerning the premises; and, it is said, that such allegation supplies all averments that the award is conformable to the submission in the matters referred (1 Saund. 324, n. 2). To avowry for rent deft. pleaded that avowant had not any reversionary interest in the premises. Replication, a power of distress given by the award of an arbitrator to whom all matters in difference had been referred. Held ill, without averring that the arbitrator had authority to confer a power of distress, or that the right to distress was one of the matters in difference (Pascoe v. Pascoe, 3 B. N. C. 898). If the breaches in an action on an arbitration-bond be not assigned in the declaration, plt. must suggest or assign them under the statute of 8 & 9 Will. III. c. 11, if deft. lets judgment go by default (Welsh v. Ireland, 6 East, 613); or pleads *non est factum*, or any other plea not leading to an issue on the breaches (6 East, 613; 2 Ch. R. 298; S. C. Homfray v. Rigby, 5 M. & S. 60, *ante*, p. 301). The breach may generally be assigned in the terms of the award (Willcocks v. Nicholls, 1 Pri. 109); but all matters necessary to constitute the breach must be distinctly stated (Serra v. Fyffe, 1 Marsh. 441; 1 Saund. 103 *d*). But it is not necessary to add disjunctive words, as, paid or caused to be paid (Aleberry v. Walby, 1 Stra. 231; 1 Saund. 234 *c*, 6). Where the breach of condition is deft.'s revocation of the arbitrator's authority, it should be so assigned; as, after a revocation, the authority of the arbitrator ceases, and the award subsequently becomes a nullity; consequently, the setting out the award, and assigning a breach, would be negated by evidence (Vynior's case, 8 Rep. 162; Marsh v. Bulteel, 5 B. & A. 507); and it is unnecessary to allege that the arbitrator had notice of the revocation (*Ib.*). And, though the breach be informally stated, yet the court will give judgment, if it appear sufficiently on the record (Charnley v. Winstanley, 5 East, 266). Where a condition precedent is to be performed by plt., he must aver its performance, or an excuse (3 Ch. Pl.). The want of assigning a breach is matter of substance; and, if admitted, or a bad breach assigned, it will be bad on general demurrer, or even after verdict (1 Saund. 103, n.; 1 Hob. 233).

As to the *conclusion* of a replication, it would seem, that where the deft. pleads performance he should conclude to the country; "and where the deft. pleads no award made, and the plt. replies, setting out an award, it seems clear, since the case of Fisher v. Pimbley, 11 East, 188, that such replication must conclude with an averment, in order that the deft. may have an opportunity of pleading in his rejoinder matter which shows the award to be void in law" (1 Saund. 327, n. *b*, *h*), though it was formerly thought otherwise (*Ib.*, n. 1).

Rejoinder, &c.] This must be consistent with the plea, and not disclose any new matter, as it would then be a departure from the plea.

*“Thus, where to debt on bond the deft. pleaded no award made, [*302] plt. replied and showed an award, and the deft. rejoined that other matters were referred, of which the arbitrators had not taken any notice, &c. The court adjudged that the rejoinder was a departure from the plea” (*Harding v. Holmes*, 1 Wills. 122; 2 Saund. 84 c, n. 1; but see n. c. 84 d, where it is stated, “that, after a plea of no award made, the deft. may in his rejoinder show an award void in law,” citing *Fisher v. Pimbley*, 11 East, 188; *Dudlow v. Watchhorn*, 16 East, 41, &c.). Where the deft. pleads general performance of the award, a rejoinder of special performance or an excuse for non-performance would be a departure (*Co. Lit.* 408). “If the replication set out the whole award, and it be void in law, the deft. should demur; if it set out only a part, omitting that which makes the award void, the deft. should set out the whole in his rejoinder, and demur” (1 Saund. 327 b, n. g; *Fisher v. Pimbley*, 11 East, 183). After a plea of no award, and a replication setting out an award to pay money, and alleging non-payment, the deft. cannot rejoin payment without being guilty of a departure (*Henton v. Cray*, 3 Keb. 512).

Precedents.

Declaration in assumpsit on a parol submission to an award.

[*For commencement, post*, “*DECLARATION.*”] For that whereas, before and at the time of the making of the agreement hereinafter mentioned, certain differences had arisen, and were depending between them the plt. and the deft. (see *ante*, 295), and thereupon, heretofore, by a certain agreement then made by and between the said plt. and deft. for the putting an end to the said differences, it was amongst other things mutually and reciprocally agreed by and between the said plt. and deft., that the said matters in dispute between them should be, and the same were thereby referred to the final award and determination of E. F., so as he should make his award in writing ready to be delivered to the said parties, or such of them as should require the same on or before the _____ day of _____ then next, and thereupon afterwards, to wit, on the day and year first mentioned, in consideration of the premises, and that the plt., at the request of the deft. had then undertaken and promised the deft. to perform and fulfil the said agreement and the award in all things therein contained, on his, the plt.’s part and behalf, to be performed and fulfilled; the deft. then undertook and promised the plt. to perform and fulfil the same in all things therein contained, on his, the deft.’s, part and behalf, to be performed and fulfilled. And the plt., in fact, says, that the said E. F., having taken upon himself the burthen of the said arbitration, afterwards, to wit, on, &c. (*day of award, or about the time*), did make and publish his award (in writing), of and concerning the said differences, so referred as aforesaid, ready to be delivered to the said parties, and did thereby declare and award, find and determine, that there remained a balance due from the deft. to the plt. of £ _____, and he did therefore thereby award, order and direct that the deft. should pay to the plt. the said balance on or before the _____ day of _____ then next; yet the deft., although often requested so to do, hath not paid the said sum of £ _____, or any part thereof, to the plt. although the time for payment thereof hath elapsed. (*Add account stated and breach*).

See other forms, as also in *Debt and Covenant*, 2 Ch. Pl.; and *Russell on Awards and Arbitrators*, 791.

Pleas.] For forms of pleas and replications, see 3 Ch. Pl., Ch. jun. by *Pearson*, and *Russell on Awards and Arbitrators*.

Evidence for Plaintiff.

Before the new rules an award might generally have been given in evidence under *non assumpsit*, and it would seem it may so still, on a count on

the original debt, when the award only settles the *amount of the claim, but does not change its nature (Allen v. Milner, C. & J. 47; Kingston v. Phelps, 1 Pea. N. P. 299).

The Submission.] In an action *on the award*, plt. must prove the submission by all parties, if traversed, and the execution of the award (Ferrer v. Oven, 7 B. & C. 427; see Brazier v. Jones, 8 ib. 124; Antram v. Chase, 15 East, 208; Kingston v. Phelps, 1 Pea. N. P. 299); and that deft. was bound by it. When the submission is by parol, it should be proved by witnesses present on the occasion. Proof of the parties submitting to be examined by an arbitrator or umpire, as to the matter in dispute, would be strong evidence of the submission (Matson v. Trower, R. & M. 17). Proof of submission by an agent or attorney will suffice (Dyer, 216; Cayhill v. Fitzgerald, 1 Wils. 28; Burrell v. Jones, 3 B. & A. 47; Bac. Abr. Arbit. C.; Filmer v. Delber, 3 Taunt. 486); but not by a partner (Stead v. Salt, 3 Bing. 103); and, as to who may submit to arbitration, see 3 Ch. Com. L. 640. Where the submission is by writing, not under seal, it should be produced, and proved, as in other cases (*post*, "WRITTEN EVIDENCE"). If the submission were by deed, the deed must be produced, and proved, as in other cases (*post*, "DEEDS"); and, where the deed is signed by several parties, submitting several disputes by the same instrument, it would seem that it is necessary to prove the execution of all the parties to the submission, as the consideration for each entering into the submission was, that the disputes of each party should be settled, not only as to one, but as to all (Antram v. Chase, 15 East, 209; 1 Ph. Ev. 380). If the award have been made by reference, under a judge's order, or an order of *nisi prius*, which has been made a rule of court, the production of the original rule of court is of itself sufficient *prima facie* evidence, without further proof (Still v. Halford, 4 Camp. 17; Bernie v. Read, 8 Q. B. 79); and, if the action be brought in the same court, an office-copy of the rule will suffice (Ib.; *post*, "RULE OF COURT"); but, if the submission be expressly denied, it should be proved by a subscribing witness, and the rule of court by which, pursuant to the agreement, it was made a rule of court, is not sufficient (Bernie v. Read, 14 Law J., N. S., Q. B. 247; 9 Jur. 620; 7 Q. B. 79). Where an award ordered the deft. to sign a memorandum, by which he undertook not to pirate the plt.'s inventions, it is sufficient evidence of his having submitted to the arbitration to show that he had signed a memorandum in terms according with the directions of the award (Stuart v. Nicholson, 3 Bing. N. C. 113).

It was said in a case, decided previously to the New Rules, that if the submission had been obtained by fraud, and an action had been brought on the award, the deft. might plead no submission, and prove the fraud in evidence, which would authorize him to treat it as no submission, or that he might plead no award, and show that the submission was obtained by fraud (Sackett v. Owen, 2 Ch. R. 39).

Arbitrator's or Umpire's Authority.] This must be proved by the submission. If the award be made by an umpire, authorized to be called in by the submission, his appointment should be proved; the recital in an award signed by the two arbitrators is not sufficient evidence of the appointment (Still v. Halford, 4 Camp. 19).

Time for making the Award.] The award must be proved to have taken place according to the terms of the submission, within the limited [*304] time (1 Saund, 327 b, n. 3). If the time has been *enlarged according to the submission, plt. need not prove the precise day of the

enlargement, as stated in the declaration (*Swinford v. Burn*, Gow. C. 6). Proof of enlargement by the consent of deft.'s attorney will suffice to bind deft. (7 Pri. 644). In a case where there was a proviso in the judge's order for the reference, that the award should be made by a certain time, but that, if the arbitrator should not then be prepared, the time might be enlarged as he might require, and a judge of the court think reasonable and just, it was held that the time for making the award was proved to have been enlarged, by the arbitrator's indorsing on the order, on the day preceding the expiration of the original time; that he required further time, though the judge's order, granting that further time, was not obtained till a subsequent day (*Reid v. Fryatt*, 1 M. & S. 2). Proof of an enlargement, by mutual consent, does not cure the objection of the award being made after the time limited by the submission, which was by bond (*Brown v. Goodman*, 3 T. R. 592, n.). If no time be limited for making the award, plt. should show that the arbitrator made it within a reasonable time, or a time acquiesced in by deft. (*Curtis v. Potts*, 3 M. & S. 147).

The Award itself must be produced, duly stamped (*Preston v. Eastwood*, 7 T. R. 96); see, where an adjusted partnership account was treated as an award, and held to require a stamp (*Car v. Smith*, 7 Jur. 600, Q. B.). The execution of the award must be proved by the attesting witness, if any, or by proof of his death, and his hand-writing; and, in that case, by other evidence of the arbitrator's hand-writing. In an action of debt or covenant, if deft., by his pleadings, does not deny the award set out, plt. need not prove it.

If the deft., by his plea, deny that the arbitrator did make and publish his award, &c., the production of the award, and of the rule of court is sufficient *prima facie* evidence to support the issue on the part of the plt., until the validity of the award is impeached by evidence *dehors* on the part of the deft. (*Gisborne v. Hart*, 5 M. & W. 50; 7 Dowl. P. C. 402). If the declaration set out a submission to three, the award of the three or any two of them to be final; and then an award by two, and issue is taken upon this; the award executed by the two, though purporting to be executed by the three, was held to support this issue for the plt. (*White v. Sharp*, 12 M. & W. 712; 1 D. & L. 1030); and the allegation in the award that it was executed by all three was treated as surplusage (*Ib.*). The award ought to be signed by the arbitrators in the presence of each other (*Stalwarth v. Innes*, 13 M. & W. 466; 2 D. & L. 428); if not so signed, it will not be enforced by rule or attachment (*Ib.*).

Breach.] The breach of the award must be proved, as stated, unless deft., by his pleadings, admit it. Plt. need not prove deft. had notice of the award, unless that be a condition to its performance (2 Saund. 62 a, n.). If the award enjoin the performance by the plt. of any collateral act, as a condition precedent to his suing for the recovery of a sum of money, payable at a particular time or place, he must prove that he has done such act, and made a demand of the money, or attended at the time and place directed (*Everard v. Paterson*, 2 Marsh. 304; S. C. 6 Taunt. 625).

Damages.] These will be ascertained by the evidence of the breach. If the award be of money due on a balance of accounts to be paid on a particular day and place, if plt. prove a demand at such time and place, he will get interest (*Pinhorn v. Tuckington*, 3 Camp. 468; *Marson [*305] v. Barber, Gow. 18; Russell on Awards, 490).

Variance.] Six partners entered (three and three) into two mutual bonds of submission to arbitration, each three undertaking to the other three for the

performance of the award: in the recitals in the bonds, the differences were stated to be depending between the above-bounden three and the above-named three; but, in setting out the bond in the declaration, the differences were laid to be depending between the six partners collectively. Held, that it was no variance (*Winter v. White*, 3 Moo. 647; 1 B. & B. 350).

Evidence for Defendant.

Defence.] As to the defences allowable under the general issue on *assumpsit* and debt, and *non est factum*, see those titles respectively. Under them, in the present case, it would seem that the deft. may avail himself of a variance between the award declared upon and that produced in evidence, or any variance in the description of the parties to the deed (*Winter v. White*, 1 B. & B. 350; 3 Moo. 674); and, by analogy, to the cases decided on *assumpsit* in general, and bills of exchange in particular (see those heads), of the want of a stamp, (*Jerv. N. Rules*, 130), but not of an alteration of the instrument since its execution (*Hemming v. Trenery*, 9 Ad. & E. 926). Under the plea of no award, he may take advantage of any material variance between the award produced and that set forth in the pleadings (1 Saund. 327 *b*, n. 3; *Foreland v. Marygold*, 1 Salk. 72). All other defences must be specially pleaded.

BAIL.

See "RECOGNIZANCE OF," "INDEMNITY," "SURETY."

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*BAIL-BOND.(a)

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(a) See 1 U. S. Dig. Tit. "Bail" subsection 5, p. 352; 1 Supp. U. S. Dig. p. 233; 1 Ann. Dig. p. 75; 2 Id. p. 42; 3 Id. p. 60.

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Form of Remedy.

By the 1 & 2 Vict. c. 110, s. 1, no person can be arrested on mesne process from any inferior court, or from any superior court, unless (s. 3) a judge issue a special order for the purpose, on being satisfied, by affidavit, that the plt. has a cause of action against the deft. to the amount of 20*l.*, and that the deft. is about to quit England. The deft. arrested on the capias so issued is to remain in custody till he *deposits the amounts endorsed [*307] on the writ, with 10*l.* for costs, or gives a bail-bond to the sheriff, according to the former practice of the superior courts (s. 4).

The form of remedy by action on a bail-bond is debt. The action may be brought in the name of the sheriff or the assignee, if it has been assigned under the 4 Anne, c. 16, s. 20. Several actions against the bail and principal, separately, at the same time, are not allowed, unless for some good reasons, as that the parties cannot be served with process, &c. (*Key v. Hill*, 2 B. & A. 598; S. C. 1 Ch. R. 337, *Abbott, C. J. diss.*; 8 Pri. 174). The action cannot be brought pending a rule to bring in the body (*R. G. H. T.* 4 Will. 4, r. 23). The action by the assignee must be still brought in the same court from whence the process issued on which the bail-bond was taken (*Chesterton v. Middlehurst*, 1 Burr. 642; *Walton v. Beat*, 3 ib., 1923; *Barnes*, 92, 117; *Morris v. Rees*, 3 Wils. 348; *Jerv. N. Rules*, 66, n. a) but the auction by the sheriff may be now brought in any court (*R. G. H. T.* 2 Will. IV. r. 28; *Jerv. N. Rules*, 66; 1 Dowl. P. C. 286). An attorney by entering into a bail-bond in another court, waives his privilege (*Barnes*, 117; 3 Wils. 348; 2 Bla. R. 838; 1 H. Bl. 631). Though the action be brought in the wrong court it is no defence under the plea of *non est factum* (*Wright v. Walmsley*, 2 Camp. 396). An application may be made to set aside the proceedings (Ib.), or deft. may plead in abatement to the jurisdiction (Ib.; 8 Pri. 176); or demur, (Ib.). It was formerly holden that a plt. had no remedy on the original consideration, whilst he retained his right to sue on the bail-bond, after assignment to him (*Tidd* 301; 1 Ch. R. 394, n.).

but a plt. who now takes an assignment of a bail-bond executed under 1 & 2 Vict. c. 110, ss. 3, 4, may proceed upon it and in the original action against the deft. at the same time (*Betts v. Smyth*, 2 Q. B. 113; 1 G. & Dav. 284; 6 Jur. 342; *Ede v. Collingridge*, 11 M. & W. 61; 2 Dowl. N. S. 764; 12 Law J. N. S. 247; 7 Jur. 203). Proceedings on the bail-bond may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more (R. G. H. T. 2 Will. IV. r. 30); but it is too late to make the application when the actions have proceeded to verdict (*Johnson v. McDonald*, 2 Dowl. 44). The court may, under 1 & 2 Vict. c. 110, s. 6, order a bail-bond to be delivered up to be cancelled (*Needham v. Bristow*, 1 Dowl. N. S. 700; 4 Sco. N. R. 773; 4 M. & G. 262); but will not do so on affidavit that the deft. has rendered himself to goal according to the condition (*Ridler d. Belton v. Chappelow*, 1 Dowl. N. S. 637; 6 Jur. 375).

The 4 & 5 Anne, c. 16, which authorizes the assignment of the bail-bond, enables the courts to give the parties such relief "as is agreeable to justice and reason" (s. 20). Hence, where the bail are prejudiced by delay (see *Piggott v. Fresh*, 3 B. & P. 221; *Collett v. Bland*, 4 Taunt. 715); or, the plt.'s giving time to the deft. without their consent (*Surinan v. Bruce*, 10 Bing. 444), the courts will stay the proceedings; and, where the proceedings are regularly commenced, they will be stayed upon payment of costs and such other terms as may be just (see *Govett v. Johnson*, 2 B. & P. 465), after bail is put in and perfected, or the deft. rendered (*Meysey v. Carnell*, 5 T. R. 534; *Standen v. Blakie*, 13 Pri. 114; *McCle*, 44), a sufficient deposit paid into court, &c., &c. (see *Lush's Pr. Index*, Bail-bond). It was formerly held not too late to apply after judgment obtained on the bail-bond and execution issued (*Lepine v. Barrett*, 8 T. R. 223). Where regular proceedings on a bail-bond are stayed, it is on the implied condition that the deft., in afterwards pleading to the original action, shall plead to the merits only (*Dowson v. Levi*, 4 B. & A. 598).

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Evidence for Plaintiff.

Declaration. The general rules as to declaration in debt here prevail (see "DEBT"). If the action be at the suit of the sheriff, the declaration is simply on the bond, without setting forth the condition, and such bond is not within the 8 & 9 Will. III. c. 11, s. 8, requiring a suggestion of breaches (*Moody v. Pheasant*, 2 B. & P. 446). If the action be at the suit of the assignee, the condition of the bond and breaches are stated, to show why the plt. may sue as assignee.

Formerly, if the bond was assigned after the first day of term, the declaration should be entitled specially, or it would be demurrable (*Pugh v. Robinson*, 1 T. R. 116; *Dickenson v. Plaisted*, 7 T. R. 474); now it follows the general course with regard to entitling. The venue, being transitory, may be laid in any county, the declaration stating the assignment to have been made in that county (*Gregson v. Heather*, 2 Stra. 727; S. C. 2 Raym. 1455; Fort. 366; *Impey*, 6). *Quære*, whether, when the action is brought in a different county from that in which the arrest was made, the assignment should not now be laid with a special venue.

Although the action is brought by an executor of the assignee, it may be in the *debet* and *detinet* (1 Selw. N. P. 597). As to the sheriff's description, *infra*. Where the plt. declared in the commencement of his declaration, as assignee of the sheriff, and then set forth a bond to himself, it was held no ground of demurrer (*Reynolds v. Walsh*, 1 C. M. & R. 580; 5 Tyr. 202; 3 Dowl. P. C. 441). The bond being joint and several, a joint action may be brought against all the parties, or a separate action against each, or even

a joint action against two out of three (*Knowles v. Johnson*, 2 Dowl. P. C. 653).

The writ in the original action should be stated accurately. The day as laid of the issuing it may be either the day of the teste, or actual issuing, or any other day about the time, if laid with a *videlicet*. The statement of the court, out of which the writ issued, should be correct (*Impey v. Taylor*, 3 Moo. & S. 166; *Mill v. Pollow*, 1 Moo. 19; S. C. 7 Taunt, 271). The usual allegation of the court, at the issuing of the writ, then and still being at Westr., is unnecessary, and sometimes improper, as where the writ is stated, without a *videlicet*, to have been sued out in vacation (*Hart v. Hingeston*, 5 Burr. 2586; *Lockett v. Plummer*, 5 Moo. 538; S. C. 2 B. & B. 659). The name of the person against whom the writ is stated to have been issued must be accurately stated (*Scandover v. Warne*, 2 Camp. 270; *Amey v. Long*, 1 Camp. 14; *Brown v. Jacobs*, 2 Esp. 726; *Large v. Attwood*, 1 D. & R. 55.) Where it was averred in the declaration, that, by a writ of *latitat*, the sheriff was commanded to take one "F. J., by the name of J. J.," an examined copy of the *latitat* was given in evidence, commanding the sheriff to take "J. J." The bail-bond was signed by the principal "F. J., arrested by the name of J. J.," and the plts. offered to prove that this person was their debtor, whom they intended to hold to bail. Lord Ellenborough said, "The writ must speak for itself. I cannot hear, that, instead of A. B., mentioned in the writ, it was meant that the sheriff should arrest X. Y.," and the plts. were nonsuited (*Scandover v. Warner*, 2 Camp. 270, disapproved of by the court in *Finch v. Cocker*, *infra*; *Wilks v. Lorck*, 2 Taunt. 309). Where the declaration stated that the writ was against the said W. Cocken, by the name of William Cocker, the judgment was arrested, on the ground that such misnomer on the writ made the arrest illegal, and the bail-bond void, there not being an averment that the deft. was known as well by one name as by the other (*Finch v. Cocken*, 3 Dowl. *678); *semble*, that such an averment would have made that declaration good (lb.). But where a declaration in case against a [*309] sheriff for taking an insufficient bail-bond, and releasing the debtor, contained such averment, but the writ described him without the *alias*, a plea traversing that the deft. had notice of the party being as well known by the one name as the other, was held a good answer to the action (*Brunskill v. Robertson*, 2 P. & D. 269). Where the declaration stated that the sheriff was commanded to take the said *deft.*, Thomas Attwood, to answer the plt., of a plea of trespass, "and also to a bill of the said plt., against the said *deft.*," it was holden on special demurrer, to be clearly defective, in not showing against whom the writ was issued; but the court gave leave to amend, on payment of costs (*Large v. Attwood*, 1 D. & R. 551). But where the declaration stated that, by the writ, the sheriff was commanded to take W. P. and one S. P., and him and the said S. P. safely keep until he should have given bail, &c.; and that the sheriff took a bail-bond, conditioned for the appearance of W. P. alone, it was held that the variance could not be taken advantage of on general demurrer (*Grottick v. Phillips*, 3 Moo. & S. 132; 9 Bing. 721). But, *quære*, if it had been special (lb.). Where a *latitat* against D. and two others was stated as a *latitat* against D. and John Doe, it was ruled no variance (*Hendray v. Spencer*, 1 T. R. 238). A writ directed generally to the sheriff of a county, may be described in pleading, as directed to the individual who was in fact the sheriff of the county when the writ issued: therefore, when the declaration stated that a person sued out a writ, directed to C. Smith, esq., and Sir R. Phillips, knt., sheriffs of the county of Middlesex, it was held sufficient (*Batchelor v. Salmon*, 2 Camp. 525); but, as the two officers in that county constitute but one sheriff, it has been held to be demurrable to describe them as *sheriffs* (MS. Middlesex

(Sheriff of) v. Barnes, 2 Raym. 1135; BAC. Abr. Shf. K. 162). The return day of the writ should formerly, when writs had return-days, be stated accurately (Everett v. Tunnard, 2 Ch. R. 624; 2 B. & B. 659; S. C. 1 Moo. 538); that to the *ac etiam* part being sufficient. In Tidd's Supplement, A. D. 1833, p. 292, it is suggested, that after the asterisk in the annexed form, the writ *throughout* should be inserted to the *teste* (see it so in 2 Ch. Pl. 322); and, in 3 Dowl. 678, the reporter states it as the usual course. All the memoranda on the writ are also sometimes set out (see Grottick v. Phillips, 3 Moo. & S. 133). We do not see the necessity for departing from the former practice in this respect, and have framed the annexed form accordingly.

The indorsement for bail should be stated accurately. Where the writ states the indorsement to levy the sum, together with the sheriff's poundage, officers' fees, and other legal charges, and incidental expenses attending the same, and the writ, when produced, is to levy the sum, together with the sheriff's poundage, officers' fees, &c., it is a fatal variance (Stiles v. Rawlins, 5 Esp. 133; *but see Cousins v. Brown, R. & M. 292). But, where the declaration stated the writ to have been indorsed for 24*l.*, and the writ produced was indorsed for 24*l.* and upwards, besides, &c.," it was held by Abbott, C. J., to be no variance (Williams v. Middlesex (Sheriff of), cited 2 Ch. Pl. 447 *b*). It is not necessary to aver that the writ on which the deft. was arrested was issued on an affidavit of debt, and indorsed with the sum sworn to (Sharpe v. Abbey, 5 Bing. 193; 2 Moo. & P. 312; S. P. Dorrington v. Bucknell, 11 Moo. 445; and see Wilcoxon v. Nightingale, 4 Bing. 501; 1 Moo. & P. 279; and Arundell v. White, 14 East, 224, confirming Whiskard v. Wilden, 1 Burr. 330, on the same point, though disapproved of in Hill v.

Hall, 2 N. R. 202). *Such an averment is usual, but it is better [*310] omitted, as it will require to be supported by proof (Webb v. Herne, 1 B. & P. 280; Whiskard v. Wilden, 1 Burr. 330; 2 Moo. 602, *post*).

The delivery of the writ to the sheriff, and the arrest, are next stated, but it is not necessary to state the *arrest*, and, if stated, it is not traversable: for the words of the statute, 4 Anne, c. 16, s. 20, "and the sheriff taketh bail from such person, against whom such writ, bill, or process, is taken out," are general enough to include the case where the party has not been arrested (Watkins v. Parry, 1 Stra. 444; Haley v. Fitzgerald, *ib.* 643; 2 Saund. 59 *a*; Taylor v. Clow, 1 B. & Ad. 223). The day of arrest need not be averred (Evans v. Moseley, 4 Tyr. 172; 1 C. & M. 190); but it must be while the writ is in force (2 Saund. 60 *a*).

The bail-bond must next be stated, and this accurately. The date of it should be stated accurately, if plt. profess so to do. Formerly, if the bond were taken by the sheriff after the return-day of the writ it was void (Pullein v. Benson, 1 Ld. Raym. 352), on *non est factum* (Thompson v. Rock, 4 M. & S. 338). If it were now taken after the expiration of the writ, it would be void for the same reasons, and *semble* in arrest of judgment upon the same plea, if the objection appeared upon the face of the record; if not there, should be a special plea. So it is void if executed before the condition is filled up (per Ellenborough, Powell v. Duff, 3 Camp. 181; 2 Saund. 60; but see Fexira v. Evans, 1 Anstr. 228, *n.*). It is a nullity, if executed without filling in blank spaces left for the name of the party to whom the copy of the writ has been delivered, and for the name of the party upon whose putting in special bail the bond is to be void (Holding v. Raphael, 5 Nev. & M. 655; 1 H. & W. 571). If it appears by the declaration that the bond is void by the provisions of the statute 23 Hen. VI. c. 9, the declaration will be bad, either upon a general demurrer, or upon arrest of judgment, after verdict upon a plea of *non est factum* (Samuel v. Evans, 2 T. R. 569; Thompson v.

Rock, 4 M. & S. 338); if it appear on craving *oyer* of the bond, the deft. may demur (per Buller, J., 2 T. R. 569). The bond is void if there be not any condition (Graham v. Crawshaw, 3 Lev. 74); or an impossible condition (Samuel v. Evans, *supra*), or a condition other than that prescribed by the statute (Rogers v. Reeves, 1 T. R. 418). It is now the practice to set out the whole condition of the bond *verbatim*; before the Uniformity of Process Act, it was sufficient to state it according to its legal effects (Waugh v. Russell, 1 Marsh. 217; Shaw v. Lee, 2 Stark. 76); and, where the condition was, that the party should appear before the King at Westr., and the writ to appear before the King, wheresover, &c., it was held to be an immaterial variance (Jones v. Blain, 9 East, 55). So, where the declaration stated the condition to be that the deft. should appear and answer the plt. "according to the custom of his Majesty's Court of Common Bench here," and these words were not in the bond (Bowfellow v. Steward, 3 Moo. 314). But where the writ was to appear before H. M. justices of the bench at Westr., and the condition before the King at Westr., it was held fatal, being different courts (Renalds v. Smith, 6 Taunt. 651; S. C. 2 Marsh. 258; 2 Saund. 60). But, where the declaration stated the issuing from the Common Pleas of a writ for the arrest of the principal, and bringing his body "before the justices of our said Lord the King, at Westr.," &c., to answer, &c.; and also to answer, &c., "according to the custom of his said Majesty's Court," &c., and alleged the condition to be for the appearance of the principal, "according to the exigency of the said writ in the said court," &c.; and also to answer, &c., "according to the custom of his said Majesty's Court of *Common Bench;" and the condition proved at the trial was for the appearance of the principal "before our said Lord the King, at [*311] Westr.," &c., to answer, &c.; and also to answer "according to the custom of the King's Court of Common Bench:" it was held that there was not any material variance (Crofts v. Stockley, 5 Bing. 32; 2 Moo. & P. 81; 3 C. & P. 281). "The Bench at Westr.," means the Common Pleas (Impey v. Taylor, 3 M. & S. 166; 1 Moo. 19; 7 Taunt. 271). Where the writ was to answer the plt. in a plea of debt *for three hundred and twenty pounds*, or in a plea of trespass, with an *ac etiam*, and the condition was to answer the plt. in a plea of debt or trespass *generally*, or without mentioning the plea at all, the variances were holden to be immaterial (Villiers v. Hastings, Cro. Jac. 286; Kirkebridge v. Wilson, 2 Lev. 123; 2 Show. 51; T. Jones, 137, 138; 6 Mod. 122; 10 Mod. 327; Tidd, 223; but see More v. Finch, 2 Lev. 177, *semble contra*); for the statute only requires a bond conditioned for the deft.'s appearance, and the description of the plea is merely surplusage. And, where the *sheriff*, upon an original writ in a plea of *trespass on the case on promises*, took a bail-bond conditioned for the deft.'s appearance, to answer the plt. in a plea of *trespass*, the court held it to be valid (Owen v. Nail, 6 T. R. 702; and see Luckett v. Plummer, 2 B. & B. 659; S. C. 5 Moo. 350). But where the condition was stated to be to answer in a plea of trespass upon promises, and the words "upon promises" were not in the bond, it was held a fatal variance (R. & M., N. Pr. C. 93). So, where the writ in *trespass* was to appear before the *Lord the King at Westminster*, and the condition was to appear before the *justices of the King's Bench at Westminster* (Kirkbride v. Dyke, 2 Lev. 180; S. C. T. Jones, 46; Lawson v. Haddock, 2 Vent. 237, 238), the bond was holden good; and, where the writ by *original* was returnable before the Lord the King *wheresoever he shall then be in England*, and the condition was without the words *wheresoever*, &c., the court gave judgment for the plt. in an action upon the bond, saying, they would understand that, by appearing before the King was meant before the King in his *court*, and not before the King in

person (*Shuttleworth v. Pilkington*, 2 Stra. 1155—6). So, where the condition of the bond, in an action by *original*, was to appear before the King at *Westminster*, it was deemed sufficient (*Jones v. Blain*, 9 East, 55; but see *Marsh v. Blackford*, 1 Ch. R. 323). In general, if a bail-bond were good in substance, it could not be avoided for any trifling informality or variance of the condition from the writ, in the description of the plea, or the time and place of appearance, or of the sum (*Atkinson v. Saunderson*, 4 Doug. 254; 1 Tidd, P. 223).

The breach of the bond, by reason of the non-performance, should be stated according to the words in the condition. Under the 1 & 2 Vict. c. 110, the only condition in the bail-bond now is, that the deft. "do cause special bail to be put in for him to the said action, in her Majesty's said court, as required by the said writ" (see form of bail-bond in Chit. G. P. by Lush, 298); *i. e.*, "within eight days after the execution thereof on him, inclusive of the day of such execution." This renders it unnecessary for us to notice the many cases on this head with reference to the former state of the law. If the deft. do not cause special bail to be put in within the eight days next after the arrest, inclusive of the day of such arrest, the plt. may proceed upon the bail-bond on the 9th day (*Hilary v. Bowles*, 2 Dowl. P. C. 201); unless, by the 8th and 9th being holidays, the deft. had till the 10th to put in bail (*Alston v. Underhill*, *ib.* 26; 3 Tyr. 427; 1 C. & M. 492). So he may proceed, if notice of bail having been put in be not given in due time (*Grant v. Gibbs*, 3 Dowl. 409; 1 Hodges' Rep. 56); but not, if there be only an informality in the notice (*R. v. Middlesex (Sheriff of)*, 3 Tyr. 448; [*312] 2 Dowl. 5; *Wigley v. Edwards*, 2 C. & M. 320; 4 Tyr. 235).

A render into actual custody will not discharge the bail-bond (*Hodson v. Mee*, 5 Nev. & M. 302; 3 Ad. & E. 765; 1 H. & W. 398; *Ridler d. Bilton v. Chappelow*, 1 Dowl. N. S. 637; 6 Jur. 375).

In stating the assignment, the date, if professed to be stated without a *videlicet*, should be according to the fact. The assignment may be alleged to have been made in a county different from that in which the bail-bond was given (*Gregson v. Heather*, 2 Stra. 727; 2 Ld. Raym. 1454; Fort. 366); but *quære* if the bond must not be assigned in the sheriff's bailiwick (*Impey*, 16; Dalt. 22). It suffices to state the assignment was made according to the statute, without stating it was sealed or witnessed (*Dawes v. Papworth, Willes*, 408-9; 2 Saund. 61 *b*; *Lease v. Box*, 1 Wils. 121); or, if it be stated to be witnessed, it is not necessary to state the names of the witnesses (*Ib.*). If the assignment appear on the declaration to have been attested by one witness only, it will be demurrable (*Willes*, 409, *n.*). But a declaration stating that the sheriff, "by an indorsement on the said writing obligatory, duly made and sealed with the seal of the office of the said sheriff, assigned the said writing obligatory to the said plt. according to the form of the statute," without saying that the assignment was under the hand of the sheriff, and executed in the presence of two witnesses, was held good on special demurrer (*Lewis v. Parkes*, 3 M. & W. 133; 6 Dowl. P. C. 93; M. & H. 321). As the assignment is not by deed, a profer is unnecessary (*Lease v. Box*, 1 Wils. 121). The assignment is good, though the sheriff be out of office (*Selw. N. P.* 600).

The declaration should state that the money is due from the bail, and not from the principal; for, where it concluded, "whereby an action hath accrued to the plt. to demand and have of the principal" (instead of the bail), and stated non-payment by the principal, it was held bad on special demurrer" (*Morgan v. Sargent*, 1 B. & P. 58).

Bail-Bond.] Debt on a bond given by a surety under the 1 & 2 Vict. c.

110, s. 8. Plea, that after making the bond the plt. brought an action against the principal, and took and detained him in execution, according to the practice of the Court of Queen's Bench, in respect of the said debt; that from the time of recovering such judgment until the arrest, he, the principal, was always ready and willing to render himself according to the course and practice of the Court of Queen's Bench; and that, by reason of his detention in execution, he was, by the practice of the said court, exonerated and discharged from rendering himself according to the said condition: held, on special demurrer, that the plea was bad, as it did not distinctly allege either that the principal did surrender, according to the condition of the bond, or that such surrender was made impossible by the act of the plt. (*Hayward v. Bennett*, 5 D. & L. 480; 5 C. B. 593; 12 Jur. 120).

Pleas.] The general rules as to pleas in debt here prevail (*post*, "DEBT"). *Nil debet* is not now allowed (see *post*, "DEBT").

Non est factum.] Deft. may plead *non est factum*, and show under it a material variance between the bond and condition, as set forth in the declaration (*Morgan v. Edwards*, 2 Marsh. 96; S. C. 6 Taunt. 394; *Baker v. Newbiggen*, R. & M. 93, *supra*). But, objections that the bond is void by erasure, alteration, cancelling, &c. (*Whelpdale's case*, 5 Co. 119; Co. Lit. 356, n., *ante*, p. 113); or by matter of fact that voids it in law: as coverture (12 Mod. 609; *Lambert v. Atkins*, 2 Camp. 272; *post*, "DEBT"); lunacy (*Yates v. Boen*, 2 Stra. 1104; *Faulder v. Silk*, 3 Camp. 126); drunkenness (*B. N. P.* 172; *post*, "DRUNKENNESS"); delivered as an escrow (*Stotes v. Pearson*, 4 Esp. 255, *post*); that it was dated and taken after the return-day of the writ (*Thompson v. Rock*, 4 M. & S. 338; *Samuel v. Evans*, 2 T. R. 569); or that the condition was not filled up when it was made (*Powell v. Duff*, 3 Camp. 181; see Com. Dig. Fait. A, 1), which could be formerly raised on *non est factum*, must now be pleaded. Intrinsic matter, which showed that the deed was voidable, as that it was not made according to the 23 Hen. VI. c. 9, or that there was no process to arrest the deft. (*Say*, 116), should in general be pleaded, even before the New Rules. The circumstance of the action being brought in the wrong court, as we have seen, cannot be taken advantage of under this plea (*ante*).

The irregularity should be made a ground of motion to set aside *the proceedings, or deft. should plead in abatement or demur [*313] (*ante*, 307, and *infra*). If the bond or condition be incompatible with the 23 Hen. VI. c. 9, and the defect appear on the declaration, it need not be pleaded; and the objection will be bad, even after verdict (*Samuel v. Evans*, 2 T. R. 569). So, if it be not made to the sheriff, or other officer, by the name of his office and county (*Noel v. Cooper*, Palm. 378); but where it was laid *solvendum eidem vice-comiti et assignatis*, it was well enough (*ib.*). So it is bad, if made to a sheriff's bailiff (*Rogers v. Reeves*, 1 T. R. 422); or to the serjeant-at-arms of the House of Commons (*Norfolk v. Elliot*, 1 Lev. 209). But it is good, if made to the marshal of the Queen's Bench (*Bracebridge v. Vaughan*, Cro. Eliz. 66).

The mere practice of the court cannot be pleaded (*Sherry v. Powell*, 1 D. & R. 50; *Sandon v. Proctor*, 7 B. & C. 800), if the practice do not go to the merits of the defence (*Dudlow v. Watchhorn*, 16 East, 39; but see *Hayward v. Bennett*, 17 Law J. 182, C. P.); such a plea neither avoids nor denies the facts in the declaration. The mode of taking advantage of irregularities in practice, is by application to the court, or plea in abatement (5 Moo, 168; *Ball v. Swan*, 1 B. & A. 393). The deft. cannot plead that the cause was

out of court for want of a declaration before the assignment of the bond was taken (*Sampson v. Brown*, 2 East, 442).

Matters of defence in equity (*Scholey v. Mearns*, 7 East, 153; *O'Kelly v. Sparkes*, 10 East, 377), or merely founded on the discretion of the court, cannot be pleaded (2 East, 442; *Hayward v. Ribbans*, 4 ib. 311; 7 ib. 153; *Wright v. Walmsley*, 2 Camp. 396); thus, it cannot be pleaded that the action is brought for the benefit of, or as trustee for, the sheriff's officer (*Scholey v. Mearns*, 7 East, 147; and see *Offly v. Warde*, 1 Lev. 235); or that the principal has become bankrupt and got his certificate (*Alridge v. Harper*, 10 Bing. 125). Or that the debt was levied on principal since the commencement of the action.

The deft. (bail) may plead that there was no process issued against the principal. In an action against the original debtor, on a bond given under stat. 1 & 2 Vict. c. 110, s. 8; held, that a plea alleging that no writ of *capias ad satisfaciendum* had issued in the original action was a good plea. Held, also, that where the declaration alleged that the deft. did not render himself, according to the terms of a judge's order, a plea averring that such order had been obtained *ex parte* by the plt. was bad, and that the proper course for the deft., if it had been irregularly obtained, was to apply to set it aside. Held, also, that where the declaration alleged that a judge's order had been made for the render within a given time, which time had been extended till the 5th day of Term by a subsequent judge's order, and that a rule *nisi* had obtained within that period, calling on the plt. to show cause on a subsequent day why the deft. and his bail should not have further time to render, and that in the mean time proceedings against the deft. and his bail should be stayed, a plea, alleging that upon that rule *nisi* a rule absolute was made on the 22d day of Term, directing a render within a given period, and that a subsequent render was made within that time, was a good plea. Held, also, that such a bond was not a bond within 6 Geo. IV. c. 16, ss. 52, 56, and that the plt.'s claim was not barred by the bankruptcy of the deft., and his certificate after the commencement of, but before judgment obtained in, the original action. Held, also, that a plea stating that an action had already been brought by the plt. for recovery of the sum mentioned in the [*314] bond at the time the bond was given, was no plea to *an action on a judgment obtained in another action subsequently commenced (*Hinton v. Acraman*. 15 Law J. 52, L. P.; 10 Jur. 203).

It may be pleaded, that the bond was taken for ease and favour, contrary to 23 Hen. VI. c. 9, after the return of the process (Com. Dig. Plead.; 2 W. 25). This plea is necessary, if the bond is dated after the return of the writ (*ante*, 312). And in the plea, the statute need not, nor should, be set forth (*Samuel v. Evans*, 2 T. R. 569); if set forth and misrecited, a variance will be fatal (*Smith v. Jeffreys*, 6 T. R. 776; *Boyce v. Whitaker*, Doug. 94).

It may be pleaded by bail, in an action by the assignee, that the principal was taken under an attachment for non-payment of costs (*Lewis v. Morland*, 2 B. & A. 56; 4 Price, 23); or for not putting in an answer (*Meller v. Palfreyman*, 1 Nev. & M. 696); but not in an action by the sheriff (*Morris v. Heyward*, 6 Taunt. 569).

The deft. may, in an action by the assignee of the sheriff, plead generally that the bond was not assigned according to the statute (*Dawes v. Papworth*, Willes, 408; 2 Saund. 61, n.). See evidence to support issue on it (*post*).

The usual plea, that the assignment is not stamped, is no longer sustainable, since the 5 Geo. IV. c. 41.

A plea that there was no *proper* affidavit of debt made in the action against the principal (*Hume v. Liversedge*, 1 Car. & M. 332; 1 Dowl. P. C. 660; 3 Tyr. 257); or that there was no affidavit filed, is bad on special demurrer

(Knowles v. Stevens, 1 C. M. & R. 26; S. C. 4 Tyr. 1016; nom. Snow v. Stevens, 2 Dowl. P. C. 664).

A plea must conclude to the country, or with a verification, since R. G. H. T. 4 Will. IV. r. 9 (Knowles v. Stevens, 1 C. M. & R. 26).

The plea that special bail was put in, according to the condition of the bond, has superseded the former plea of *comperuit ad diem*, and is governed by the same principles. The latter plea should be concluded with a verification by the record (1 Leon. 90; see *post*).

Replication.] See the general rules as to *post*, "DEBT."

To the plea of *comperuit ad diem*, plt. might have replied *nul tiel record* (Lill. Ent. 498; 1 Saund. 92; 2 ib. 60). When the record was of the same court, the replication ought to conclude with giving a day to deft. (Cremer v. Wicket, Carth. 517; S. C. 1 Raym. 550); but, when of another court, then it should conclude with the usual prayer and verification (Sandford v. Rogers, 2 Wills. 113; Newbury v. Stradwick, Com. Rep. 533). The replication in C. P., if it gave a day for producing the record, made a complete issue, and deft. could not afterwards demur (see Tipping v. Johnson, 2 B. & P. 302; Jackson v. Wickes, 7 Taunt. 30; S. C. 2 Marsh. 354).

To the plea of no process against principal, plt. may reply the process as stated in the declaration (see Jackson v. Wickes, 2 Marsh. 354; *sed vide* Samuel v. Evans, 2 T. R. 576).

To the plea of ease and favour, if the action be at the suit of the sheriff, plt. should pray an enrolment of the bond; and, after setting it out, state he was sheriff, and deft.'s arrest, and that the bond was made to the plt. as sheriff, and traverse the ease and favour (Carth. 301, 302; 1 Saund. 9; 2 Saund. 60). In an action by the assignee, plt. should reply, stating the bond was duly executed, and denying the ease and favour, concluding to the country; it is not necessary to make a formal traverse of the ease and favour (see 1 Saund. 163, n.; Com. Dig. Plead. 2, n. 25).

Precedents.

[*315]

Declaration on bail-bond by the assignee against the principal or bail, where the first writ was by *capias*.

In the Q. B. (C. P., or Ex. of P.) On the _____ day of _____, in the year of our Lord 1850.

Middlesex, to wit, (*venue transitory*). John Nokes, assignee of C. D. and E. F., sheriff of the county of Middx., according to the form of the statute in such case made and provided, by A. B. his attorney, (or, in his own proper person,) complains of Joseph Styles, who has been summoned to answer the plt. in an action of debt, and the plt., as assignee aforesaid, demands of the deft. the sum of _____ (*the amount of the penalty in the bond*) of lawful money of Great Britain, which he owes to, and unjustly detains from him. For that whereas the plt. heretofore, to wit, on _____ (*the teste, or day of issuing writ*), in the year of our Lord _____ according to the form of the statute in such case made and provided, and under and by virtue of a special order of _____ (*naming the judge*), one of the judges of one of her Majesty's superior courts at Westmr., to wit, the court of our lady the Queen, before the Queen herself (*according to the fact*), caused to be issued out of her Majesty's Court of Queen's Bench (or, "Common Pleas," or, "Exchequer of Pleas," at Westmr., in the county of Middx., against the deft. (or, if the declaration be against one of the bail, say, "against one A. B.") a certain writ of our lady the Queen, called a *capias*, directed to the sheriff of _____ and bearing date, &c., &c., by which said writ, our said lady the Queen commanded the said sheriff to take the said deft., if he should be found in his bailiwick, and him safely keep, until he should have given him bail, or made deposit with him according to law, in an action upon promises (or, in an action of debt, as the case may be) at the suit of the plt., or until the said deft. should, by other lawful means, be discharged from his custody by order of (*the judge who made the order*). Which said writ

afterwards, and before the delivery thereof to the said sheriff of the said county of Middx., to be executed as is hereinafter mentioned, to wit, on the day and year aforesaid, was marked and endorsed for bail for £—, according to the form of the statute in such case made and provided; and which said writ, so indorsed, afterwards, to wit, on the day and year first aforesaid (*it is immaterial*) was delivered to the said C. D. and E. F., who then, and from thence, until, and at, and after eight days after the execution of the said writ, were sheriff of the said county of Middx., in due form of law to be executed. By virtue of which said writ, the said C. D. and E. F., so being sheriff as aforesaid, afterwards, and within one calendar month from the date thereof, including the day of such date, to wit, on the day and year last aforesaid, and within their bailiwick, as such sheriff, took and arrested the deft. (*or A. B.*), by his body, and then and there had and detained him in their custody, as such sheriff, at the suit of the now plt., for the cause aforesaid. And the said C. D. and E. F. thereupon, and on the execution of the said writ, to wit, on the day and year last aforesaid, delivered a copy of the said writ, together with every memorandum and notice subscribed thereto, and all indorsements thereon, to the said J. S. And the deft. (*or A. B.*) being so arrested, and in custody of the said C. D. and E. F., so being sheriff as aforesaid, by virtue of the said writ, at the suit of the now plt., the said C. D. and E. F., afterwards, and within eight days next after the execution of the said writ, inclusive of the day of such execution, to wit, on the day and year last aforesaid (*the date of bail-bond*), as such sheriff took bail for the said deft. (*or A. B.*) causing special bail to be put in for him to the said action, in her Majesty's said court, as required by the said writ, and according to the form of the statute in such case made and provided; and, on that occasion, the deft. (*or, if the action be against one of the bail, say, "the deft., as bail and surety for the said A. B."*) then and there, to wit, on the day and year last aforesaid, by his certain writing obligatory, commonly called a bail-bond, sealed with the seal of the deft., and now shown to the court of our said lady the Queen, before the Queen herself here (*or, in C. P., before her Justices of the Bench, or, in the Exchequer,*

[*316] before the Barons of the said Exchequer), the date whereof is the same day and year last aforesaid, acknowledged himself to be *held and firmly bound to the said —, so then being sheriff of the said county of Middlesex as aforesaid, as such sheriff, in the penal sum of £—, of good and lawful money of Great Britain, to be paid to the said sheriff, or their certain attorney, executors, administrators, or assigns, with and under a certain condition thereunder written, whereby (*set out the condition verbatim. It is generally as follows:—*) after reciting that the said Joseph Styles was, on the day of then instant, taken by the said sheriff in the bailiwick of the said sheriff, by virtue of the Queen's writ of *capias*, issued out of her Majesty's court of —, bearing date at Westr., the day of then instant, to the said sheriff directed and delivered, against the said J. S., in an action upon promises (*or, an action of Debt, according to the fact,*) at the suit of the now plaintiff, being the said writ above-mentioned, and that a copy of the said writ, together with every memorandum and notice subscribed thereto, and all indorsements thereon, was, on the execution thereof, duly delivered to the said J. S., and he was, by the said writ, required to cause special bail to be put in for him in the said court, to the said action, within eight days after execution thereof on him, inclusive of the day of such execution, it was conditioned, that if the said J. S. should cause special bail to be put in for him in the said action, in her Majesty's said court, as required by the said writ, that then the said obligation should be void, otherwise should be and remain in full force and virtue; as by the said writing obligatory, and the condition thereof, reference being thereunto had, may more fully and at large appear. And the plt. in fact saith, that the deft. (*or, A. B.*) did not cause special bail to be put in for him to the said action, in her Majesty's said court, as required by the said writ, in the condition of the said writing obligatory mentioned, according to the exigency of the said writ, but therein wholly failed and made default, whereby the said writing obligatory became forfeited; and the plt. further saith, that the said writing obligatory being so forfeited, and the money therein specified remaining unpaid and unsatisfied to the said sheriff, the said C. D. & E. F., so being sheriff of the said county of Middx. as aforesaid, afterwards, to wit, on, &c. (*date of the assignment*), at the request of the said John Nokes, the now plt., and the plt. in the said suit, by an indorsement on the said writing obligatory duly made, and sealed with the seal of office of sheriff of the said county of Middx., assigned the said writing obligatory to the plt., according to the form of the statute in such case made and provided. By means whereof, and by force of the statute in such case made and provided, an action hath accrued to the plt., as assignee of the said C. D. and E. F., so being sheriff of the said county of Middx., as aforesaid, to demand and have of and from the said deft. the said sum of £—, above demanded. Yet the deft. (although often requested so to do) hath not as yet paid the said sum of £—, above demanded, or any part thereof, to the said C. D. and E. F., before the said assignment, or to the plt., assignee as aforesaid, or either of them, since the said assignment, but hath hitherto wholly neglected and refused so to do, and still doth neglect and refuse to pay the same, or any part thereof, to

the said plt., as assignee as aforesaid; to the damage of the said plt., as assignee as aforesaid, of £—: and therefore he brings his suit, &c.

Other forms of declaration.

See other forms of declaration on bail-bond on attachment out of Chancery, *Morris v. Haward*, 2 Marsh. 280; see 2 Ch. Pl. 325, 7th edit.: at the suit of assignee of sheriff of County Palatine of Chester, *Ib.*, 456, 5th edit.; of Lancaster, 5 Wentw. 574; and other precedents, *Petersdorff's Index*, "Bail-Bond."

Plea—no writ of *capias* against principal.

[*Plea of Non est factum*, see *post*, "DEBT"]. Because he says, that no writ of *capias*, as in the said declaration mentioned, wherein the said E. F. could and might be arrested and held to special bail was sued and prosecuted out of the said court, by and at the suit of the said A. B., in the said suit, in the said condition mentioned, before the making of the said alleged writing obligatory. And this, &c. (*Conclude with a verification as post*, "DEBT.")

Special bail.

[*Actio non*, as *post*, "PLEAS."] Because he says, that the said E. F. did cause special bail to be put in for him to the said action in the said court, *within eight days after the execution of the said writ on him, inclusive of the day of such execution, [*317] to wit, on, &c., in the said condition of the said writing obligatory mentioned, according to the form and effect of the said condition, as by the record of the said bail so put in, remaining in the said court of our said Queen, more fully appears. And this, &c. (*Conclude with a verification by the record as post*. "PLEAS.")

Other Forms of Pleas.

See other forms of pleas, denying issuing of writ of summons, as stated 3 Ch. Pl. Index, "Bail-Bond;" no affidavit made, *Ib.*; debt levied against principal, *Ib.*; ease and favour, *Ib.*; that bond was given to sheriff on attachment against deft. for non-payment of costs, 4 Price, 23; and other pleas, 7 Wentw. 613-4.

See replication, denying ease and favour, 3 Ch. Pl. 1177.

Evidence for Plaintiff.

[*Non est factum*.] Under this plea, plt. will have to prove the execution of the bond in the usual way (1 Selw. N. P. 601; *post*, "DEED"). The delivery, signing, and sealing, as well as deft.'s identity, must be proved (*post*, "DEED"). The bailiff who made the caption is a competent witness to prove the execution, if he witnessed it at deft.'s desire (*Honeywood v. Peacock*, 3 Camp. 196). If any defence, besides the mere execution of the bond, be expected under this plea, and which deft. can avail himself of under it, plt. should be prepared to rebut it. In debt, on specialty, this plea shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void as well as those which make it voidable (*R. G. H. T.* 3 Will. IV.).

[*Special Bail*.] This plea seems to be governed by the same principles as applied to the old plea of *comperuit ad diem*, the issue on which was tried by the record (*Austen v. Fenton*, 1 Taunt. 23; *Whittle v. Oldaker*, 7 B. & C. 478), and lay principally on deft.; and, if it could be decided by the date of the appearance, the court would order the day of the appearance to be entered on the filacer's book, according to the truth (*Austen v. Fenton*, *supra*; 2 Hammond, 901). If bail have not justified, the court will, from the same reason, cause their recognisance to be taken off the roll, because it testified a falsehood, the truth of which the sheriff would otherwise have

no opportunity of controverting. The deft. must prove the fact of his having put in special bail by production of the record: as, the roll, showing the recognisance of the bail, the filacer's book, the bail-piece, &c., according to the practice of the court in which the action is brought.

No Process against Principal.] Plt. must be prepared to prove this by production of a transcript of the writ taken from the record, and prove it by a witness, who has compared it with the original, or who has examined the copy, whilst another read the original (*M'Neil v. Perchard*, 1 Esp. 263; *Rolf v. Dart*, 2 Taunt. 52; *Reid v. Morgison*, 1 Camp. 470).

That there was no such Process as stated in Declaration against Principal.] The plt.'s evidence in support of this plea will be similar to the last. Under it deft. may take advantage of a variance (see *ante*, 309; *post*, 319).

**No affidavit.]* If deft. plead there is no affidavit of the cause [318] of action made, plt. should produce and prove an office-copy in the usual way (see "*AFFIDAVIT*," 2 Moo. 62; *Webb v. Hearne*, 1 B. & P. 280; *Whiskard v. Wilder*, 1 Burr. 330). The original affidavit must be produced, if the declaration state it to have been made by any particular person (*Webb v. Hearne*, 1 B. & P. 291; 2 Moo. 61).

Debt levied on Principal.] The burden of proof on this plea lies on deft. (*post*, 319).

Ease and Favour.] The burden also of proof in this plea lies on deft. (see *post*, 319.) Plt. should be prepared to disprove the plea by showing the time of execution of the bonds.

Plea denying Assignment.] In proving this plea, it must be shown that the injunctions of 4 Anne, c. 16, s. 20, were strictly complied with; that it was done in the presence of "two or more credible witnesses," by the sheriff, or other officer, putting his hand and seal to it. It is sufficient if the under-sheriff does it in the name of the high-sheriff; and there is no necessity to prove his appointment, as it will be presumed that the under-sheriff has authority to do so *virtute officii* (*Doe d. James v. Brawn*, 5 B. & A. 243); and in the case of an assignment of a replevin-bond, it was held sufficient, though neither done by the sheriff or under-sheriff, but a person accustomed to act in the sheriff's office (*Middleton v. Sandford*, 4 Camp. 36). In *Kelson v. Fagg*, 1 Stra. 60, it is stated, that the assignment could not be done by the under-sheriff's clerk; but, in a later case, where it appeared in evidence that the bond had been assigned to the plt. by one of the under-sheriff's clerks, Lord Mansfield, C. J., was of opinion, that the seal to the assignment, being the seal of office, was sufficient to prove its validity, whoever signed it (*Harris v. Ashbey*, 1 Selw. N. P. 599, n.). The witnesses must be disinterested; therefore, neither the plt. himself, nor the sheriff, nor, it seems, the under-sheriff, are "credible" within the act (*White v. Barrack*, 1 M. & W. 424). It is enough to indorse and attest it *in the presence* of two credible witnesses; there need not be any attestation *by* them (*Pillips v. Barber or Barlow*, 1 Sco. 322; 1 Bing. N. C. 439); the plt. is not a credible witness (*White v. Barrack*, 1 M. & W. 424; 5 Dowl. P. C. 64; 2 Gale, 57).

Sum Recoverable.] The amount which the plt. is entitled to recover is

not limited to the sum sworn to and costs, but the bail are liable to pay the plt. the whole debt, for which the plt. might have had judgment against the original deft., to the full extent of the penalty in the bond (*Orton v. Vincent*, Cowp. 71; *Mitchell v. Gibbons*, 1 H. Bl. 76; *Peters v. Morgan*, 2 Raym. 1564; 1 East, 91, n.; *Stevenson v. Cameron*, 8 T. R. 29). And, it seems, that where bail were let in upon terms to try the cause, the money levied to abide the event, and the bail-bond to stand as security, the bail were not liable beyond the penalty, though the debt and costs exceeded it after the trial, and the plt.'s debt would have been fully covered when the bail was first let in to try upon terms (2 Smith, 364). Each of the bail is liable for his own costs, as well as to costs in the first action (2 Saund. 61, n.).

Evidence for Defendant.

Non est factum.] The burden of proving the bond, as we have seen, lies on the plt. If deft. have any evidence in disproof, he *should adduce it. If there be a variance, or the stamp be insufficient, plt. [*319] will be nonsuited under this plea. As to evidence that the bond was taken after the expiration of writ, see *infra*, evidence under "*Ease and Favour.*" As to evidence of alteration, *ante*, 113 (see "BOND," "COVER-TURE," "LUNACY," "DRUNKENNESS").

Special Bail.] This plea, like that of *comperuit ad diem*, is to be tried by the record; the proof lies on the deft. (*ante*, 317).

No such Process as stated in Declaration issued against Principal.] Plt. must prove the process. Under this plea deft. may avail himself of any variance in the writ and that stated in declaration (as to what a variance, *ante*, 312); as, if it appear that the writ alleged in the declaration and that produced were returnable on different days, or in different courts, &c. (*Bon-fellow v. Steward*, 3 Moo. 214; *Baker v. Newbegin*, R. & M. 93; *Impey v. Taylor*, 3 M. & S. 166; *ante*, 312). But any trifling informality, or variance in the writ, as to the description of the plea, &c., or of the time or place of appearance stated in the condition of the bond, &c., will not be prejudicial (*Lockett v. Plummer*, 2 B. & B. 659; S. C. 5 Moo. 538; *Owen v. Nail*, 6 T. R. 705; 2 Show. 51; *Cro. Jac.* 286).

Debt levied on Principal.] The deft. must in this case prove the *fieri facias* and levy, as stated, in his plea (see "WRIT;" see form of plea, 3 Ch. Pl., Index, "Bail Bond").

Ease and Favour.] If issue be taken on the due execution of the bond, under this plea, slight evidence will suffice, *prima facie*, to support it (1 Sid. 384; 1 Saund. 163, n.). The deft. must support his plea by proving the exact day the writ expired, and showing that the bond was executed previous to that time. In order to prove the issuing and expiration of the writ, an office-copy should be produced in evidence. It is not sufficient to produce the præcipe in the filacer's book, and to prove a notice to produce the writ, unless it be shown that search has been made at the Treasury, and that, subsequently to the expiration, the writ has been seen in the possession of the opposite party (*Edmonstone v. Plaisted*, 4 Esp. 160; *Petersdorf on Bail*, 264).

BANK NOTE.

See Index, "BANK NOTE," "BANKER."

[*320]

*BANKRUPT.(a)

UNDER this title will be considered the pleadings and evidence—I. In actions by assignees of a bankrupt.—II. In actions against assignees.—III. In actions by bankrupt.—IV. In actions against bankrupt.

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Form of Remedy.

The assignment and bargain and sale under the 6 Geo. IV. c. 16, ss. 63, 64, vested in the assignees the bankrupt's real (except copyhold) and personal property, from the act of bankruptcy, and with it also all rights and remedies which the bankrupt had in relation to it before such act of bank-

ruptcy, and all rights and remedies which they, as owners in their own right should have after such act. But, under the 1 & 2 Will. IV. c. 56, ss. 25, 26, the appointment of the assignees had the same effect and operation to all purposes as the assignment and conveyance had under the former statute. And by the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, s. 141, it is enacted, "that when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed or come to him, before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right, and interest in such debts, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment; and after such appointment, neither the bankrupt, [*324] nor any *person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the City of London or otherwise, but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt."

Sect. 144. "That no assignee of any bankrupt's estate, nor any purchaser from any such assignee of any goods, chattels, stock, or crop, being part of the estate of any bankrupt engaged or employed in husbandry on any lands let to farm, shall take, use, or dispose of any hay, straw, grass or grasses, turnips, or other roots, or any other produce of such lands, or any manure, compost, ashes, sea-weed, or other dressings intended for such lands, and being thereon, in any other manner or for any other purpose than such bankrupt so employed in husbandry ought to have taken, used, or disposed of the same if he had not been adjudged bankrupt." As to when the estate and effects vest in official assignees, see sect. 218.

Sect. 142. "That when any person shall have been adjudged a bankrupt, all lands, tenements, and hereditaments, except copy or customaryhold, in England, Scotland, Ireland, or in any of the dominions, plantations, or colonies belonging to her Majesty, to which any bankrupt is entitled, and all interest to which such bankrupt is entitled, in any of such lands, tenements, or hereditaments, and of which he might, according to the laws of the several countries, dominions, plantations, or colonies, have disposed, and all such lands, tenements, and hereditaments as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt, before he shall have obtained his certificate, and all deeds, papers, and writings respecting the same, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment, without any deed of conveyance for that purpose; and as often as any such assignee or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed shall by virtue of such appointment vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose." By sect. 219, the court may make sale of copyhold lands, for the benefit of creditors.

Sect. 143. Where a conveyance of the property of a bankrupt would require to be registered, the certificate of appointment of the assignees shall be registered.

The form of remedy, therefore, will be the same as in other cases. The assignees can recover that only which the bankrupt was equitably and legally

entitled to (*Carvalho v. Burn*, 4 B. & Ad. 382; *Tibbits v. George*, 4 Ad. & E. 107). The same doctrine applies to assignees of insolvents (*Best v. Angles*, 2 Car. & M. 394; *Mogg v. Baker*, 3 M. & W. 195). If they proceed against equity, or against a creditor who has a clear legal or an equitable right of set-off, they will be restrained by injunction (*Ex parte Booth*, 4 Deac. & Ch. 211; 2 M. & Ayr. 93; *Ex parte Clegg*, 3 Deac. & Ch. 505; 1 M. & Ayr. 91; *Ex parte Pearce*, 2 Mont. Deac. & D. 142; *Ex parte Michil*, ib. 181). The consent of the creditors to the assignees suing at law is not necessary (6 Geo. IV. c. 16, s. 88; 12 & 13 Vict. c. 106; *Bozon v. Williams*, 2 Y. & J. 475).

Assignees cannot sue for personal injuries to the bankrupt as for slander (*Jon. W.* 215); or the breach of a contract for his personal skill or service (*Beckham v. Drake*, 8 M. & W. 845; see *Williams v. Chambers*, *16 Law J. 230; 11 Jur. 798); or for the seduction of his daughter [*325] (*Howard v. Crowther*, 8 M. & W. 601; 5 Jur. 91); or for trespass, *q. c. f.*, where the personal injury is the principal and essential cause of action (*Clark v. Calvert*, 3 Moo. 96; 8 Taunt. 742; *Spence v. Rogers*, 2 Dowl. N.S. 99; 11 M. & W. 191; S.C. in error, 13 M. & W. 571; 15 Law J. 49, Exch.; 12 Cl. & Fin. 700); or for the personal annoyance and injury resulting from breaking and entering his house, and seizing his goods under a pretended claim of debt (*Brewer v. Dew*, 1 D. & L. 383). As to the right of the assignees to sue for unliquidated damages, see *Wright v. Fairlie*, 2 B. & Ad. 727; *Porter v. Varley*, 9 Bing. 93; and for injury to bankrupt's personal property, *Hancock v. Caffyn*, 8 Bing. 358. A right of action for money lent by a woman whilst *sole*, and before her marriage settled in the names of trustees for her benefit, does not pass to the assignees (see *Penham v. Hurst*, 8 M. & W. 743).

The assignees under an Irish commission of bankruptcy may sue here for a debt contracted with the bankrupt here (*Ferguson v. Spencer*, 2 Sco. N.R. 229; 2 M. & G. 987).

In 1843, H., residing in Australia, being indebted to B. in 771*l.* 3*s.* 4*d.*, B., on the 8th of January, 1844, assigned the debt to W., and on the 22nd of January joined W. in a letter to H. apprising him of the assignment, and requiring him to pay the debt to W. This letter was posted by W. to H. in Australia, in the ordinary way in which letters to that country are posted, and could not have reached Australia before the 10th of February, had it been posted on the 8th of January. On the 10th of February a fiat in bankruptcy issued against B. On the 29th of January, 1844, a bill for 50*l.* was remitted to H., in Australia, who had no notice of the bankruptcy, to the bankrupt, and by him handed over to W. The assignees of the bankrupt having brought an action against W. to recover the amount of the bill: held, that W. having done all in his power to prevent the debt from remaining in the possession of the bankrupt, it could not be said to be, by the consent of the true owner, in the order or disposition of the bankrupt at the time of his bankruptcy, and that the assignees were not entitled to recover (*Belcher v. Bellamy*, 17 Law J., Exch. 219).

Assignees, after a nonsuit, may bring a fresh action for the recovery of a sum from a creditor who had given credit for it in his account and proved for the balance. The general rule is to proceed by petition when the creditor has proved (*Ex parte Hilton*, 1 J. & W. 467). If one of several partners become a bankrupt the others may use the names of his assignees in actions against the debtors of the firm (*Whitehead v. Hughes*, 2 Cr. & M. 318; 4 Tyrw. 92). Where a member of a firm becomes bankrupt, as to the power of joining in an action the remaining partner with the assignee, see 12 & 13 Vict. c. 106, s. 152. And by the same statute, sect. 157, it is enacted,

"that whenever an assignee shall die or be removed, or a new assignee shall be chosen, no action at law or suit in equity shall be thereby abated, but the court in which any action or suit is depending may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same." Under a similar provision in 6 Geo. IV. c. 16, s. 67, it was held that a second assignee, who continues, by suggestion on the record, a suit commenced by his predecessor, may recover a penalty as well as the first assignee (*Bates v. Sturgess*, 7 Bing. 583). Before the creditors' assignees are appointed the official assignee is entitled to the estate and effects of the bankrupt (12 & 13 Vict. c. 106, s. 39; see *Page v. Bauer*, 4 B. & A. 345). The assignees under a fiat against a company may maintain actions for recovery of debts due to the company against any person, whether a member or not (7 & 8 Vict. c. 111, s. 8).

By 12 & 13 Vict. c. 106, s. 268, it is enacted, "that if any petitioning creditor shall after the bankruptcy receive any money, satisfaction, or security for his debt or any part thereof, whereby such petitioning creditor may receive more in the pound in respect of his debts than the other creditors, such petitioning creditor shall forfeit his whole debt, and shall also repay or deliver up such money, satisfaction, or security, or the full value thereof, to the assignee or assignees of such bankrupt, for the benefit of the creditors of the bankrupt."

Sect. 270. "That if any creditor of a bankrupt shall obtain any sum of money, or any goods, chattels, or security for money, from any person, as an inducement for forbearing to oppose or for consenting to the allowance of the certificate of such bankrupt, or to *forbear to petition for the [*326] recall of the same, every such creditor so offending shall forfeit and lose for every such offence the treble value or amount of such money, goods, chattels, or security so obtained, as the case may be."

Sect. 275. "That all sums of money forfeited under this act, or by virtue of any conviction for perjury committed in any oath, affirmation, or declaration thereby directed or authorized, may be sued for by the assignees of the estate and effects of any bankrupt connected therewith or interested therein, in any of her Majesty's superior courts of record, and the money so recovered (the charges of suit being deducted) shall be paid over to the Bank of England, to the credit of the accountant in bankruptcy, to the account intituled 'The Chief Registrar's Account.'"

Deft. being a creditor of C., struck a docket against him, and issued a fiat, but did not file it (under stat. 2 & 3 Will. IV. c. 114, s. 5), nor otherwise proceed in the bankruptcy. Afterwards he was requested by C. to sign a composition deed, together with C.'s other creditors, accepting 10s. in the pound. He refused to do this, except on receiving security for his whole debt, which C. gave him by promissory notes, and deft. thereupon signed the deed. C. afterwards committed an act of bankruptcy, and a fiat was prosecuted, under which plts. were assignees. Before this act of bankruptcy, deft. received money on one of the notes which had fallen due. Plts. brought money had and received for the amount. Held, that they could not recover; for that although the case was within the stat. 6 Geo. IV. c. 16, s. 8 (see now 12 & 13 Vict. c. 106, ss. 202, 270), and deft.'s debt was forfeited, the money was to be paid only to persons appointed by commissioners under some commission founded on the deft.'s docket, or under some later commission, and no appointment for this purpose had been made, and that as C. himself could not recover the money, being a party to the transaction, the plt.

who succeeded only to C.'s rights could not (*Belcher v. Sambourne*, 6 Q. B. 404).

As to the right of the assignees to affirm a contract made by the bankrupt, after his bankruptcy, or to sue in tort, see *King v. Leith*, 2 T. R. 141; *Clark v. Gilbert*, 2 Bli. N. S. 343; *Gye v. Hitchcock*, 4 Ad. & E. 84; *post*, pp. 231-2).

Actions by Assignees.] In 1840, A. being lessee of a warehouse and cellar, under a demise from B., and also lessee, under C., of other adjoining property, comprising *inter alia*, a vault, D. became tenant from year to year to A. of the warehouse and cellar and vault at an annual rent of 185*l.*, made up of 140*l.* for the warehouse and cellar, and 45*l.* for the vault. On the 27th October, 1845, A. became bankrupt, 92*l.* 10*s.* being at that time due as rent from D. to the bankrupt. The assignees, upon being appointed, elected to take the property held under B., and on 26th February, 1846, elected not to take the property held under C. At Christmas, 1845, rent to the amount of 114*l.* 7*s.* 6*d.* became due from A. to C., for which amount, on the 19th February, 1846, C. distrained upon the goods in the vault held by D., who, to relieve himself of that distress, paid that sum to C. An action having subsequently been brought by the assignees of A. against D. to recover the above sum, 92*l.* 10*s.* and 35*l.* for a quarter's rent, due at Christmas, for the warehouse and cellar: held, that the plts. could well sue for the quarter's rent due since the bankruptcy in their representative character as assignees (*Graham v. Allsopp*, 3 Exch. 186; 18 Law J. 85, Exch.).

B., the foreman of C. and D. in the business of typefounders, entered into a written contract to serve them as such during the term of seven years; and C. and D. thereby covenanted and agreed to employ B. as their foreman for seven years, and pay him 3*l.* 3*s.* a week; and it was thereby agreed, that, upon breach of the covenants therein, the party so failing should pay to the other of them the sum of 500*l.*, by way or in the nature of specific damages. C. and D. dismissed B. from their service before the expiration of the seven years, and subsequently to such dismissal B. became bankrupt: held, affirming the decision of the Exchequer Chamber, which reversed that of the Court of Exchequer, that, the right of action in respect of the damages or penalty having accrued before the bankruptcy of B., and the damages relating rather to the property than to the person, feelings, or character, &c. of B., the right of action in respect of the damages passed to the assignees in bankruptcy of B. (*Beckham v. Drake*, 13 Jur. 921, H. L.).

In an action of trover by the assignees of a bankrupt against a sheriff, for seizing and selling the bankrupt's goods, to which the deft. pleaded "Not possessed," it appeared that the bankrupt had told the officers of the deft. that the goods were the goods of B., but he afterwards contradicted that statement and said they belonged to C. The jury found that the goods were the goods of the bankrupt, but that he had represented them to the sheriff's officers as the goods of B., so as to induce them by that false representation to seize them: held, that this finding was not sufficient to estop the bankrupt or his assignees from complaining of the seizure of the goods as being their own (*Freeman v. Cook*, 12 Jur. 777, Ex.; 2 Ex. 654).

The servant of a bankrupt, without authority, sold the bankrupt's goods to the deft., who had notice of the act of bankruptcy. The assignees delivered to the deft. a bill of parcels as for goods sold and delivered by the bankrupt, and made two several demands for payment, which the deft. refused, and he also refused to deliver up the goods when they were subsequently demanded: held, that the demand for payment amounted only to a

qualified offer by the assignees to adopt the sale, and that they were not thereby precluded from suing in trover (*Valpy v. Sanders*, 12 Jur. 484; 17 Law J., 249, C. P.; 5 Q. B. 887).

Assumpsit, when it lies.] *Assumpsit* lies by the assignees against any person who has received money which ought to be paid to them, on the ground of an implied privity of contract; as the party receiving the money is supposed in justice to have received the same for the use of the assignees, and to have *promised* to pay them (*Kitchen v. Campbell*, 3 Wils. 307). Thus, they may maintain an action for money had and received against a banker, for money received by him, and paid over to a creditor of the bankrupt, with knowledge of the bankruptcy; but, after having recovered it from the banker, they cannot resort to the creditor; for they cannot affirm and disaffirm the same transaction (*Vernon v. Hankey*, 2 T. R. 113; *Vernon v. Anson*, ib. 287). So, an action for money had and received lies where a creditor has levied his debt by *fi. fa.* subsequently to the fiat (*Hitchin v. Campbell*, 2 Bla. 827; S. C. 3 Wils. 340; and 2 & 3 Vict. c. 29, s. 1; and 12 & 13 Vict. c. 106); or has received it by receipt of the rent and profits and sale of the bankrupt's estate, with the assent of the assignees under an invalid commission of bankruptcy; as where the deft., an attorney, had a lien on a lease of premises belonging to the bankrupt as a security for his debt, and a commission having issued and an assignee having been appointed, the deft. acted as solicitor to the commission, and after notice of a petition to supersede *the fiat for want of a [*327] valid petitioning-creditor's debt, joined the assignee in an assignment of the lease to a purchaser, and out of the purchase-money was paid his debt by the assignee, and part of his bill as solicitor to the commission, and received by the authority of the assignee certain rents of the premises in further liquidation of his demands, and the commission having been subsequently superseded the plts. were appointed assignees under a new commission; they were held entitled to recover those several sums from the deft. as money had and received to their use, he having, by parting with the lease, been guilty of a conversion (which they might waive and sue in *assumpsit*), and the assent of the first assignee, not being assignee *de jure*, to the receipt of the rents, not making any difference in the law of the case (*Clark v. Gilbert*, 2 Sco. 320; 2 Bing. N. C. 343; 1 Hodges, 347). A trader having been arrested on a *ca. sa.* at the suit of the defts., who, as well as the sheriff's officer, had received a notice of a prior act of bankruptcy, paid over a portion of his assets to the officer in order to procure his discharge, and the officer paid over the amount to the defts. Held, that the bankrupt's assignees were entitled to recover back from the defts. the amount so paid, in an action for money had and received (*Follett v. Hope*, 17 Law J. 76, C. P.; 11 Jur. 974). So, if a person, after notice of an act of bankruptcy, claim a lien upon deeds of the bankrupt, and the latter, in order to get possession of them, pay the lien, if there be no just claim for lien at all the assignees may recover the sum paid as money had and received to the use of the bankrupt; but if there be any lien, they cannot question the amount unless there be a count for money had and received to their own use (*Noble v. Kersey*, 4 C. & P. 90). Nor can they sue in *assumpsit* at all if the deft., instead of receiving payment, get a mortgage from a debtor of the bankrupt's by his direction (*Ib. per Tenterden*).

The proceeds of a sale under an execution on a warrant of attorney, invalid by reason of a prior act of bankruptcy under the 6 Geo. IV. c. 16, s. 108 (see now 12 & 13 Vict. c. 106, ss. 135, 136), become vested in the assignees, subject, however, while in the hands of the sheriff, to writs of

execution in adverse actions lodged before fiat (*Goldschmid v. Hamlet*, 1 D. & L. 501).

Where the goods of a trader, after his act of bankruptcy, are taken in custody, or otherwise disposed of, with notice and without the consent of the assignees, they may waive the tort, and proceed in assumpsit for money had and received, if the goods have been sold (*Ib.*; *Boyter v. Dodsworth*, 6 T. R. 681). And it has been held to lie against a deft., who took the goods of the bankrupt in execution after an act of bankruptcy, and then took them under a bill of sale from the sheriff, although no money was actually paid (*Reed v. James*, 1 Stark. 134). It lies to recover money paid by a bankrupt by way of fraudulent preference (*Edmeads v. Newman*, 1 B. & C. 418; 2 D. & R. 568; see 12 & 13 Vict. c. 106, s. 133); and, also, against a person who, after the arrest, and before the expiration of the limited time of imprisonment, having *had notice* that a commission would be sued out against the trader, sold his goods, and paid him the produce (*King v. Leith*, 2 T. R. 141; 3 Camp. 168); or against a creditor residing in this country, who knew of the assignment of the bankrupt's estate (*Hunter v. Potts*, 4 T. R. 182; 2 H. Bl. 402); or if he knew of an act of bankruptcy committed, though before an assignment, and attached money belonging to the bankrupt abroad (*Sill v. Worswick*, 1 H. Bl. 665; *Harvey v. Liddeard*, 1 Stark. 128). Where a bankrupt, after an act of bankruptcy, contracted with a factor, to whom he had delivered goods for sale, and who had accepted a bill upon the strength of the goods, *to return the bill if he would return the goods, and he accordingly did return the bill, it was [*328] held they might adopt the contract, and recover against the factor for the non-delivery of the goods (*Butler v. Carver*, 2 Stark. 433). So they may sue in assumpsit for the breach of a contract made with the bankrupt before his bankruptcy, and only *in fieri* at the time of the bankruptcy; as where the bankrupt agreed to buy of the deft. 2000 quarters of linseed, free on board at Odessa, to be shipped on board the buyer's vessel, and to be paid for in cash on handing over the invoice and bills of lading to the buyer in London, and the buyer having become bankrupt the deft. refused to put the linseed on board, the assignees were held entitled to recover (*Gibson v. Carruthers*, 8 M. & W. 321); for though they may elect to reject or adopt such contracts *in fieri*, yet in no case can the party who contracted with the bankrupt set up the bankruptcy against them as a reason for not doing what he has agreed to do (per Rolfe, B., *ib.* 327).

On the other hand, assignees cannot maintain an action for money had and received against a landlord, for money paid to him for rent by the bankrupt, after an act of bankruptcy, from the landlord's being about to distrain for it; for he had a legal lien for it upon the goods in the bankrupt's possession at the time (*Stevenson v. Wood*, 5 Esp. 200). A distress for rent shall now be available for one year's rent only (12 & 13 Vict. c. 106, s. 129). Nor will an action lie for money had and received against a person who was merely the bearer of the money from a third person to the bankrupt, after the act of bankruptcy (*Coles v. Wright*, 4 Taunt. 198); nor will it lie for money received by a creditor in payment of a bill of exchange, indorsed to him by the bankrupt after an act of bankruptcy, though trover will (*Waller v. Drakeford*, 1 Stark. 481); nor will it lie for the amount of India stock transferred by a trader after an act of bankruptcy, as in that case no money has, in fact, been received (*Nightingale v. Devisme*, 5 Burr. 2589; Arch. B. L. 252); nor for the amount of a mortgage granted by a debtor of the bankrupt, by his directions, to the deft. in discharge of a lien on deeds which the bankrupt wishes to get into his possession (*Noble v. Kersey*, 4 C. & P. 90). And it has been held, that the assignees cannot

recover for money had and received to their use, against a person who has received money from a bankrupt before his bankruptcy, it having been paid in consideration of putting off a trial for perjury, as it was held that it ought not to be considered an illegal and corrupt agreement (*Harvey v. Morgan*, 2 Stark. 17). And, where A. deposited policies of insurance with his bankers, as security for a debt which B., a creditor, afterwards obtained, upon an undertaking to settle with the underwriters, and collect for them, and B. received the amount; but A. becoming bankrupt, and indebted to him in a larger sum, he refused to pay over the money, it was held, that A.'s assignee, even with the banker's consent, could not sue B. for the breach of the undertaking (*Chalmers v. Page*, 3 B. & Ad. 697).

It should be observed, that, by declaring in *assumpsit*, the assignees elect to affirm the contract of the bankrupt, which is made after his act of bankruptcy, such contract being only voidable or not at their election. In some cases, where the claim is not for a mere money demand, it may be more beneficial to them to disaffirm the contract, and sue for the tort (see *post*, p. 332). We have already seen, the assignees cannot affirm as well as disaffirm the same transaction (*ante*, p. 325).

Non-joinders in actions by Assignees.] In actions of contract by the assignees of bankrupts the non-joinder of another assignee is a ground of nonsuit, and the proper mode of taking advantage of the non-joinder is by a traverse that the plts. are assignees, and not by plea in abatement (*Jones v. Smith*, 1 Exch. 831; 5 D. & L. 728; 18 Law J. 145, Exch.).

Interest.] Where a party is indebted to a trader in a sum bearing interest, the assignees may recover interest accruing subsequently to the [*329] *bankruptcy, although there be no express reservation of interest (*Pott v. Beavan*, 6 M. & G. 604).

Debt may be maintained by the assignees of a bankrupt, and they may sue either in the *debet* or *detinet*, as the whole of the bankrupt's property is vested in them (*Winter v. Kretchman*, 2 T. R. 46). So they may sue in debt on 9 Anne, c. 14, against the winner of money lost at play by the bankrupt (*Brandon v. Pate*, 2 H. Bl. 308; *Carter v. Abbott*, 1 B. & C. 444; 2 D. & R. 575); or for the penalty against a person swearing to a false oath (*Holmes v. Walsh*, 7 T. R. 458).

Covenant may also be supported by assignees; and, as they succeed to all the rights of the bankrupt, they are entitled to the benefit of any estoppel, in the same manner as the bankrupt would have been (*Parker v. Manning*, 7 T. R. 537; *ante*; see 12 & 13 Vict. c. 106, s. 144, as to their right to take conveyances, leases, &c.).

Where the bankrupt and the defts. were members of a building society, and the bankrupt agreed to demise land to the defts. as trustees of the society, and they covenanted to pay him rent, and by a separate deed the bankrupt and the other members of the society covenanted that for the better indemnifying the trustees, each of the members would, when called upon at their general quarterly meetings, do all such acts as might be necessary for indemnifying the trustees for any loss they might sustain in the execution of the trusts, it was held that the assignees of the bankrupt, though he was a member of the society, might sue the defts. on the covenant for the payment of rent (*Bedford v. Brutton*, 1 Bing. N. C. 399). But where a lease of fulling mills, after reciting that the machinery had been valued, contained a covenant that, at the termination of the term, another valuation of the ma-

chinery should be made, and, if valued at more, the difference should be paid by the lessor to the lessee, and the lessee having become bankrupt, and the assignees having refused the lease, the machinery was valued at a sum exceeding the first valuation, and delivered up to the lessor, and he refused to pay the difference of value, the assignees could not have covenant, as the covenant in the lease had been determined by the bankruptcy, and the refusal of the lease by the assignees; but that the proper remedy was trover, they having demanded back the machinery (*Fairburn v. Eastwood*, 6 M. & W. 679).

Trover lies to recover goods which the deft. has converted to his own use, whether before or after the bankruptcy, or which remain *in specie* (*Bloxam v. Hubbard*, 5 East, 407; *Cumming v. Roebuck*, Holt's Ca. 172). Formerly trover might be supported against a sheriff who levied and sold the bankrupt's goods after an act of bankruptcy; and though before the commission, or any notice (*Cooper v. Chitty*, 2 Burr. 20; S. C. 1 Bla. 65; 4 M. & S. 260; *Smith v. Mills*, 1 T. R. 475; *Garland v. Carlisle*, 10 Bing. 452; 2 Car. & M. 31; confirmed in the House of Lords, 3 M. & W. 152); or before fiat (*Balme v. Hutton*, 2 Moo. & Sc. 1; 9 Bing. 471; 2 Crompt. & J. 19); or though he only received the goods (*Wyatt v. Blades*, 3 Camp. 395); or though the assignees had it in their power, from peculiar circumstances, to retake possession of them (*Vaughan v. Wilkins*, 1 B. & Ad. 370); or though he paid over the proceeds to the execution creditor before commission or notice of an act of bankruptcy (*Potter v. Starkie*, cited 4 M. & S. 260). So, trover lay against the party suing out the execution, if he were a party to the conversion, as if he accompanied the officer in levying, even although the produce of the goods remained in the hands of the *sheriff, or his [*330] broker (*Menham v. Edmonson*, 1 B. & P. 369); and so if he received the produce from the sheriff, upon giving a bond of indemnity (*Rush v. Baker*, 2 Stra. 996). But the 6 Geo. IV. c. 16, s. 81, protected all attachments and executions, executed *bona fide* two calendar months before the fiat issued, without notice of an act of bankruptcy, and the 2 & 3 Vict. c. 29, s. 1, protected all executed and levied in like manner "before the date and issuing of the fiat:" and the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, now enacts, sect. 133:—"That all payments really and *bona fide* made by any bankrupt, or by any person on this behalf, before date of the fiat or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt, and all payments really and *bona fide* made to any bankrupt before the date of the fiat or the filing of such petition, and all conveyances by any bankrupt *bona fide* made and executed before the date of the fiat or the filing of such petition, and all contracts, dealings, and transactions by and with any bankrupt really and *bona fide* made and entered into before the date of the fiat or the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt *bona fide* executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt *bona fide* executed and levied by seizure and sale before the date of the fiat or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with or paying to or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such payment, conveyance, contract, dealing, or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed: Provided, also, that nothing herein contained shall be deemed or taken to give validity to any payment or to any delivery or transfer of any goods or chattels made

by any bankrupt, being a fraudulent preference of any creditor of such bankrupt, or to any conveyance or equitable mortgage made or given by any bankrupt, by way of fraudulent preference of any creditor of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or *cognovit actionem* or judge's order obtained by consent given by any bankrupt by way of fraudulent preference."

Sect. 134. "That no purchase from any bankrupt *bona fide* and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless a fiat or petition for adjudication of bankruptcy shall have been sued out or filed within twelve months after such act of bankruptcy."

Sect 135. "That every warrant of attorney to confess judgment in any personal action, given by any bankrupt after the commencement of this act (11 Oct. 1749), and within two months of the filing of a petition for adjudication of bankruptcy by or against such bankrupt, and being for or in respect of (wholly or in part) an antecedent debt or money demand, and every *cognovit actionem* or consent to a judge's order for judgment given by any bankrupt, at any time after the commencement of this act, and within two months of the filing of any such petition in any action commenced by collusion with the bankrupt, and not adversely, or purporting to have been given in an action, but having been in fact given before the commencement of any action against the bankrupt, such bankrupt being unable to meet his engagements at the time *of giving such warrant of attorney, *cognovit actionem*, or consent (as the case may be) shall be deemed and taken to be null and void, whether the same shall have been given by such bankrupt in contemplation of bankruptcy or not."

Sect. 136. "And be it enacted, that if after the commencement of this act any warrant of attorney to confess judgment in any personal action, or any *cognovit actionem* in any personal action, shall have been given by any such trader, and such warrant of attorney or *cognovit actionem*, or a true copy thereof, shall not have been filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench within twenty-one days next after the execution thereof, in manner and form provided by an act passed in the third year of the reign of his late majesty King George the Fourth (c. 39), intituled 'An Act for preventing Frauds upon Creditors by secret warrants of Attorney to confess Judgment,' every such warrant of attorney and *cognovit actionem* shall be deemed fraudulent, null, and void, to all intents and purposes whatever; and if any such warrant of attorney or *cognovit actionem* which shall be so filed as aforesaid shall have been given subject to any defeazance or condition such defeazance or condition shall be written on the same paper or parchment on which such warrant of attorney or *cognovit actionem* shall be written, before the time when the same or a copy thereof respectively shall be filed, otherwise such warrant of attorney or *cognovit actionem* shall be null and void to all intents and purposes whatever."

Sect. 137. "And be it enacted, that every judge's order made by consent given after the commencement of this act by any such trader defendant in any personal action, and whereby the plaintiff in such action shall be authorized forthwith after the making of such order, or at any future time, to sign or enter up judgment, or to issue or take out execution in such action, and whether such order shall be made subject to any defeazance or condition or not, in case the action in which such order shall be made shall be in the Court of Queen's Bench, or in case the action wherein the same is made shall be in any other court, a true copy of such order shall, together with an affidavit of the time of such consent being given, and a description of

the residence and occupation of the defendant, be filed with the officer acting as clerk of the docquets and judgments in the said Court of Queen's Bench within twenty-one days after the making of such order, in like manner as a warrant of attorney in any personal action, and a cognovit actionem given by any defendant in any personal action, or copies thereof and affidavits of the execution thereof respectively, may be filed with the said clerk within the space of twenty-one days after such warrant of attorney or cognovit actionem shall have been executed, otherwise such judge's order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be null and void to all intents and purposes whatever; and the provisions respectively contained in the said act passed in the third year of the reign of his late majesty King George the Fourth (c. 39), intituled, 'An Act for preventing Frauds upon Creditors by secret Warrants of Attorney to confess Judgment,' and in an act passed in the parliament holden in the sixth and seventh years of the reign of her majesty (c. 66), intituled 'An Act to enlarge the Provisions of an Act for preventing Frauds upon Creditors by secret Warrants of Attorney to confess Judgment,' for liberty to file warrants of attorney and cognovits actionem, or copies thereof, with the clerk of the docquets and judgments, and for the said clerk to make certain entries and *search in relation thereto, [*332] and for entering satisfaction thereon and for fees for search and filing and taking office copies, shall extend and be applicable to every such judge's order, in like manner as to warrants of attorney and cognovits actionem mentioned in the said acts."

The statute 2 & 3 Vict. c. 29 protected the sheriff and execution creditor only where the execution is executed and levied with *bona fides* on their part (Belcher v. Magnay, 1 D. & L. 441), and without notice; and, therefore, where a sheriff having seized under a *fi. fa.* issued after the commission of an act of bankruptcy on a judgment founded on a warrant of attorney, and sold after notice of the act of bankruptcy and fiat, he was held liable in trover (Cheston v. Gibbs, 1 D. & L. 420; 12 M. & W. 420). Trover lies for goods sold upon an invalid execution, subsequent to a sale upon a valid one (Stead v. Gascoigne, 8 Taunt. 527); or for goods sold without a proper authority, as where an equitable mortgagee, with the concurrence of the assignee under a fiat, which was afterwards annulled, sold the pledge, and retained the price in satisfaction of his claim, he was liable in trover to an assignee under a new fiat, as the mere deposit did not enable him to sell; and the assignee under the fiat which was annulled, was to be considered as a stranger to the estate, and therefore could not authorize the sale (Clark v. Gilbert, 2 Bing. N. C. 343; 2 Sco. 520); or for goods sold by the bankrupt after an act of bankruptcy, although the assignees may not have demanded payment of them; for the very taking of goods from one who has no right to dispose of them, is of itself a conversion (Hurst v. Gwennap, 2 Stark, 336; and see B. N. P. 41); or for goods sold by a third person for the bankrupt after an act of bankruptcy (King v. Leith, 2 T. R. 141; Wilson v. Poulter, 2 Stra. 859; or for goods taken during a bankrupt's examination, and converted into money, even though for the necessary subsistence of the bankrupt and his family (Thompson v. Counsell, 1 T. R. 157); or for goods collusively sold to a creditor before an act of bankruptcy, but in contemplation of bankruptcy, and with a view of giving him a fraudulent preference; there must, however, be either a demand and refusal, or an actual conversion, to enable the assignees to maintain the action (Nixon v. Jenkins, 2 H. Bl. 135); and where bills were so delivered to a creditor, the receipt of the amount of them was held not to be a conversion, and the plt. could not recover without proving a demand and refusal before the bills be-

came due (*Jones v. Foot*, 4 Man. & Ry. 547). A trader assigned his effects to a trustee, thereby committing an act of bankruptcy; afterwards a creditor, ignorant of the act of bankruptcy, took in execution the trader's goods comprised in the assignment. The trustee paid off the execution, and took an assignment of the goods from the sheriff. A fiat in bankruptcy having afterwards issued against the trader; held, that although the levy made by the execution creditor might have been protected by stat. 6 Geo. IV. c. 16, s. 81, or 2 & 3 Vict. c. 29, the party who had become assignee of the sheriff with knowledge of the act of bankruptcy, could not avail himself of that protection, and that the assignee in the bankruptcy might bring trover against him for the goods (*Fawcett v. Fearne*, 6 Q. B. 20).

Trover lies against a servant receiving goods for his master, after an act of bankruptcy, committed by the owner, although he has accounted with his master for the produce (*Perkins v. Smith*, Say. 40; 1 Ld. Raym. 724); or transmitted the goods to America to him (*Stephens v. Elwell*, 4 M. & S.

259); or against the servant of a bankrupt, who, acting under a [*333] general authority only, sells or *delivers his masters goods (*Coles v. Wright*, 4 Taunt. 198); but not, if he sell or deliver them under express orders from his master (*Pearson v. Graham*, 2 Nev. & P. 636; 6 Ad. & E. 899).

Where the bankrupt before his bankruptcy has deposited with the defts. a life-policy of insurance, as security for money then and previously advanced by them to him, and the lien still remains undischarged, the assignees cannot recover the policy in trover as being within the order and disposition of the bankrupt (*Gibson v. Overbury*, 7 M. & W. 555).

As to damages, see "TROVER."

Where Trover does not lie and Assumpsit does.] Where a bankrupt, after an act of bankruptcy, gives a creditor a check on his banker, or a bill on a debtor, or any other security, *and the money is paid*, the assignees should sue in assumpsit for money had and received (*Thomason v. Frere*, 10 East, 418), and not in trover, as in the latter form of action they can only recover the value of the paper, and must be nonsuited if that is of no value (*Matthew v. Sherwell*, 2 Taunt. 439); or if it belonged to the creditor, and was merely signed by the bankrupt (*Walker v. Laing*, 7 Taunt. 568; 1 Moo. 281). And so, where a bankrupt assigned a policy of assurance to the deft., but the company, upon it being afterwards discovered to be invalid, paid to the deft. half the sum insured, as a gratuity on his giving up the policy, it was decided that the value of the parchment only, and not the sum gratuitously paid, was recoverable in trover (*Wills v. Wells*, 8 Taunt. 264; S. C. 2 Moo. 247).

But, if the money be not paid, assumpsit will not lie (*Walker v. Laing*, *supra*; and see Moo. 286 n.). And where the bankrupt, after an act of bankruptcy in order to procure his discharge from arrest at the suit of D., drew and indorsed to D. a bill of exchange, which M. accepted in expectation of receiving goods of the bankrupt into his hands, which he was authorized by the bankrupt to sell, and afterwards, on receiving and selling them, paid D. the amount of the bill, it was held that the assignees could not sue D. for it as money had and received to their use, for (per Ld. Ellenborough, C. J.) "Smith" (the drawer of the bill) "at this time being a bankrupt, could exercise no disposing power over the goods in the hands of Martin: they were the property of the assignees, and the assignees may, if they think proper, bring an action of trover for the conversion of these goods, or they may ratify the act by bringing an action for goods sold and delivered; but they cannot

consider the property as changed by the act of a party who held them under no contract or authority" *Waller v. Drakeford*, 1 Stark. R. 481).

If the assignees have once affirmed the transaction as a contract, they cannot afterwards disaffirm and bring trover upon it as for a tort, as where a person wrongfully continues the bankrupt's business, though for the benefit of his creditors and the assignees accept, they cannot sue him for the conversion of the goods (*Brewer v. Sparrow*, 7 B. & C. 310; 1 M. & R. 2).

Where the servant of a bankrupt, without authority, sold the bankrupt's goods to the debt., who had notice of the act of bankruptcy; the assignees delivered to the debt. a bill of parcels as for goods sold and delivered by the bankrupt, and made two several demands for payment, which the debt. refused, and he also refused to deliver up the goods when they were subsequently demanded. Held, that the demand for payment amounted only to a qualified offer by the assignees to adopt the sale, and that they were not *thereby precluded from suing in trover (*Valpy v. Sanders*, 12 Jur. 483, C. P.)

Trover, when more beneficial.] It is generally more advisable for the assignees to proceed in trover; for, if the goods have been sold, "the plt. may recover in trover the full value of the goods, deducting the ordinary expenses of a sale, though the sale may not actually have produced more than half their worth; but, in assumpsit, the assignees can only recover what the party really received" (per Buller, J., *King v. Leith*, 2 T. R. 144). But, if the assignees might have prevented the sale, but did not, and did not make any objection to the time and manner of it, or give notice not to sell, a fair and proper measure of the value to them, is the amount produced on a fair sale; for as it is their duty to sell at all events, they are in a different position from an owner who is under no obligation to sell, as in *Glasspoole v. Young*, 9 B. & C. 696; and to whom a "thing may be worth more than he could dispose of it for to any one else" (*Whitmore v. Blake*, 8 Jur. 1103, E.).

Another reason for suing in trover, in preference to assumpsit, is that, by proceeding in trover, they are not compelled to affirm the contract, as in assumpsit, "and having once treated the transaction as a contract of sale, they must pursue it through all its consequences, one of which is, that the party buying may set-off another debt owing to him" (*Smith v. Hodson*, 4 T. R. 217). It is also advisable, in many cases, to adopt the action of trover in preference to an action *ex contractu*, as, in trover, the debt. cannot set-off any debt due to him by the bankrupt (*Wilkins v. Carmichael*, 1 Doug. 101; *Raphael v. Birdwood*, 5 Pri. 604); *sed quære*, if the form of action make any difference in this latter respect (see *Key v. Flint*, 1 Moo. 451; S. C. 8 Taunt. 21).

As to when trover should be brought and not covenant, see *ante*, "COVENANT."

Ejectment.] Assignees may support an action of ejectment, but they must not lay the demise before the date of their appointment; as this has only the same effect as the bargain and sale had formerly, which vested the title in them only from its date and execution by the commissioners, and not before (*Doe d. Esdale v. Mitchell*, 2 M. & S. 446).

A trader being seised of an estate for life, with a power of appointment, remainder in default of appointment to himself in fee, after having committed an act of bankruptcy, made an appointment to J. S.; it was holden that all his interest having passed to his assignees, under a bargain and sale executed by the commissioners, the appointment was void, and therefore that the as-

signee might maintain ejectment (*Doe d. Coleman v. Britain*, 2 B. & A. 93; see *Badham v. Mee*, 7 Bing. 695; *Jones v. Winwood*, 3 M. & W. 653; *Hole v. Escott*, 2 Keen, 444; see "EJECTMENT").

Trespass will lie at the suit of the assignees for an injury to, or a motion of the property, if they have obtained actual possession of it, but they cannot support it before they have obtained such possession (*Clark v. Calvert*, 3 Moo. 95; 1 Glyn & J. 147). It will not lie against a sheriff for taking the bankrupt's goods in execution, after the act of bankruptcy, and before the issuing of the commission; the assignees, in such case, should bring trover (*Smith v. Mills*, 1 T. R. 475; *Burr*. 20).

Pleas.

Pleas to Actions by Assignees.] The right of action is vested in [*335] *all the assignees jointly, and the non-joinder of one of them was considered a ground of nonsuit (*Snelgrove v. Hunt*, 1 Ch. Rep. 71; but see observations thereon in *Alivon v. Furnival*, 1 C. M. & R. 285, 296; *quare*, whether it should not form the subject of plea in abatement; see 1 Ch. Pl. 27; *Hollands v. Phillips*, 10 Ad. & E. 49. *Quære*, whether the plea of not guilty, in trover, does not put in issue the wrongful nature of the conversion, per Parke, B., *Kynaston v. Crouch*, 14 L. J. 324, Ex.; see *Sancliffe v. Hardwick*, 2 C. M. & R. 1). If the cause of action accrued before the act of bankruptcy, the deft. may set up every defence he could have done to the action by the trader if he had not become bankrupt (*Dobson v. Lockhart*, 5 T. R. 132); and, on the other hand, the assignees may claim the benefit of any estoppel, which would have operated between the deft. and the bankrupt, as in an action for rent, to prevent him from questioning their title as lessors (*Parker v. Manning*, 7 T. R. 537). Where A. having given a trader a bond to secure an annuity, before any payment became due A. lent the trader a sum of money, and it was agreed that A. should retain the payments of the annuity, until the sum lent was discharged; in an action by the assignees of the trader (who had become bankrupt), against A., for arrears of the annuity, it was holden that this agreement to retain was a good defence to the action, even as to payments of the annuity accruing due after the bankruptcy, as it was equivalent to a plea of *solvit ad diem* (*Sturdy v. Arnaud*, 3 T. R. 599).

The deft. may plead the Statute of Limitations (*post*); which begins to run from the accruing of the original cause of action (*Gray v. Mendez*, 1 Stro. 556).

It has been held, that to *indebitatus assumpsit* for the value of goods, he may plead in bar a judgment for him in trover for the same goods (*Kitchen v. Campbell*, 3 Wils. 304; Bla. R. 827); but a judgment of nonsuit for him in trover would not be a good plea to an action for money had and received, on the same ground of action (*Walker v. Laing*, 1 Moo. 286, n.; *Eden*. 314).

He cannot plead a release executed by the bankrupt after an act of bankruptcy, though two months before the issuing of the fiat, if the releasee knew at the time of the bankrupt's insolvency (*Mavor v. Pyme*, 2 Bing. 285).

Set-off] He may plead a set-off. This defence is now raised distinctly on the pleadings, and is not as before the new pleading rules, admissible under the general issue (*Graham v. Partridge*, 1 M. & W. 395; and see *post*, "SET-OFF," generally). Care must be taken that the plea be pleaded only to those counts of the declaration to which a set-off is applicable; where

assignees sue for money had and received to their use *as assignees*, or on account stated with them in that character, they may recover in that form money received by the deft. by way of fraudulent preference before the bankruptcy; in such case therefore a set-off of money due from the bankrupt cannot be pleaded (*Groom v. Mealy*, 2 Bing. N. C. 138); and they may recover money received *after* the bankruptcy, so that in such case a set-off for money due from the bankrupt would be equally bad (*Wood v. Smith*, 4 M. & W. 522).

By s. 171 of 12 & 13 Vict. c. 106, "where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the court shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt, before the credit given *to, or the debt contracted by him, and what [*336] shall appear due on either, on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand thereby made proveable against the estate of the bankrupt may also be set-off in manner aforesaid, against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."

This section, which is a re-enactment of Geo. IV. c. 16, s. 50, consolidated the provisions of the 5 Geo. II. c. 30, s. 28, and the 46 Geo. III. c. 135, s. 3, and also made these alterations:—1. The accounts may now be taken down to the date of the fiat, and the credit need not be given two months previous, as by 46 Geo. III. c. 135 (*Southwood v. Taylor*, 1 B. & A. 471; *Kinder v. Butterworth*, 6 B. & C. 42). 2. The party is to be affected only by notice of an act of bankruptcy, and not by notice that the bankrupt was insolvent, or had stopped payment. 3. Every debt or demand *which may be proved*, may also be set-off against the bankrupt's estate; therefore, cases where the debt was contingent, which were formerly held not to be within the provision of the acts as to mutual credit (*Ex parte Groome*, 1 Atk. 115; *Hancock v. Entwistle*, 3 T. R. 435; 5 T. R. 133; *Ex parte Whittaker*, 1 Rose, 301) may now be proved under the 56th section, and therefore set off. Debts not payable at the time of bankruptcy may be proved (12 & 13 Vict. c. 106, s. 172). So may debts payable by sureties and persons liable for the debts of any bankrupt (*Ib.* 173). So obligees in bottomry, and assured, are allowed to prove in respect of policies; and persons effecting insurance (s. 174); annuity creditors (s. 175); debts contingent (s. 177).

In actions by assignees of bankrupt companies (under 7 & 8 Vict. c. 10, s. 9) the deft. cannot set off any claim he may have, as a member, in respect of his share in the joint stock or any dividend, interest, profit or bonus in respect of it. *Semble*, that the commissioner has no jurisdiction to value the annuity for the purpose of its value being set off in action (*Ex parte Law*, 1 De Gex, 378; see 12 & 13 Vict. c. 106, s. 175).

B., a tanner, committed a secret act of bankruptcy by leaving his house, but, directed the deft., his foreman, to carry on his business in his absence. The deft. did so, and received several sums of money for debts due to the bankrupt, and for goods sold after the act of bankruptcy. He also made disbursements by payment of some of the bankrupt's debts, of house-keeping expenses, and for wages to himself. The payments were made *bona fide* and without notice of the act of bankruptcy. The deft. pleaded never indebted, and a set off. Held, that the deft. was liable to the assignees of the bankrupt in an action for money had and received for all the money received by him after the act of bankruptcy, and was not entitled to set off any of the payments made by him. *Semble*, that the deft. under 6 Geo. IV. c. 16, s. 82;

or 2 & 3 Vict. c. 29; 12 & 13 Vict. c. 106, might have protected himself by a special plea as to part of the payments and disbursement made by him without notice of an act of bankruptcy (*Kynaston v. Crouch*, 14 Law J., 324, Ex.; 14 M. & W. 266).

In the year 1840, A. being the lessee of a warehouse and cellar under a demise from B., and being also the lessee under C. of property comprising, *inter alia*, a vault, D. became tenant, from year to year, to A. of the warehouse and cellar and vault, under an annual rent of 185*l.*, made up of 140*l.* for the warehouse and cellar, and 45*l.* for the vault. On the 27th October, 1845, A. became bankrupt, 92*l.* 10*s.* being at that time due as rent from D. to A. The assignees, upon being appointed, elected to take the property held under B., and on the 26th February, 1846, elected not to take the property held under C. At Christmas, 1845, rent to the amount of 114*l.* 7*s.* 6*d.* became due from A. to C., for which amount, on the 19th February, 1846, C. distrained upon the goods in the vault held by D., who, to relieve himself from this distress, paid that sum to C. An action having been subsequently brought by the assignees of A. against D. to recover the above sum of 92*l.* 10*s.*, and also 35*l.*, being one quarter's rent of the warehouse and cellar due at Christmas, 1845: held, that D. was not entitled, in such action, to avail himself of the payment of 114*l.* 7*s.* 6*d.* made by him to C. (*Graham v. Allsopp*, 3 Exch. 186; 18 Law J. 85, Exch.).

Mutual Credit.] If the cause of action accrued after the act of bankruptcy, but before fiat, plead mutual credit. As to distinction between mutual credit and set-off, see *Forster v. Wilson*, 12 M. & W. 302. By the new rules, mutual credit must be specially pleaded. The term *mutual credit* has [*337] always received a very liberal construction, being more extensive than that of mutual debts, and has not been confined to mere pecuniary demands (*Ex parte Deeze*, 1 Atk. 228). "A mutual credit may be said to exist where there is a debt, or something that will end in a debt" (per Taunton, J., *Rose v. Sims*, 1 B. & Ad. 526). In *Rose v. Hart*, 8 Taunt. 499, it was held, that it must be such as will in its nature terminate in a debt; "as, where a debt is due from one party, and credit given by him to the other, for a sum of money, payable at a future day, and which will then become a debt, or where there is a debt on one side, and a delivery of property, with directions to turn it into money, on the other, in such case, the credit given by the delivery of the property must, in its nature, terminate in a debt; the balance will be taken on the two debts, and the words of the statute will, in all respects, be complied with; but, where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and, therefore, it is not a credit within the meaning of the statute (per Gibb, C. J., 8 Taunt. 506). But (per Tindal, C. J., *Gibson v. Bell*, 1 Bing. N. C. 743), this construction is too narrow, and it would seem to be enough if the credit was such as would be likely to terminate in "a demand which, though unliquidated at the moment, was capable of being reduced to a certainty by a simple calculation" (1 Bing. N. C. 754-5); and, therefore, a debt may plead a set-off to a declaration, without stating special damage, for the breach of an agreement to accept a bill of exchange, in payment of the balance due for goods sold and delivered by the bankrupt to the debt. (*Gibson v. Bell*, *supra*; 1 Sco. 712). So he may, though the declaration sound in form in special damage, as by alleging that "the personal estate and effects" of the bankrupt, "applicable to the discharge of his just debts, were, by reason of the said non-acceptance and non-payment, much diminished in value" (*Groom v. West*, 8 Ad. & E. 758; 1 P. & D. 19); and, per Denman, C. J.: "I doubt whether, in any instance, a mere pecuniary

loss from breach of contract can be deemed such a special damage as excludes a set-off" (lb.; 8 Ad. & E. 771). But deft. cannot plead a set-off to an action for not indorsing a bill according to agreement (*Rose v. Sims*, 1 B. & Ad. 526); for, "if the indorsement had been made, it would not in its nature necessarily have terminated in a *debt* from the deft., for the acceptor would have been the debtor, the indorser the guarantee only (per Tindal, C. J., 1 Bing. N. C. 755). A liability on a guarantee for contingent damages is not the subject of set-off (*Sampson v. Burton*, 2 B. & B. 89); and where, upon a dissolution of partnership, the deft., the retiring partner, was found indebted to the firm in 6800*l.*, supposing all the debts of the firm to be paid, and he agreed to pay the other partners this sum, they undertaking to pay the partnership debts; upon their becoming bankrupt his liability to pay those debts does not constitute a debt or mutual credit to be set off against the 6800*l.*, under this clause, nor a debt proveable under the 52d or 56th section (*Abbott v. Hicks*, 7 Sco. 715; 3 Jur. 871). A mutual credit may be created, though it were not the intention of the parties to trust each other, as, if a bill of exchange, accepted by A., get into the hands of B., and B. buy goods of A., there is mutual credit between A. and B., though A. do not know that the bill is in B.'s hands (*Hankey v. Smith*, 3 T. R. 507, n.). Where a party lodges money with a banker on two distinct accounts, and on the one there is a debt due to him, and on the other due from him, he may, on the bankruptcy of the banker, set off one debt against the other (*Ex parte Pearce*, 2 Mont. Dea. & De. 142). So, where a *creditor leaves a legacy to his debtor, a bankrupt, and dies without proving his debt, the executors [*338] of the testator may set off the dividends payable, upon proof of the debt (but not the debt unproved), against the legacy (*Cherry v. Boulton*, 2 Jur. 884; 4 Myl. & Cr. 442).

The plts. and defts. being, by agreement by and between them, jointly entitled to the benefits of a charter-party, the plts. assigned their interest in it, by indorsement, to D., their creditor, at the same time giving the defts. notice of such assignment, and afterwards became bankrupts. The assignees of the charter-party having sued upon it in the names of the plts., the defts. pleaded the bankruptcy of the plts., by which the right to their choses in action vested in their assignees. Replication setting forth the assignment by the plts. of the interest in the charter-party to D., and notice to the defts. of that assignment given by them before the bankruptcy of the plts., and that the plts. sued on account of D. Rejoinder (after terms to rejoin gratis and issuable had been imposed), setting up the previous agreement between the plts. and defts., that they should share the benefits of the charter-party, by way of mutual credit between the parties on which an account should be stated, and one demand set against the other, under 6 Geo. IV. c. 16, s. 50: held, not issuable, and bad in substance; for at the time of the bankruptcy no mutual credit existed between the plts. and defts. (*Boyd v. Mangels*, 16 M. & W. 337).

The right of set-off is incident to the right of lien at common law, limited, however, by the extent of the lien: thus, in the case of a *general* lien, as where a factor has a lien for his general balance, he will have a right to set off the whole of his debt due from the bankrupt; but one who has only a particular lien, as a miller or fuller, has no lien beyond the amount of his respective charges (*Cherry v. Boulton*, 2 Jur. 884; 4 Myl. & Cr. 442). So, if valuable paper be deposited as security for a particular loan, there cannot be a lien upon it for previous loans (*Young v. Bengal* (Bishop of), 1 Moo. 150; 1 Deac. 622); so if deposited for a specific purpose, and is detained against good faith (*Key v. Flint*, 8 Taunt. 21; 1 Swanst 30); or if it be remitted for application in a particular way, and not so applied and

detained against the request of the remitter (*Buchanan v. Findly*, 9 B. & C. 738; 4 M. & R. 593). So, also, where there is a lien; yet if a security payable at a distant day be taken, the lien and with it the right of set-off, is gone (*Hewison v. Guthrie*, 2 Bing. N. C. 755; 3 Sco. 298).

Where money is paid, by a party who is justified in paying it, to release property from a lien, as rent paid to a landlord, by an execution creditor, to release the goods from a distress levied while he was in possession, though his execution was afterwards defeated by a previous act of bankruptcy by the debtor, it is the subject of set-off against the assignees (*Ex parte Elliott*, 3 Deac. 343; 3 Mont. & Ayr. 664). So, where a mortgagor, disposes of his mortgaged premises at a certain sum, which is not to be paid till the mortgages are satisfied, and the purchaser becomes bankrupt, and his assignees pay the mortgages before any proof made in respect of the mortgagor's claim, they may set off the amount of the mortgage from the dividends on the debt to him from the bankrupt at the time of the bankruptcy (4 Sim. 267).

With Respect to the Nature of the Debt due by the Creditor to the Bankrupt's Estate.] It must have been due before the act of bankruptcy on which the commission is founded, though it is immaterial whether [*339] it were then payable or not. Thus, if the holder of an acceptance buy goods from the acceptor, and the acceptor becomes bankrupt, the purchaser may set off the acceptance against the price of the goods (*Hankey v. Smith*, 3 T. R. 507, n.) So, if a trader, before an act of bankruptcy, give a security to his creditor for his debt, and that security become available either before or after bankruptcy, the creditor may set off the amount derived from the security against the debt due to him (*Olive v. Smith*, 5 Taunt. 56). And, if a trader, previous to an act of bankruptcy, send goods to a factor for sale, and draw bills upon him, on account of them, the factor may set off the amount of the bills, when paid, against the proceeds of the goods, when sold by him (*Hammonds v. Barclay*, 2 East, 227). And, where a person sold goods to a trader to the amount of 430*l.* at six months credit, and afterwards sold him another parcel to the amount of 230*l.*, at the same credit, at the expiration of the credit for the first parcel the trader gave him bills upon other persons for 600*l.*, and he gave the trader an undertaking to repay him the balance, 170*l.*, upon the bills being paid; the bills were paid, and the trader had become bankrupt before the credit for the second parcel expired, yet it was holden that the vendor of the goods could set off this 170*l.* against the amount of the second parcel (*Atkinson v. Elliott*, 7 T. R. 378). But, where a banker had accepted bills for a trader, after he had committed an act of bankruptcy, but, before a commission sued out, and he lodged money in his hands for the payment of them, it was held, under 5 Geo. II. c. 30, that the assignees might recover this money from the banker, and that the banker was not entitled to set it off, although he had paid the bills (*Tamplin v. Diggins*, 2 Camp. 312; *Ridout v. Brough*, Cowp. 133. See 12 & 13 Vict. c. 106, s. 172; *ante*, p. 334). However, now, in such case, it must appear in evidence that debt. had notice of the act of bankruptcy. And, if a banker receives and pays money on account of a bankrupt, after notice of his bankruptcy, he cannot set off the payments against the receipts, as against the assignees (*Vernon v. Hanken*, 2 T. R. 113; 3 Bro. 313; *Raphael v. Birdwood*, 5 Pri. 604; *Ex parte Rhoades*, 15 Ves. 539). But he may set off what he has paid before notice of an act of bankruptcy, though after notice that the bankrupt had stopped payment (*Hawkins v. Whitten*, 10 B. & C. 217; 3 M. & R. 219), but not after notice of the commission of an act of bankruptcy (*Dixon v. Cass*, 1 B. &

Ad. 343); and notice of a docket having been struck is not notice of an act of bankruptcy (*Hocking v. Arraman*, D. & L. 434).

With respect to the Nature of the Debt due from the Bankrupt to the Creditor.] This must be such as might be proved under the commission. Where a country banker became a bankrupt, and, at the time of his bankruptcy, he and another country banker in the same town held notes and other securities of each other, to nearly the same amount, immediately after the private meeting, after the banker was declared bankrupt, and a provisional assignee was appointed, the provisional assignee presented the notes of the other banker for payment, partly at the bank in the country, and partly at the house of his agent in London, and was paid: it was holden that the banker whose notes were so paid might recover the amount in an action for money had and received against the provisional assignee (*Edmeads v. Newman*, 2 D. & R. 568; 1 B. & C. 418; and see *Ex parte Rawson*, Jac. 274). But the debtor of a bankrupt cannot set off a debt due from the bankrupt, if assigned to him after the bankruptcy. Therefore, it has been held under the old statutes, and would doubtless *on [*340] the present, that where the holder of a promissory note of a bankrupt indorsed it over after the issuing of a commission to a person who was a debtor to the bankrupt's estate, in order that he might set it off in his settlement with the assignees, he was not entitled to do so, even though he might have proved for the amount (*Marsh v. Chambers*, 2 Stra. 1234); and debt cannot set off cash notes of the bankrupt, payable to J. S., or bearer, without being prepared to show that they came to his hands before the bankruptcy, though they bear date before that time (*Dickson v. Evans*, 6 T. R. 57). And, even where such a transfer of a note of a bankrupt occurred before the issuing of the commission, but after both indorser and indorsee were apprised of his insolvency, it was holden that the indorsee could not set it off (*Ex parte Stone*, 1 Gly. & J. 191). And, where a country banker became bankrupt, and a debtor to his estate, after the issuing of the commission, purchased a quantity of his bank notes, at the rate of 10s. in the pound, it was holden that he could not set them off in his settlement with the assignees (*Hodgson v. Young*, E. 1814, cited, Arch. B. L. 70).

In cases of *a trust* between two parties, where the object of the trust was the sale of goods, and one party was indebted to the other on another account, it has been held to be a subject of set-off. Thus, where three persons joined in an adventure to buy and sell pearls, but the profit and loss were to be divided between the three, one of the parties becoming bankrupt, the party (who was to sell the pearls) was allowed to set off a debt due to him from the bankrupt, in an action commenced against him by the assignees, against the third share of the pearls belonging to the bankrupt, although the pearls were not sold, nor the produce received, until after the bankruptcy (*French v. Fenn*, C. B. L. 536). So, also, where a principal entrusted his broker with a policy of insurance, to receive an average loss under it, and then became a bankrupt, and the broker afterwards received the average loss, he was allowed to set off several sums of money due to him from the bankrupt, for premiums, &c., against the amount he received upon the policy after the bankruptcy, for the average loss was held to be a debt due before the bankruptcy, though not ascertained till afterwards (*Whitehead v. Vaughan*, C. B. L. 566; *Parker v. Carter*, ib. 567). "And the general principle is, that wherever each party has trusted the other with the possession of value, the assignees of either party (in case of his bankruptcy) can only withdraw that value from the other on the terms of paying what is due between them" (per Gibbs, C. J., *Olive v. Smith*, 5 Taunt. 56).

Where Credit not expired.] A sum of money payable at a future day after the bankruptcy, is a subject of set-off, within the meaning of the term mutual credit (*Ex parte Prescott*, 1 Atk. 230); as, where A. lent his acceptance to the bankrupts, which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, and A. paid the amount after the commission issued, and, before the assignee, sued for a debt owing by him to the bankrupt, it was holden that he was entitled to set off the amount of such payment under the words "mutual credit" (*Smith v. Hudson*, 4 T. R. 211; *Ex parte Boyle*, C. B. L. 542; *Ex parte Wugstaff*, 13 Ves. 65; *Russell v. Bell*, 8 M. & W. 277; 1 Dowl. N. S. 107). So, where the acceptor of a bill, which was afterwards indorsed to and negotiated by bankers, kept cash with them, and they became bankrupt before the bill became due, having in their hands sufficient of his money to pay the bill, he was held entitled to set off against the acceptance the amount due [*341] to him at the time of the *bankruptcy (*Bolland v. Nash*, 8 B. & C. 105; 2 M. & R. 189). So, where the bankrupt discounted a promissory note of the defts., and give in part payment his own acceptance, which was indorsed to the defts. and negotiated by him, and he, on its becoming due, after the issuing of the commission, paid the amount to the holder, he was entitled to set it off against the claim on the promissory note (*Collins v. Jones*, 10 B. & C. 777. See 12 & 13 Vict. c. 106, s. 172, *ante*, p. 334).

Debt must be in the same Right.] The debt, to be the subject of a set-off, must be due in the same right. Thus, the costs of a judgment, as in case of a nonsuit against plt. after he has become bankrupt, cannot be set-off against the costs of an action by his assignees, though the defts. be the same in both actions, there being no mutual credit between the defts. and the assignees, nor the parties in the two actions the same (*West v. Pryce*, 2 Bing. 455). And so, where three partners, A. B., and C., delivered bills to D. for a special purpose, and A. and B. became bankrupts, and their assignees, together with C., the solvent partner, brought an action against D. for the proceeds of the bills, it was held he could not set-off a debt due to him from A., B., C. (*Stainforth v. Fellowes*, 1 Marsh. 184; *Thomason v. Frere*, 10 East, 418).

In an action by the assignees of an army-agent, against the colonel of a regiment, for goods sold and delivered by the agent for the use of the regiment, it was held that the colonel, who had given authority, by warrant to the agent, to receive moneys from the paymaster, might set-off a sum remaining unaccounted for in the hands of the agent, in reduction of the demand (*Knowles v. Maitland*, 4 B. & C. 173; S. C. 6 D. & R. 312).

And bona fide due to the same Parties.] Where a party holding the acceptance of a trader in bad circumstances, agreed with defts. that he should indorse the bill to them, and that they, as a mode of covering the acceptance, should purchase goods of the trader, to be paid for by a bill after the time of the trader's acceptance becoming due, the trader not being aware that defts. held his acceptance; the trader having become bankrupt, and, on an action brought by the assignees to recover the value of the goods sold, it was held that defts. could not set-off the bankrupt's acceptance, they not being the real *bona fide* holders of the bill, but merely trustees, and, as such, could not set-off a demand made upon them in their own right (*Fair v. M'Ilver*, 16 East, 130); and so, *a fortiori*, if the bill was indorsed upon a preconcerted arrangement, that the defts. (the indorsee) should hold the goods for, and hand them over to, the indorser (*Lackington v. Coombes*, 6 Bing. N. C. 71; 8 Sco. 312); and so, where the holders of a bill accepted

by the bankrupt, upon its being dishonoured, intending to close the transaction with respect to it, and having in their hands funds of the indorsers to the amount of it, debited the indorsers in their account with the amount, and wrote a receipt on the back of the bill, and returned it protested, but afterwards, at the request of the indorsers, and for their benefit, received it back, in order, if possible, to set it off against an acceptance of their own, drawn by the indorsers of the first bill in favour of bankrupt; it was held that they could not do so, both because they did not hold it *bona fide* for themselves, and that, having once closed the transaction, they could not re-open it (*Belcher v. Lloyd*, 3 Moo. & Sco. 822).

If the deft. mean to question the title of the plt. as assignee, he must plead specially in denial of it (R. G. H. T. 4 Will. IV. r. 2, pl. 21). This *rule is general, but it would seem that it cannot apply to ejectment). A plea or replication in trespass, denying goods to be [*342] theirs as assignees, does not put their title in issue (*Jones v. Brown*, 1 Bing. N. C. 484). He must also, at or before pleading, give them a notice pursuant to the 12 & 13 Vict. c. 106, s. 234, by which "it is declared, that, in any action other than an action brought by the assignees for any debt or demand for which the bankrupt might have sustained an action had he not been adjudged bankrupt, and whether at the suit of or against the assignees, or against any person acting under the warrant of the court, for anything done under such warrant, *no proof* shall be required at the trial of the *petitioning creditor's debt, or of the trading or act of bankruptcy respectively*, unless the other party in such action shall, if deft. at or before pleading, and if plt. before the issue joined, give notice in writing to such assignees, or other person, that he intends to dispute some, and which, of such matters, and if the assignees, &c., shall prove such matter, they shall be entitled to the costs thereof (Id.).

The analogous section 90 of 6 Geo. IV. c. 16, related only to actions brought by or against the assignees or commissioners, or persons acting under their warrant. It, therefore, did not affect actions where such persons are not parties, and, in those cases where the validity of the commission came incidentally in question, it was necessary to be regularly and strictly proved, as it used to be (*Doe v. Liston*, 4 Taunt. 741). So it did not apply to an indictment against the bankrupt for perjury in passing his examination (R. v. Penson, 3 Camp. 96); nor to a feigned issue (such as that in *Lott v. Melville*, 3 M. & G. 40; 9 Dowl. P. C. 882; 3 Sco. N. R. 345) under the Interpleader Act; whether at the time of an execution, by a creditor upon the bankrupt's goods, "the plts." (his assignees) "were entitled to the same or any part thereof, as against and free from the said execution," and whether the goods "were or were not liable to be so seized and levied, under the said writ as against the plts." The statute was not confined to cases where the assignees or commissioners are named as such upon the record; it also extended to actions where the opposite parties knew that they made out their title or their justification, as the case may be, under the commission (*Simmonds v. Knight*, 3 Camp. 251; *Rowe v. Lant, Gow*, 24); as where they sue as lessors of the plt. in ejectment (*Doe d. Johnson v. Liversedge*, 11 M. & W. 517). It also extended to actions, though there are other defts. on the record, if these defts. have justified as servants of the assignees (*Gilman v. Cousins*, 2 Stark. 182); and, of course, to an action by a bankrupt against his assignees (*Ex parte Dick*, 1 Rose, 41).

The notice must be strictly conformable to the statute, and must not be to dispute the *bankruptcy* generally, but must specify what *facts* in particular will be disputed, as the petitioning creditor's debt, the trading, or the act of bankruptcy (*Trimley v. Uwins*, 6 B. & C. 537; 9 D. & R. 548).

Time of Service.] The time of service, if on the part of the *plt.*, must be before issue joined. But a notice delivered at the time of delivering the issue, with notice of trial, is sufficient (Richmond v. Heapy, 4 Camp. 207). A notice by the *def.* must be given at or before pleading. If he has *omitted* to give notice *before pleading*, and wishes to dispute the commission, his course would be to withdraw his plea, and plead *de novo*, with such notice (Willock v. Smith, 2 Camp. 184; Decharme v. Lane, 2 Camp. 324; Radmore v. Gould, Wightw. 80; Gardner v. Slack, 6 Moo. 489.) But he

should, for this purpose, apply to the court, for he cannot regularly
 [*343] *withdraw a plea once pleaded, and deliver it again, with a notice, even though the time for pleading has not expired (Poole v. Bell, 1 Stark. 328; Lawrence v. Crowder, 1 M. & P. 511). With respect to the mode of *service* of the notice, service on the assignees in person, though the safest course, when practicable, is not absolutely necessary, a delivery of the notice to their *attorney* being sufficient; but leaving it with a *servant* at the dwelling-house even of the assignee, is not sufficient (Howard v. Ramsbottom, 3 Taunt. 526); though leaving it with a clerk at his counting-house is (Widger v. Browning, M. & M. 27; 3 C. & P. 229).

In trover against a sheriff for selling the bankrupt's goods, he ought to plead specialty payments necessarily made by him of the proceeds, as it is doubtful whether he can otherwise give them in evidence (Goldschmid v. Raphael, 3 Sco. 385).

Form of Pleadings.

Declaration.] In an action by assignees in that character, it is usual for them to allege their title, by stating themselves generally to be such in the beginning of the declaration, and to state generally, that the bankrupt was such, within the meaning of the stat. (Winter v. Kretchman, 2 T. R. 45); and this form of declaring, without setting out the petitioning creditor's debt, the proceedings of the commissioners, &c., is sufficient (Lawson v. Lamb, 1 Lutw. 274; Raym. 1548; Pepys v. Lowe, Carth. 29; Fletcher v. Pogson, 3 B. & C. 192; 5 D. & R. 1). In debt it is unnecessary after the words, "who has been summoned to answer the said A. B. and C. D.," to add, "as assignees as aforesaid," if it sufficiently appear that they sue as assignees (Ferguson v. Mitchell, 2 C. M. & R. 687; 4 Dowl. P. C. 513). Where the cause of action arose to the bankrupt, previously to the bankruptcy, and the bankrupt himself could have recovered, the assignees *must* declare as assignees, and so declare themselves in the declaration; but, if it arose after the act of bankruptcy, and either before or after the issuing of the fiat, so that the sum to be recovered would belong to the estate, they *may* sue and declare in their individual capacity, as in their own right, without describing themselves as assignees (Evans v. Mann, Cowp. 569; Maltby v. Christie, 1 Esp. 341; Thomas v. Rideing, 1 Wightw. 65; 1 Rose, 121; 2 Chit. Rep. 325). Where the assignees, under a joint commission, sue for a separate debt due to one of the partners, they may describe themselves as the assignees of that partner only (Stonehouse v. De Silva, 3 Camp. 399). If it have become due subsequent to the bankruptcy, they need not so describe themselves, but may describe themselves as assignees under the joint commission (Pepper v. Molony, 1 Al. & Nap. 63, Irish); but, where the conversation took place when they were assignees of only the one partner, they must so describe themselves, and cannot recover even a moiety if they describe themselves as assignees of both bankrupts (Edwards v. Hooper, 11 M. & W. 363; and see Smith v. Goddard, *infra*). In an action by the assignees of two partners, bankrupts, if the declaration contain counts on debts which

accrued to the partners jointly before their bankruptcy, and counts on debts which accrued to one of them separately, it is sufficient, and it is not essential for them to state whether the deft. is indebted to them as assignees of the two partners, or only of one, as under a joint commission against the two, for they may recover in the same action debts due to the partners jointly, and debts due to them separately (*Graham v. Mulcaster*, 4 Bing. 115). Where the assignees, under separate commissions against two or more persons, sue jointly, they should not describe themselves as assignees of all the *bankrupts, but each set of assignees must be distinctly [*344] described as the assignees of the bankrupt whom they represent (*Ray v. Davies*, 8 Taunt. 134; S. C. 2 Moo. 3). Where A. & B., who were assignees of C. and D., bankrupts, under separate commissions, sued in one action for debts due individually to C. and D., it was held the action could not be supported, there being no priority with respect to such separate demands; and, as the bankrupts could not have sued in this form, the assignees could not recover more than the persons they represented (*Hancock v. Haywood*, 3 T. R. 433; *ib.* 779). Where one of two partners became bankrupt before the other, the assignees, under a joint commission in an action for money paid to the deft. after the first, but before the second act of bankruptcy, declared for money had and received, to the use of the partners before their bankruptcy, and for money had and received to their own use as assignees, after the bankruptcy, it was held that they could not recover, though it would seem that, had they declared as assignees of A., they might have recovered a moiety of the money paid (*Smith v. Goddard*, 3 B. & P. 465; *Edwards v. Hooper*; and see *supra*). In an action of covenant for rent accrued since the bankruptcy, it is no objection, on a general demurrer, that the assignees have not set forth their title (*Barker v. Manning*, 7 T. R. 537). In declaring on a *sci. fa.* by the assignees, it may be stated generally that the bankrupt became such within the meaning of the statute, &c., that his goods, &c., were assigned to them, &c. (*Winter v. Kretchman*, 2 T. R. 45; *Fletcher v. Pogson*, 3 B. & C. 192; S. C. 5 D. & R. 1). In an action by a new assignee upon a judgment recovered by a removed assignee, it is sufficient to state the removal of the former assignee, and that the new assignee was *duly* constituted and appointed (*Da Cosson v. Vaughan*, 10 East, 61). All the assignees, who are living must join in the action (*Snelgrove v. Hunt*, 2 Stark. 424), including the official assignee, if any (1 & 2 Will. IV. c. 56, s. 22, repealed by 12 & 13 Vict. c. 106). Where his name was omitted the proceedings were allowed to be amended, on motion, by adding it (*Baker v. Neaver*, 1 Dowl. P. C. 616; 1 Car. & M. 112; 3 Tyr. 233). Where the bankrupt is a member of a partnership, the assignees must join the solvent partner (*Thomason v. Frere*, 10 East, 418; 12 & 13 Vict. c. 106, s. 152), and he cannot release (12 & 13 Vict. c. 106, s. 152), and he can *e contra* use their names (*Whitehead v. Hughes*, 2 Car. & M. 318; 4 Tyr. 92). The assignees of a bankrupt may maintain an action in their own names only for a chose in action belonging to the wife of the bankrupt, *e. g.* a promissory note given to her *dum sola*, and in such action the deft. cannot set off a debt due to him from the bankrupt (*Yates v. Sherrington*, 11 M. & W. 42).

If a promissory note is made payable to the bankrupt only, he should sue, and not the assignees (*Carpenter v. Marnell*, 3 B. & P. 40). So, if a warrant of attorney is given to enter up judgment in his name and no other, and it is so entered, they must sue on the judgment in his name (*per Patteson, J.*, in *Guinness v. Carroll*, 4 B. & Ad. 464).

As to nonjoinder of assignee or solvent partners, see *post*, "PARTNERS."
The cause of action should be stated, as it accrued to the bankrupt or to

the assignees (Selw. N. P. 261). An assignee ought, in *assumpsit*, to state the promise, as if made to the bankrupt, unless an express promise be made to the assignee; but he may declare in his own name for money had and received after the assignment (*Anon.*, 6 Mod. 131), though the promise may always be laid to have been made to the bankrupt (Rig v. Wilmer, 1 Stra. 697).

Where *the plts. sue as assignees of several bankrupts, for money [*345] had and received, and part of the money was received before the bankruptcy of either parties, and part after the bankruptcy of one, and before that of the others, the counts must be framed accordingly (Smith v. Goddard, 3 B. & P. 465). Where the declaration alleged an account stated with the bankrupt, and promises to the assignees, and the evidence was of an account stated with the bankrupt, and promises to him, it was held sufficient (Skinner v. Rebaw, 1 Selw. N. P. 261). It has been held, that where a levy of bankrupt's goods, after bankruptcy, was valid, by 49 Geo. III. c. 121, s. 2, a description of such goods, as of the bankrupt, in an action by the assignees, in consequence of such levy, was good (Sampson v. Buxton, 4 Moo. 515; 2 B. & B. 89). In an action to recover 20% per cent. under the act, the plt. must declare specially as for a penalty, unless the commissioners have settled an amount, charging the assignees with such interest (Beresford v. Bireh, 1 C. & P. 373).

The declaration must not contain counts with claims arising out of different rights; otherwise it would be bad on a general demurrer, or in arrest of judgment, or upon error (2 B. & P. 424; 4 T. R. 347; 2 Chit. Rep. 697; 1 Ch. Pl. 28). Therefore, as we have already seen, the assignees of A., a bankrupt, and also of B., a bankrupt, under separate commissions, cannot recover in the same action a joint debt due from the deft., to both the partners, and also separate debts due to each (Hancock v. Haywood, 3 T. R. 433; and see further, *ante*, 344).

Different Counts.] Counts for money lent by the assignees of a bankrupt, may be joined with counts for money lent by the bankrupt himself (Richardson v. Griffin, 5 M. & S. 294; 2 Chit. Rep. 325); and counts for money had and received to the use of the bankrupt, and on an account stated with him, may be joined with counts for money received to the use of the assignees, and on an account stated with them (Williams v. Vines, 1 D. & L. 710; nom. Laekington v. Vines, 1 D. & L. 710). It is a rule in actions by executors, administrators, assignees of bankrupts, &c., that a promise after the death of the testator, or after bankruptcy, cannot be given in evidence unless there be a count charging such promise to have been made to the plt. in his representative capacity (Sarell v. Wine, 3 East, 409; Powley v. Newton, 6 Taunt. 453; Hickman v. Walker, Willes, 27; Pittain v. Forster, 1 B. & C. 548).

Plea.] See *post*, "PLEA" A plea of set-off must show that the mutual credit on which the balance is claimed was given before the bankruptcy (Hewison v. Guthrie, 2 Bing. N. C. 755; 3 Sco. 298); and that it is pleaded to a debt to which it is strictly applicable; and therefore to a count in debt for money had and received to the use of the plts., as assignees (not stating whether received before or since the bankruptcy), a plea of set-off for money due on an account stated with the bankrupt, before his bankruptcy, is bad, as not showing that the debts are mutual (Groom v. Mealey, 2 Bing. N. C. 138; 2 Sco. 171). So it is bad if the count is for money received to the use of the assignees since the bankruptcy (Wood v. Smith, 4 M. & W. 522. See this case, *ib. n.*, p. 526, as to the incorrectness of the reporter of Tindal's judgment, in Groom v. Mealey, in 2 Bing. N. C. *supra*). It is necessary to

state the mode in which the credit was given (*Alsager v. Currie*, 12 M. & W. 751).

Where to *assumpsit* by assignees, for money had and received to their use since the bankruptcy, the deft. pleaded that, before the bankruptcy, and before notice of any act of bankruptcy, he gave *credit to the bankrupt to the amount of 50*l*, by indorsing, for his accommodation [*346] and without consideration, a bill for that amount, drawn by him, and payable to the bankrupt's order, and that such credit was of a nature extremely likely to end in a debt; that the amount of the bill was paid by him on its dishonour, after the bankruptcy, but before the commencement of the action, and that the bankrupt thereupon became indebted to the deft.; that, before the bankruptcy, the bankrupt drew a bill of exchange on the Chesterfield Bank, and delivered it to the deft. by way of loan, that he might raise the amount, and thereby give credit to the deft. to that amount, and that afterwards, and before the bankruptcy, the deft. obtained the amount of the said bill from the Chesterfield Bank, and that he was ready to set off the two sums against each other: it was held, that this was such a giving of credit as ought to be the subject of set-off (*Hulme v. Muggleston*, 3 M. & W. 31; 6 Dowl. P. C. 112). So, in another case, where the plea of set off was the same as above, except that it showed that the bill, on which the deft. received the money, was delivered to him, and the money was received before the issuing of the fiat and notice of bankruptcy: the plea was held good on special demurrer, as showing good ground of set-off, and properly confessing and avoiding the cause of action (*Buttleson v. Timmis*, 1 C. B. 389; see "SET-OFF").

Where the defence is in substance a denial that the property passed to the assignees, a simple traverse of such property is sufficient (see per Parke, B., in *Carr v. Burdres*, 1 C. M. & R. 787, 788; and also in *Turquand v. Hawtrey*, 9 M. & W. 727); therefore, if the declaration is only for money received since the bankruptcy, and the money was received before it, the deft. need only plead the general issue (per Parke, B., in *Wood v. Smith*, 4 M. & W. 525).

Replication.

It seems that a replication to the plea (in *Hulme v. Muggleston*, *supra*) that the deft. did not give credit to the bankrupt, and that the bankrupt did not give credit to the deft., and that the bankrupt was not, nor is, indebted to the deft., *modo et formâ*, is bad for duplicity (3 M. & W. 31; 6 Dowl. P. C. 112). The proper form of replication is—and the plts. say that the said E. F. was not, nor is he, indebted to the deft., *modo, &c.*, concluding to the country (*Alsager v. Currie*, 11 M. & W. 14). The assignees cannot reply a fraudulent delivery of goods, for the price of which they sue (*Russell v. Bell*, 8 M. & W. 277). *De injuriâ* would seem to be bad.

Where, to an action by assignees for 48*l.*, the price of a phaeton which the deft. had purchased from the bankrupt, for cash on delivery, and the deft. pleaded a set-off on a bill of exchange for 48*l.*, accepted by the bankrupt, payable to one H, and by H. endorsed to the deft., and the plt. replied, that after the bill became due, and was dishonoured, H. indorsed it to the deft. without consideration, in order that the deft. might purchase the phaeton, setting off the amount of the bill, and then hand over the phaeton to H.; it was held, on special demurrer, that the replication was an answer to the claim of set-off (*Lackington v. Coombes*, 6 Bing. N. C. 71; 8 Sco. 312; see more, as to Pleas and Replications, 3 Ch. Pi. Index, and *post*, these heads).

**Precedents.*

Commencement of declaration, ats. assignees.

Middlesex, to wit (*venue*). A. B. and C. D., assignees of the estate and effects of E. F. a bankrupt, according to the statutes in force concerning bankrupts, by I. K., their attorney, complain of G. H. For that, &c.

Indebitatus assumpsit on promises to the bankrupt.

For that whereas (*or, if this be not the first count, say, "and whereas also"*) the deft., heretofore, and before the said G. H. became a bankrupt, (to wit) on the 1st day of January, A. D. 1848 (*any day before the bankruptcy*), was indebted to the said G. H. in 100l., for the price and value of goods then bargained and sold (*or sold and delivered*), by the said G. H. to the deft., at his request, and on 100l. for money found to be due from the deft. to the said G. H. on an account then stated between them (*so adopting and altering such other of the common counts (ante, p. 225) as the circumstances of the case may render it advisable to insert, taking care to state all the promises and causes of action to have accrued to the bankrupt before the bankruptcy*).

General conclusion.

And, whereas the deft. being so indebted, afterwards, and before the bankruptcy of the said G. H., on the day and year aforesaid (*or, as case may be, "last aforesaid"*), in consideration of the premises respectively, then promised to pay the said several moneys respectively to the said G. H., on request, yet he hath disregarded his promises, and hath not paid any of the said moneys, or any part thereof, to the damage of the plts., *as assignees, as aforesaid, of £—*, and thereupon they bring suit, &c. (*If there be the least ground for presuming there has been a promise to the plts., as assignees, counts should be inserted to meet the same*).

On promises to the assignees, for a debt due before bankruptcy.

And whereas also the deft., after the said G. H. became bankrupt, to wit, on the 1st day of January, in the year of our Lord 1848, (*any day after the bankruptcy*), was indebted to the plts., as assignees as aforesaid, in 100l., for the price and value of goods, by the said G. H., before his bankruptcy, sold and delivered to the deft., at his request. And 100l. for money found to be due from the deft. to the plts. as assignees as aforesaid, on an account then stated between them. And whereas deft., being so indebted, afterwards, on the day and year aforesaid, in consideration of the premises respectively, then promised to pay the said several moneys respectively, to the plts., as assignees as aforesaid, on request, yet, &c., as ante. (*Other counts may be readily framed on other causes of action, on the principle of the preceding one. It is not, however, usual, nor perhaps necessary, to insert any other count than the account stated, unless there has been some distinct cause of action, as goods sold, or money lent, &c., after the act of bankruptcy, and when this, and counts as post, should be added*).

On promises to the assignees, on causes of action accruing since the act of bankruptcy.

And whereas, also, the deft., after the said G. H. became a bankrupt, to wit, on the 1st day of January, in the year of our Lord 1848, was indebted to the plts., as assignees as aforesaid, in 100l., for the price and value of goods, by the plts., as assignees as aforesaid, before then, and after the bankruptcy of the said G. H., sold and delivered to the deft., at his request. And whereas the deft., being so indebted, afterwards, on the day and year last aforesaid, in consideration of the premises respectively, then promised to pay the plts. as assignees as aforesaid, the said last-mentioned sum of money, on request, yet, &c. (*Other counts may be readily framed, on causes of action accruing after the bankruptcy, on the principle of the preceding count. Care should be taken to insert a count for money had and received to the use of the assignees. The account stated is as supra. If the plt. be a surviving assignee call him so throughout, and insert the usual breach as above*).

Other forms in assumpsit.

See a form at the suit of one partner, and the assignee of another, being bankrupt, for work done before the bankruptcy, 2 Chit. Pl. 71; on note payable to bankrupt, ib. 90; by assignee of indorsee against acceptor, ib. 109; against drawer, where bill dishonoured after bankruptcy, ib. 114.

[*348] *Trove by assignees on the bankrupt's possession, and a conversion after the bankruptcy.

For that whereas the said G. H., heretofore and before he became a bankrupt, to wit,

on the 1st day of January, in the year of our Lord, 1848 (*some days before the bankruptcy*), was lawfully possessed, as of his own property, of certain goods and chattels, to wit, (*state the property as usual, post, "TROVER,"*) of great value, to wit, of the value of 100*l.*; and, being so possessed thereof, he, the said G. H., afterwards, and before he became a bankrupt, to wit, on the day and year aforesaid, casually lost the said goods and chattels out of his possession; and the same afterwards, and before he became a bankrupt, to wit, on the day and year aforesaid, came to the possession of the deft. by finding. Yet the deft., well knowing the said goods and chattels to be the property of the said G. H. before he became a bankrupt, and of right to belong and appertain to him before his bankruptcy, and to the said plts., as assignees as aforesaid, after such bankruptcy; but contriving, and intending, to injure the said G. H. before he became a bankrupt, and the plts., as assignees as aforesaid, since the said G. H. became a bankrupt, in this behalf, hath not as yet delivered the said goods and chattels, or any or either of them, or any part thereof, to the said G. H. before his bankruptcy, or to the plts. since, although often requested so to do, and hath hitherto wholly refused so to do; and afterwards, and after the said G. H. became a bankrupt, to wit, on the second day of January, in the year aforesaid (*any day after the bankruptcy*), converted and disposed of the said goods and chattels to his, the said deft.'s, own use. (*If the conversion was before the act of bankruptcy, a count should be inserted to meet same accordingly. It is also advisable to insert the following count.*)

Trover on the assignees' possession, and conversion afterwards.

And whereas also the plts., as such assignees as aforesaid, heretofore, and after the said G. H. became a bankrupt, to wit, on the 1st day of January, in the year of our Lord, 1848 (*any day after the bankruptcy*), were lawfully possessed, as of the property of the plts., as assignees aforesaid, of certain other goods and chattels, to wit, &c. (*describe goods as usual in trover, post, "TROVER"*) of great value, to wit, of the value of 100*l.*, of lawful money of Great Britain, (or, *if this be not the first count describing the goods, say, "goods and chattels of the like number, quantity, quality, description, and value, as the said goods and chattels in the said first count mentioned"*); and being so possessed thereof, they, the plts., afterwards, to wit, on the day last aforesaid, casually lost the said last-mentioned goods and chattels out of their possession; and the same afterwards, to wit, on the day and year last aforesaid, came to the possession of the deft. by finding; yet the deft., well knowing the said last-mentioned goods and chattels to be the property of the plts., as such assignees as aforesaid, and of right to belong and appertain to them as such, but contriving, and fraudulently intending, to injure the plts., as such assignees as aforesaid, in this behalf, hath not as yet delivered the said last-mentioned goods and chattels, or any or either of them, or any part thereof, to the plts., although often requested so to do, but hath hitherto wholly refused so to do; and afterwards, to wit, on the day and year last aforesaid, converted and disposed of the said last-mentioned goods and chattels to his, the deft.'s, own use; to the damage of the plts., as such assignees as aforesaid, of 100*l.*, (*insert enough to cover full value of goods*); and therefore they bring their suit, &c.

See a form of declaration in debt by assignees of a bankrupt obligee against obligor, 2 Ch. Pl. 331, and other forms, *ib.* Index.

Pleas.

Pleas.] The forms of pleas are the same for the most part as in ordinary cases. A plea, or notice of set-off, may be readily framed, stating, that "the bankrupt, at the time of the bankruptcy, was indebted," &c.; and omitting the words, "before and at the time of the commencement of the suit, was, and still is;" and after setting forth the subject-matter of the debt in the usual form, alleging, "which said sum of money is still wholly unpaid, and due and owing to the deft., and exceeds the damages sustained by the plts. as assignees as aforesaid, by reason of the non-performance by the deft. of the promises (&c.) in the declaration mentioned, and out of which sum due to the deft. he is ready, and hereby offers, to set off and allow to the plts., as assignees as aforesaid, the full amount of the said damages.—*Verification.*

*Denial that plts. are assignees.

[*349]

C. D. ats. A. B. and another suing as assignees of, &c., says that the plts. were not, nor are they assignees of the estate and effects of the said E. F., a bankrupt, in manner and form as the plts. have above, in the said declaration, alleged. And of this the deft. puts himself upon the country, &c.

Evidence for Plaintiff.

Proof of Title to sue.] The plts., when necessarily suing as assignees,

were, in all actions, formerly obliged to substantiate their title to sue, by proving strictly all the requisites to support the commission, viz., the petitioning creditor's debt, the trading and act of bankruptcy, the issuing of the commission, and the assignment to the plts. But the law in this respect, as to the proof of the first three requisites, is materially modified; for, in some cases, no such proof is required, and in others the depositions before the commissioners are conclusive evidence. We shall consider those cases; 1. When proof of title is necessary; and, 2. The mode of making such title.

I.—WHEN PROOF OF TITLE IS NECESSARY.

The character of the plt. is not to be considered as in issue unless specially denied (R. G. H. T., 4 Will. IV. r. 2, pl. 21, see *post*, "EVIDENCE FOR DEFENDANT"). A plea specially denying it, puts in issue the petitioning creditor's debt, the trading, and the act of bankruptcy, the fiat, or petition for adjudication, the assignment or appointment of the assignees (Hobson v. Butler, 4 Bing. N. C. 290; 6 Dowl. P. C. 409; Buckton v. Frost, 8 Ad. & E. 844). A plea, or replication in trespass, averring that the goods were not theirs, as assignees, does not put their title in issue (Jones v. Brown, 1 Bing. N. C. 484). But the plts., notwithstanding such special plea, need prove only such of the above requisites as the deft. by his notice declares it his intention to dispute (Porter v. Walker, 1 M. & G. 686; Hobson v. Butler; Buckton v. Frost, *supra*; and see notice under 12 & 13 Vict. c. 106, s. 234, *post*, p. 152); and if proper notice be not given no proof whatever of petitioning creditor's debt, the trading, or act of bankruptcy, &c., is required, though there is a plea denying the bankruptcy (Moon v. Raphael, 7 C. & P. 115); or though the proceedings, if unnecessarily put in, appear defective on the face of them (McBeath v. Coates, 4 Bing. 34; 12 Moo. 122; Bevan v. Lewis, 1 Sim. 376). The notice on the part of the deft. is not to be considered as part of his evidence in the cause, but should be proved at the beginning of the trial; and, as soon as the commissions and proceedings are produced by the plt., the court will then immediately compel the latter to support the commission in the same manner as he was formerly obliged to do, viz., by strict proof of the petitioning creditor's debt, and the other requisites (Decharme v. Lane, 2 Camp. 324). Where notice has been given only to dispute the act of bankruptcy, and the other side have read the depositions on the file to prove the trading and debt, the residue of the proceedings are not considered to be evidence, and the counsel for the party contesting the commission has no right to inspect them (Bluck v. Thorne, 4 Camp. 191; Stafford v. Clarke, 1 C. & P. 26).

The 12 & 13 Vict. c. 106, s. 234, renders the party giving notice liable to the cos's occasioned by it, if the disputed matter is proved by the other side, or admitted by the party giving the notice: and the judge before whom the cause shall be tried, if he thinks fit, may grant a certificate of [*350] such proof or admission. But the judge, if the cause is referred before trial, cannot certify (Barthrop v. Anderton, 8 Bing. 269), and the statute does not apply to an issue to try the title of the assignees as against an execution creditor (Lott v. Melville, 3 M. & Gr. 49). But an action of ejectment, in which the assignees are lessors of the plt., is within it, and it applies to assignees under commissions issued before the statute (Doe v. Leversedge, 11 M. & W. 517), and to an action by a bankrupt against assignees (see *post*; Ex parte Dick, 1 Rose, 51).

II.—MODE OF PROVING TITLE OF PLAINTIFFS.

This will be considered with reference to cases—1. Where no notice has been given to dispute the title; 2. Where the commission has not been disputed by the bankrupt within a limited period after the adjudication; and, 3. Where a notice has been given to dispute the title, and the commission has been disputed by the bankrupt within such limited period, and where strict proof of title is required.

1. *Mode of proving Title, where no Notice has been given to dispute it.*] If there be a plea specially denying the title of the plts., but no notice has been given, pursuant to the 12 & 13 Vict. c. 106, s. 234, it will be sufficient for the assignees, commissioners, or persons acting under their warrant, to prove the fiat and their appointment only, without any further proof. Even this proof is unnecessary if the opposite party have admitted their title, but such admission must be proved (*ante*, and *post*, p. 365).

As to plts. undertaking or retaining venue, see *Soulsby v. Lea*, 3 Taunt. 86.

We shall now consider the mode of proving the fiat, and the appointment of the assignees.

The Fiat.] By 1 & 2 Will. IV. c. 56, s. 14, a fiat is now issued, in lieu of the commission under the 6 Geo. IV. c. 16, s. 12. By the 2 & 3 Will. IV. c. 114, s. 5, all fiats, adjudications of bankruptcy, appointments of assignees, and certificates of conformity, shall be entered of record in the court of bankruptcy; and (sect. 8) unless so entered shall not be received in evidence in any court of law or equity; and by sect. 6, 12 & 13 Vict. c. 106, all the records and proceedings shall continue to be so kept; and (sect. 9, 3 & 4 Will. IV. c. 114) “upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy purporting to be sealed with the seal of the said court of bankruptcy, or of any writing purporting to be a copy of such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record, without any further proof thereof.

Though, under a similar clause in the 6 Geo. IV., c. 16, the great seal alone was not sufficient to authenticate proceedings in bankruptcy, yet, when a commission was superseded, the writ of *supersedeas* (reciting that a commission issued on a day certain) was evidence to show that such a commission issued on that day, even against a party who was both a stranger to the writ and to the commission; for a commission of bankruptcy is considered in law as a proceeding to which all the world are parties (*Gervis v. Western Canal Company*, 5 M. & S. 76); it was sufficient proof of a fiat to show that it is under the hand of a Master in Chancery, without proving *his appointment to sign fiats under 1 & 2 Will. IV. c. 56, s. 12 [*351] (*Marshall v. Lamb*, 13 Law J., N. S., Q. B., 75).

It is now enacted by 12 & 13 Vict. 106, sect. 236, “that any fiat, petition for adjudication of bankruptcy, adjudication of bankruptcy, petition for arrangement between a debtor and his creditors, assignment, appointment of assignees, certificate, deposition, or other proceeding or order in bankruptcy, or under any such petition for arrangement, appearing to be sealed with the seal of the court, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and whether for the purposes of this act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of

such proceedings and orders having respectively taken place or been made, and be deemed respectively records of the court, without any further proof thereof, and no such document or copy shall be receivable in evidence unless the same appear to be so sealed, except where otherwise in this act specially provided: provided always, that all fiats and proceedings under the same which may have been entered of record before the passing of the act passed in the parliament holden in the second and third years of the reign of his late Majesty King William the Fourth (c. 114), intituled, 'An Act to amend the Laws relating to Bankrupts,' or purporting to have been sealed before the commencement of this act with the seal of the Court of Bankruptcy theretofore in use, or a writing purporting to be a copy of any such document, and purporting to have been so sealed, shall and may upon the production thereof, and in the case of any fiat or proceedings entered of record before the passing of the last-mentioned act, with the certificate thereon, purporting to be signed by the person duly authorised to enter proceedings in bankruptcy, or by his deputy, be received as evidence of the same, and of the same having been duly entered of record, and of such proceedings having respectively taken place, anything hereinbefore contained notwithstanding."

By sect. 237, "that all courts, judges, justices, and persons judicially acting, and other officers, shall take judicial notice of the signature of any commissioner or registrar of the court, and of the seal of the court, subscribed or attached to any judicial or official proceeding or document to be made or signed under the provisions of this act."

As to the proof of the assignment, under the 6 Geo. IV. c. 16, see *Pearce v. Hooper*, 3 Taunt. 62; *Orr v. Morrice*, 3 B. & B. 139; *Read v. Cooper*, 5 Taunt. 89; *Tucker v. Barrow*, M. & M. 137; *Gomersal v. Serle*, 2 Y. & J. 5; and of the bargain and sale, see *Perry v. Bowes*, Jon. T. 196; *Bennet v. Gaudy*, Carth. 178; *Elliot v. Danby*, 12 Mod. 3; 2 Ph. Ev. 388, 499; 27 Hen. VIII. c. 16; *Kinnersley v. Orpe*, 1 Doug. 56, 58; *R. v. Hopper*, 3 Pri. 495.

Where Defendant estopped from disputing Title.] Proof of title of the assignees will be dispensed with, in cases where deft., by his own act, has estopped himself from disputing it (*Eden* 354; *Maltby v. Christie*, 1 Esp. 340; *Rankin v. Horner*, 16 East, 191). As, where the deft. had attended a meeting of the commissioners, and exhibited an account between him and the bankrupt, and afterwards made a part payment to the assignee, as such, on that account, it was held to be *prima facie* evidence that the plt. was assignee (*Dickenson v. Coward*, 1 B. & A. 677). So, if a deft., on being

applied to by a person whom it is proved he knew to be the collector of the bankrupt's *debts for the assignees, said he would call [*352] and pay the money, such promise was held *prima facie* to dispense with the necessity of proving plt.'s title (*Pope v. Monck*, 2 C. & P. 112), though the title was directly in issue (*Inglis v. Spence*, 1 C. M. & R. 432). So, where, to debt on bond by assignees, the deft. (before the new rules) pleaded payment only, it was held that this was an admission of their title, and that they need not prove themselves to be assignees (see *Corsbie v. Oliver*, 1 Stark, 76, *ante*). So, in an action brought by the assignee to recover the price of the goods received by deft. from the bankrupt before his bankruptcy, to sell by auction, and which he had sold after the bankruptcy, it was held that the deft., having described the goods in his catalogue of sale as "the property of D., a bankrupt," had estopped himself from calling the bankruptcy in question, and *prima facie* dispensed with the necessity of proving the proceedings (*Maltby v. Christie*, 1 Esp. 340; 16

East, 193). Where the deft. himself contracted with the assignees, or, *semble*, even with the bankrupt after the bankruptcy, it was held that they might recover, without proving themselves to be such (*Evans v. Mann*, Cowp. 569), although they alleged themselves in the declaration to be assignees (*Thomas v. Rideing*, Wight. 65). The mere circumstance of a creditor's proving a debt under the commission, is not sufficient to preclude him from disputing its validity (*Rankin v. Horner*, 16 East, 191; *Stewart v. Richman*, 1 Esp. 108; but, where he had sent his agent as a witness to prove the act of bankruptcy, it was held that the depositions of that witness were evidence against him, though the witness was still living (*Gardner v. Moulst*, 2 P. & D. 403; 10 Ad. & E. 464); and so an affidavit by a petitioning creditor himself, that a trader is indebted in 100%. to him, and is become a bankrupt, is conclusive evidence against such creditor of the bankruptcy (*Ledbetter v. Salt*, 4 Bing. 623).

So, where the bankrupt had petitioned for his discharge under 49 Geo. III. c. 121, s. 14, it was held that he could not, in an action against his assignees, dispute the validity of the commission, "for, having availed himself of the commission for one purpose, he could not afterwards be allowed to assert to the same judges before whom he took the benefit of it, that it was invalid" (*Watson v. Wace*, 5 B. & C. 153, 155). So, where the bankrupt had gone to various persons to solicit them to vote in the choice of assignees under his commission (*Like v. Howe*, 6 Esp. 20), or where he had taken a part in the sale of his own effects under the commission (*Clarke v. Clarke*, 6 Esp. 61), it was held he could not afterwards dispute the validity of the commission. But a bankrupt's merely presenting a petition to enlarge the time of his surrender, in which he stated he had been duly declared a bankrupt, does not so preclude him (*Mercer v. Wise*, 3 Esp. 216). Nor does his applying to a commissioner (a fiat having issued against him) to appoint an assignee to investigate the sufficiency of the debt, and to protect the property (*Monk v. Clark*, 2 Bing. N. C. 299). In trespass defts. justified in taking goods as assignees of M.; the plt. denied that the goods were the goods of the defts. *as assignees*; held, that these pleadings admitted the bankruptcy and assignment (*Jones v. Brown*, 1 N. C. 484).

2. *Mode of proving Plaintiff's Title, where the Fiat has not been disputed by the Bankrupt within a limited period.*] By the 12 & 13 Vict. c. 106, s. 233, it is enacted, that "if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication) within twenty-one days after the advertisement of the bankruptcy in the London Gazette, or (if he were in any other part of Europe at *the date of the adjudication) within three months after such advertisement, or (if he were else- [*353] where at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat, or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the Gazette containing such advertisement shall be *conclusive* evidence in all cases as against such bankrupt; and in all actions at law, or suits in equity, brought by the assignees for any debt or demand *for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt*, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, or before the date and filing of the petition for adjudication, and that such fiat was sued forth, or such petition filed, on the day on which the same is stated in the Gazette to bear date.

It was held that a similar section in 5 & 6 Vict. c. 122, s. 24, did not

apply to adjudications before the 11th November, 1842 (Edwards v. Sherren, 11 M. & W. 595; 1 D. & L. 338).

The 92nd sect. of the 6 Geo. IV. c. 16, was similar to the above, except as to the times within which the bankrupt should have disputed the commission. The following cases under that clause will apply to the present.

Notice to dispute given by Bankrupt within two months after adjudication.] In order to render the proceedings *not conclusive* evidence of the facts therein stated, in an action for the recovery of that which *the bankrupt himself* might have sued for, if his bankruptcy had not taken place, the bankrupt must have given the notice pointed out in the latter statute, and within the limited time. But this need not have been done, if the proceedings, upon the face of them, do not contain *facts* which will amount to proof of the several matters required by law to constitute a good petitioning creditor's debt, trading, or act of bankruptcy: for mere conclusions of law, drawn by the witnesses or by the commissioners from the facts stated, are not sufficient to support the commission; and, in such cases, the depositions are not *conclusive* evidence, and the opposite party may, by other facts, dispute the commission (see Humphries v. Coggan, 1 Rose, 226; Clarke v. Askew, 1 Stark. 458); provided, indeed, he has first pleaded, and has given notice under the 234th sect. 12 & 13 Vict. c. 106 (*ante*, p. 349; Macbeth v. Coates, 4 Bing. 34).

The term "conclusive evidence," means that no evidence is admissible to contradict the depositions (Eden, 370, 3rd ed.). But if they do not on the face of them prove a debt, trading, and act of bankruptcy the assignees cannot recover on that evidence (Id. 371). Therefore where the debt is stated to be due from the bankrupt, as drawer of a bill of exchange, but the deposition states no notice of dishonour, it will not be conclusive evidence of the debt, which the other party, after notice to dispute, may dispute (Cooper v. Machin, 1 Bing. 426; 4 Bing. 34). So, if the deposition of the petitioning creditor state only that the debt was due to him at and before the time of suing forth the commission, not showing that it existed at the time of the act of bankruptcy, this is not conclusive proof of the goodness of the petitioning creditor's debt (Clarke v. Askew, 1 Stark. 458; Lawson v. Robinson, ib. 456). If a deposition state that the deponent witnessed the execution of a deed by the bankrupt, by which he assigned his property to A. B., though this is evidence of such a deed, as stated in the deposition, it is not

*evidence that the deed itself was an act of bankruptcy (Kay v. [*354] Stead, 2 Stark. 200). Where the deposition, to prove the act of

bankruptcy, stated that the party absented himself on a certain day, and that he had declared to the deponent that his motive was to avoid his creditors, but not stating the time when this declaration of the bankrupt was made, this was held not sufficient proof of an act of bankruptcy (Marsh v. Meager, 1 Stark. 353). And so, where the deposition omits to state that the party absented himself with an intent to delay his creditors (Toleman v. Jones, 9 Moo. 24). The deposition of the petitioning creditor will be evidence of a certain sum due to him, and also of the character in which he claimed it, whether as executor or assignee; nor will it be necessary in either of these cases to produce the probate or the assignment; but, whether the sum due was a debt to support a commission, that is an inference of law which the court, upon the trial, will not be estopped from determining by the adjudication of the commissioners (Skaife v. Howard, 2 B. & C. 560; 4 D. & R. 37; Deac. B. L. 778). The whole effect, indeed, of the provision of the statute is only to make the depositions evidence, not to admit the fact of the bankruptcy to be proved; for this must be as strictly made out by the

depositions, as it would be required to be done by the witnesses (Rawson v. Haigh, 1 C. & P. 80). If the facts stated in the depositions are sufficient of themselves to sustain the commission, no further proof is necessary; but they may be always objected to for not proving the subject-matter to which they apply (Skaife v. Howard, 2 B. & C. 560; 4 D. & R. 37; Deac. B. L. 778); however, the objection must be taken at the trial; it is too late after verdict (Jacobs v. Latours, 2 M. & P. 201). Where the depositions prove the petitioning creditor's debt, the debt. cannot object that it was a fraudulent contrivance between the petitioning creditor and the bankrupt (Young v. Timmins, 1 C. & J. 148).

The assignees may always support the commission by evidence, *aliunde* the depositions (Clarke v. Askew, 1 Stark. 458).

It must be remembered, that an action brought by the assignees to recover back the payment of a debt made by the bankrupt to a creditor, after his knowledge of an act of bankruptcy, or after the issuing of the commission, for which the bankrupt himself could have no right to sue, would not be such an action as would deprive the debt. of his right at any time to dispute these matters, upon his giving the requisite notice of his intention so to do (Deac. B. L. 777); for it is only in suits or actions brought by a bankrupt's *own* assignees, for a debt or demand for which *he* might have sued, that the depositions under a commission against *him* are made evidence; and, therefore, where the assignees of R., another bankrupt, are petitioning creditors against *him*, *his* assignees are bound under the usual notice to dispute their trading, &c., not only to produce the proceedings under his commission, but to prove strictly, *aliunde*, his (R.'s) trading, act of bankruptcy, and petitioning creditor's debt (Drummond v. Muskett, 10 B. & C. 153). The assignees must be careful not to go unnecessarily into proof of the trading, petitioning creditor's debt, or act of bankruptcy. In a case within the 92nd section of 6 Geo. IV. c. 16, where the assignees inconsiderately went into evidence of the trading, and failed in proof, they were non-suited (Johnson v. Piper, 2 Nev. & M. 677); and where, in an action against a sheriff, for the proceeds of goods sold under a *fi. fa.*, there was no notice to dispute their title, they proved an act of bankruptcy before the levy. Bailey and Littledale, Js., thought they were bound to prove also a petitioning creditor's debt; Tenterden, *C. J., and Parke, J., being, however, [*355] of the contrary opinion (Norman v. Booth, 10 B. & C. 703).

Trover is an action for a *demand* within this section (Robson v. Alexander, 1 M. & P. 448); and so is detinue (Smith v. Woodward, 4 C. & P. 541). Whether the depositions are evidence in cases where the formal cause of action has arisen since the bankruptcy seems to be as yet not satisfactorily settled. In Fox v. Mahony, 2 C. & J. 325, and Smith v. Woodward, 4 C. & P. 541, it was held that they were so, though the conversion took place after the bankruptcy. In Jones v. Fort, M. & M. 196, recognized in Gibson v. Oldfield, 4 C. & P. 313, Tenterden, Ld., held they were not; and there being two sets of counts, one on a possession by the bankrupt and a conversion in his time, and the other on a possession by the assignees and a conversion in their time, that the latter set of counts should be given up if the plts. relied on the deposition. But in Kitchener v. Power, 3 Ad. & E. 232; 4 Nev. & M. 710, this case was over-ruled, and they were held to be conclusive evidence on a declaration stating a conversion in the time of the assignees only; the Court of Q. B. being of opinion that, in determining this question, they were to consider "not whether the same issue in form could have been sustained, merely substituting the bankrupt's name as plt. for that of the assignees, but whether the bankrupt, if no bankruptcy had occurred, could have maintained any sort of action for the *same debt or demand*;" and

so, also, in *Alsager v. Close*, 10 M. & W. 576, it was held that they were conclusive evidence in an action by the assignees for the conversion of a bill of exchange, by obtaining money on it after the bankruptcy, and after a demand by the assignees; and, per Abinger, C. B., they would have been so, if there had been no other evidence of the conversion, except the demand and refusal, though the bankrupt himself could not have sued without making another demand and proving another refusal (lb.). It would seem that the section applies to all actions where the bankruptcy is an immaterial fact in the cause, as in the case of bills not due, or credit not expired, &c., at the date of the bankruptcy; but not to actions where the bankruptcy is a material ingredient in the cause of action, as in the case of a fraudulent preference, in which, unless there be a valid commission, there is no cause of action against the deft. in any one (per Denman, C. J., in *Kitchener v. Power*, 3 Ad. & E. 242). The 92d sect. of 6 Geo. IV. did not apply to commissions anterior to the act (*Kay v. Goodwin*, 6 Bingh. 576).

Proof of Defendant's Notice of Act of Bankruptcy.] Pending a negotiation to settle an action by a judge's order, the clerk of the attorney for the debtor said to the clerk of the attorney for the creditor, that more time was wanted by the debtor, who was arranging with his creditors; that he had committed an act of bankruptcy; and that, unless further time was given, he should give notice of his having committed an act of bankruptcy. Upon the trial of an issue between the assignees of such debtor (he having become a bankrupt) and such creditor, the judge ruled, that what passed, as above, between the attorneys' clerks, was a sufficient notice to the creditor of an act of bankruptcy, within the 2 & 3 Vict. c. 29, s. 1: held a misdirection, it not being found by the jury that the clerk to whom the notice was given was a managing clerk, or that he communicated such notice to his employer (*Pennell v. Stephens*, 13 Jur. 766; 18 Law J. 291, C. P.). *Quære*, whether notice of an act of bankruptcy to a managing clerk of an attorney is sufficient to bind the client (lb.). Notice of a prior act of bankruptcy was served on a clerk of the plt.'s attorney at the office in the absence of the attorney, and he was requested to inform the attorney of it when he came to the office. The clerk had issued the writ of execution, but was not shown to have had personally the conduct of the suit; held, that the notice would not take the execution out of the protection of sect. 1 of stat. 2 & 3 Vict. c. 29, until communicated to the attorney (*Pike v. Stephens*, 12 Jur. 746; 17 Law J., 282, Q. B.). A trader being indebted to the defts., on the 1st of July filed a declaration of insolvency, pursuant to 5 & 6 Vict. c. 122, s. 22, and, on the following day, gave notice thereof to the defts. At a subsequent period of the same day the defts. levied an execution on the trader's goods. A fiat in bankruptcy issued on the day following; held, that the act of bankruptcy dated from the time of filing the declaration of insolvency, and that the defts., having had notice thereof, were not entitled to the proceeds of the execution within the meaning of the 2 & 3 Vict. c. 29, s. 1 (*Green v. Laurie*, 1 Exch. 335; 17 Law J. 61, Exch.).

Under the 5 & 6 Vict. c. 122, the filing of a declaration of insolvency is of itself a complete act of bankruptcy, without being followed by an advertisement of the same in the Gazette, under the 36 Geo. IV. c. 16, s. 6 (*Follett v. Hoppe*, 17 Law J. 76, C. P.; 5 C. B. 226).

Therefore, where a trader gave execution creditors notice that he had filed a declaration of insolvency, and thereby committed an act of bankruptcy, this was held a sufficient notice of a prior act of bankruptcy to deprive the creditors of the protection of the 2 & 3 Vict. c. 29 (lb.).

A trader, having been arrested on *ca. sa.*, at the suit of the defts., who, as

well as the sheriff's officer, had received a notice of a prior act of bankruptcy, paid over a portion of his assets to the officer, in order to procure his discharge, and the officer paid over the amount to the defts.; held, that the bankrupt's assignees were entitled to recover back from the defts. the amounts paid in an action for money had and received (1b.)

When Depositions not conclusive.] The deposition of the petitioning creditor is admissible at the trial in proof of his debt (2 Camp. 92); though, indeed, if he himself were called, he would not be a competent witness to support the commission (Green v. Jones, 2 Camp. 411; and see Skaife v. Howard, 2 B. & C. 560; 4 D. & R. 37). As to its being evidence of party being executor, *post*, 364. Where the petitioning creditor's debt was due to him as executor, proof of probate would not be necessary under such circumstances (Skaife v. Howard, 2 B. & C. 560; Muskett v. Drummond, 10 B. & C. 151). Formerly, in order to make the depositions, &c., evidence, it was necessary to show that they came out of the custody of the solicitor to the commission, or the handwriting of the commissioners must have been proved (Collinson v. Hillier, 3 Camp. 30); and for which purpose the bankrupt himself, having obtained his certificate, and released the surplus, is a competent witness ^{*}(Morgan v. Price, 2 B. & C. 14; 3 [*356] D. & R. 215; *post*, "DEED"). It is now however enacted by 12 & 13 Vict. c. 106, s. 236 (see *ante*, p. 349), and also by sect. 242, "that in the event of the death of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any bankruptcy heretofore or hereafter, or under any petition for arrangement, the deposition of any such deceased witness, purporting to be sealed with the seal of the Court, or a copy thereof purporting to be so sealed, shall in all cases be received as evidence of the matters therein respectively contained." And see further, as to the admissibility in evidence of the depositions and proceedings under the commission, in cases independent of the 92d sect. of the 6 Geo. IV. c. 16, *post*, 248). Where the petitioning creditor is assignee of another bankrupt and the debt is due to him in that character, and his title comes incidentally in question, strict evidence of his title as assignee must be given (Doe v. Liston, 4 Taunt. 741). But if they are parties to the record, though not named assignees, the proceedings will be sufficient evidence, at least if the other party is aware that they make title under the commission (Simmonds v. Knight, 3 Camp. 251; Rowe v. Lant, Gow, 24). So, though there be other defts. on the record, if these defts. have justified as servants of the assignees (Gilman v. Cousins, 5 Stark. 182). But where in an action by such assignee no notice to dispute had been given under the statute, the depositions under the commission were held to be evidence of a debt due to the petitioning creditor in the character in which he claimed it, and no evidence of the first bankruptcy was in such case held necessary (Skaife v. Howard, 2 B. & C. 560).

3. *Mode of proving Title, where there is a Plea and a Notice to dispute it, and the Fiat has been disputed by the Bankrupt within the limited time; and, in other cases, where strict Proof of Title is necessary.]* In such cases, where an assignee or party has to support a fiat by strict proof of the proceedings under it, he will have to prove the petitioning creditor's debt, the trading, the act of bankruptcy, the fiat, the appointment of assignees, and some other proceedings; the proof of all which will be now considered.

Petitioning Creditor's Debt.] This will be considered with reference to the amount of it, the subject-matter of it, the time when due, and the mode of proving it.

In the first place, it may be observed that the plts., after proving the debt,

must adduce in evidence the petition or the fiat, in order to connect the debt proved with the fact of bankruptcy, or they will be nonsuited (*George v. Campion*, 2 Jur. 843, Exch.).

Amount of Debt.] If the petitioning creditor's debt be a debt to one creditor, or to a firm, it must *amount* to 50*l.*; if it be to two, 70*l.*; and if to more, 100*l.*, although it be payable at a future time, and security be given (12 & 13 Vict. c. 106, s. 91). Under the earlier statutes, and the 6 Geo. IV. c. 16, s. 15, and 1 & 2 Vict. c. 110, s. 8, the amount was, under the same circumstances as above, respectively, 100*l.*, 150*l.*, and 200*l.* By 7 & 8 Vict. c. 111, s. 1, a fiat might be issued on the petition of a creditor, whether a member of a company or not, for a debt of requisite amount to support an ordinary fiat.

Where a further debt is contracted by the bankrupt, after leaving off trade, and he makes a payment without directing to which debt it is to be applied, it will be taken to apply to the old debt; and, if *it be thereby [*357] reduced to a sum less than 100*l.*, it will not support a commission (*Meggott v. Mills*, 1 Raym. 286; S. C. Comb. 463). So, if the fiat issue on an attorney's untaxed bill of costs, which, on taxation, is reduced below the required amount, it will not support the fiat (*Ex parte Forde*, 1 Mont. & Ch. 97). A creditor buying in notes to the amount of 100*l.*, at 10*s.* in the pound, has a sufficient debt (*Ex parte Lee*, 1 P. Wms. 782). Where a creditor to an amount sufficient to support a commission, after notice of an act of bankruptcy, received a payment, diminishing the original debt to a sum insufficient to support the commission, it was held that, as that payment was void, there was still a good petitioning creditor's debt (*Mann v. Shepherd*, 6 T. R. 79; *Brokerdike v. Bollman*, 1 T. R. 405; and see *Ex parte Miller*, Buck, 283; *Ex parte Jones*, 3 Dea. & Ch. 697; 1 Mont. & Ayr. 442). Two firms, of several partners each, may jointly petition, though the debt of neither amount to 100*l.*, if the two debts equal 100*l.* (*Doe v. Ingleby*, 14 M. & W. 91). Where the debt was for a bill of exchange for 50*l.*, drawn and issued before the act of bankruptcy, but becoming due afterwards, it was objected that the sum of 50*l.* was not due, but only that sum *minus* the rebate of interest; but it was held that the debt was sufficient to support the commission, upon the principle that the debt was contracted at the time the bill was given (*Brett v. Levett*, 13 East, 213). In the case of a bill of exchange, where it is not expressed on the face of it that interest should be paid, it cannot be added, so as to make up a legal petitioning creditor's debt (*Cameron v. Smith*, 2 B. & A. 305; *Ex parte Burgess*, 2 Moo. 745; S. C. 8 Taunt. 960); even though it be noted and protested, pursuant to 9 & 10 Will. III. c. 17 (*Ex parte Greenaway*, Buck, 412). Where there is only one petitioning creditor, there must be a debt due to him separately, for which he alone might maintain an action at law. So a commission cannot be supported on the petition of one of two joint partners to whom a joint debt is due (*Buckland v. Newsame*, 1 Taunt. 477).

Subject-matter of Debt.] With respect to the subject-matter of the debt, the debt must be a legal one; not a mere equitable claim (1 Atk. 147; 2 Ves. 407), or debt (*Ex parte Hawthorn*, Mont. 132). An order by the Lord Chancellor for payment of a sum to an uncertificated bankrupt does not constitute a debt to support a fiat (*In re Chambers*, 3 Mont. & Ayr. 303); nor do taxed costs upon a judgment, as in case of a nonsuit under a rule of court, they being recoverable only by attachment in the nature of execution (*Ex parte Stevenson*, 1 M. & M. 262). It is doubtful whether a mortgagee in trust can alone issue a fiat against the mortgagor on the mortgage deed, unless the legal validity of the debt has been previously established in an

action at law (*Ex parte Gray*, 2 Mont. & Ayr. 283). An acceptance by one of two partners in the name of the firm for a pre-existing debt of his own, without the authority of the other partner, will not support a joint fiat against both partners (*Ex parte Austen*, 1 Mont. Dea. & De. 247); nor is an acceptance in the name of the bankrupt, without his authority, sufficient to sustain a fiat against him, though he acknowledged to the holder of the bill, after it became due, that he is responsible for the payment of it (*Ex parte Edwards*, 2 Mont. Dea. & De. 241; 5 Jur. 706). A judgment debt, on which the debtor has been already taken in execution, will not support a fiat (*Cohen v. Cunningham*, 8 T. R. 123); nor, *semble*, will a demand for rent, with respect to which an action of replevin is already pending (*Emery v. Mucklow*, 4 Moo. & S. 263): but a simple-contract *debt will, though it has been merged in a higher security, as a bond (Am- [*358] *brose v. Clendon*, 2 Stra. 1042), or a judgment (*Briant v. Withers*, 2 M. & S. 123), which is invalid by reason of being given or obtained after an act of bankruptcy. So, a creditor entering into a composition-deed, after an act of bankruptcy committed by his debtor, is not precluded from being a petitioning creditor, in respect of the original debt (*Doe v. Anderson*, 5 M. & S. 161; and see *Ambrose v. Clendon*, 2 Stra. 1042; Ca. t. Hard. 267; *supra*). So, where a creditor receives a bill of lading as a security for his debt from the consignee, and the consignor afterwards stops the goods *in transitu*, the creditor may issue a fiat on his original debt (*Ex parte Ashton*, 2 Deac. & Ch. 5). So, where the debtor has become insolvent, and included the debt in his schedule (*Jellis v. Mountford*, 4 B. & M. 256; *Ex parte Shuttleworth*, 2 Glyn & J. 68). So, where a note was given on a wrong stamp as security for a debt, the debt was held sufficient to support a sequestration in Scotland (*Geddes v. Mowatt*, 1 Glyn & J. 414. So, a debt upon an attorney's bill, though it has not been signed and delivered pursuant to the statute, is sufficient (see *Ex parte Steele*, 16 Ves. 166; *Ex parte Howell*, 1 Rose, 312; *Ex parte Sutton*, 11 Ves. 163; *Ex parte Prideaux*, 1 Glyn & J. 28); and a debt, though barred by the Statute of Limitations, will be good, if the bankrupt himself make no objection to it (*Swayne v. Wallinger*, 2 Stra. 746; *Quantock v. England*, 5 Burr. 2628; *Mavor v. Pyne*, 3 Bing. 285); but, if he object to it, it will not (*Ib.* and *Gregory v. Hurrill*, 5 B. & C. 341; 8 D. & R. 270; and see S. C. 3 B. & B. 212; 1 Bing. 324; 8 Moo. 189; and *Taylor v. Hipkins*, 5 B. & A. 489). A verdict for damages in an action for breach of promise of marriage does not, before judgment, constitute a debt (*Ex parte Charles*, 14 East, 197).

The debt must be of such a nature, that an action of law might be brought for it by the petitioning creditor against the bankrupt. Therefore it will not support a fiat, if the creditor have covenanted with the debtor not to sue him for it (*Small v. Marwood*, 4 M. & R. 181; 9 B. & C. 300); or if it be founded on an illegal consideration (*Wells v. Gozling*, 1 B. & B. 447; 4 Moo. 78); or on a promissory note made in violation of the statutes made for the protection of the Bank of England (*Ex parte Randleson*, Mont. & Ayr. 86). Where the debt is due to a partnership, it must appear that all the partners concurred in the proceeding. A commission cannot be supported on the petition of one only of two partners, to whom a joint debt is due (*Buckland v. Newsame*, 1 Taunt. 477; S. C. 1 Camp. 474); but a separate commission may be taken out against one of several partners, on the petition of a joint creditor (*Crispe v. Perritt*, Willis, 467). One partner cannot sue out a fiat against another for a partnership debt, except, perhaps, where accounts have been liquidated and the partnership determined, and the creditor paid all the debts (*Ex parte Nokes*, 2 Mont. 144); and where a partner has filed a bill, and treated a debt as mixed with the partnership, he

cannot afterwards support a fiat upon it (*Ex parte Gray*, 2 M. & Ayr. 283); but, for a debt not arising out of a partnership transaction, or where they are not equally concerned in the profit and the loss, one partner may sue out a fiat against another (*Windham v. Paterson*, 1 Stark. 144); or, where the profit was equally to be divided between them, but the loss to be borne exclusively by one only (*Marston v. Barber*, Gow. C. 17). So, where H. P., the bankrupt borrowed money of his partner by way of personal loan, and on the dissolution of the partnership purchased the stock at a stipulated price, W. P.

had a good petitioning creditor's debt, though he had *entitled the [*359] account, "H. P. in account with H. and W. P." (*Ex parte Richardson*, 3 Dea. & Ch. 244). So, where A. advances 200*l.* to B. to set up trade, on an agreement that A. should have one-eighth of the profits, he may support a fiat on such advance (*Ex parte Notley*, 1 Mont. & Ayr. 46).

Affidavit.] One of several assignees may sue out a commission in respect of a debt due to their bankrupt, without the other assignees joining in the affidavit, &c. (*Ex parte Blakey*, 1 Glyn & J. 197). So, an affidavit sworn by one of several partners is sufficient (*Ex parte Rhodes*, 4 Deac. 125; 1 Mont. & Ch. 319); or by an agent duly authorized (*Ex parte Hall*, 3 Deac. 405; 1 Mont. & Ch. 467); and it may be sworn before a master extraordinary in chancery (*Ib.*), even in Scotland or Ireland, under 6 & 7 Vict. It now may be sworn before the court, or any commissioner, registrar, or master thereof, or before a master in ordinary or extraordinary of the high court of chancery, or before any clerk of affidavits, assistant clerk, or second assistant clerk of affidavits of the high court of chancery, or in Scotland or Ireland before such master extraordinary aforesaid, or before a magistrate of the county, city, town, or place where any such affidavit shall be sworn, or elsewhere before a magistrate and attested by a notary, or before a British minister, consul, or vice consul, 12 & 13 Vict. c. 106, sect. 243.

A husband alone cannot be a petitioning creditor in respect of a debt composed partly of a sum due to himself, in his own right, and partly to his wife (*Rumsey v. George*, 1 M. & S. 176); but, in the case of a bill of exchange, or promissory note, given to the wife *dum sola*, the husband may alone petition, for the right of action, shifting with the possession of the bill, vests by marriage in the husband (*McNeillage v. Holloway*, 1 B. & A. 218; *Ex parte Barber*, 1 Glyn & J. 1); but, if it is payable to her order only, see p. 343.

A debt due to an infant is not sufficient to support a fiat (*Ex parte Barrow*, 3 Ves. 554; *Ex parte Morton*, Buck, 42); nor is a debt contracted by an infant; but an acceptance after he came of age, upon a bill drawn when he was an infant, was holden to be a good petitioning creditor's debt (*Stevens v. Jackson*, 4 Camp. 164). Though a public company have power by statute to "commence all actions and suits" in the name of their secretary, as the nominal plt., this does not enable the secretary to petition for a commission (*Guthrie v. Fisk*, 3 B. & C. 178; 5 D. & R. 24). It is now enacted by 12 & 13 Vict. c. 106, s. 92, "that a petition for adjudication of bankruptcy against any trader indebted in the amount aforesaid (see p. 356), to any copartnership duly authorized to sue and be sued in the name of a public officer of such copartnership may be filed by such public officer as the nominal petitioner for and on behalf of such copartnership." The debt of a factor, selling goods in his own name, is sufficient to support a commission against the purchaser; but not so if it appear that, by agreement between the principal and factor, the former was to consider the purchaser as his debtor, as, by the intervention of the principal, the right of the factor was gone (*Sadler v. Leigh*, 4 Camp. 164). The debt of a natural-born subject,

residing and trading in an enemy's country, will not support a commission (M'Connell v. Hector, 3 B. & P. 113). The mere residence, however, will not affect the debt, if it do not appear that it was for the purpose of trading, and that the creditor went there with a knowledge of the existing hostilities (Roberts v. Hardy, 3 M. & S. 533); nor will the *debt be invalidated if the creditor reside there under a license granted by order [*360] in council (Ex parte Baglehole, 18 Ves. 525; 1 Rose, 271; and see *ante*, "ALIEN"). An uncertificated bankrupt (Ex parte Cartwright, 2 Rose, 230), an insolvent debtor (Jellis v. Mountford, 4 B. & A. 256), may, in most cases, be a petitioning creditor. An executor of a bankrupt cannot sue out a commission on a debt due to his testator before his bankruptcy (1 Atk. 100).

Debt must not be contingent.] The debt must be a present existing debt, and not one depending on a contingency (Deac. B. L. 90; Ex parte Page, 1 Glyn & J. 100; see *post*). A warrant of attorney has been deemed a *debitum in presenti*, sufficient to support a commission, though given as a security against running acceptances (Miles v. Rawlyns, 4 Esp. 194). The debt should be of a liquidated nature, or capable, from computation, of being liquidated (see 2 Ves. 326; 4 Ves. 168). A mere verdict for damages in an action for breach of promise of marriage or tort, does not constitute, before judgment, a sufficient petitioning creditor's debt (Ex parte Charles, 14 East, 197; 16 Ves. 257; recognised in Walker v. Barnes, 1 Marsh. 346; and Scott v. Ambrose, 3 M. & S. 362). A sum awarded by an arbitrator will support a commission against the person who is awarded to pay it, notwithstanding a bill is filed to set aside the award (Ex parte Lingood, 1 Atk. 241). Proof of a surety debt will support a commission against the party liable on it (Hughes v. Hall, Palm. 325); but a security for a contingent debt will not be sufficient, though given in the form of a present debt (Ex parte Page, 1 Glyn & J. 100). A penalty due to the crown is a sufficient debt to support a commission (Cobb v. Symonds, 5 B. & A. 516); so, also, is an assessment for church and highway rates; and the assessor would be a good petitioning creditor (Lloyd v. Heathcote, 2 B. & B. 388).

Debt contracted while Bankrupt a Trader.] The debt must be proved to have been contracted, or to have subsisted, while the party was a trader (Dawe v. Holdsworth, Pea. 64; Meggott v. Mills, 1 Raym. 287; S. C. 12 Mod. 157; Baillie v. Grant, *post*). Where a person contracted a debt and afterwards became a trader, and the debt still remaining unpaid he went out of trade and afterwards committed an act of bankruptcy, a commission founded on this debt and act of bankruptcy was held to be valid (Baillie v. Grant, 1 Cl. & Fin. 238). If a simple-contract debt is contracted whilst the party is in trade, though he give the creditor a bond for it after leaving off trade, this will not extinguish the debt, so as to prevent the creditor from suing out a commission on it (Dawe v. Holdsworth, Pea. 64). But, if a trader, indebted in 100%, quit his trade, and afterwards become indebted to the same creditor in 100% more, and subsequently pays 100% without saying on what account, the creditor in this case cannot take out a commission on the old debt (Dawe v. Holdsworth, Pea. 64; Meggott v. Miles, 1 Raym. 287). If there be a petitioning creditor's debt at the time of the act of bankruptcy on which a commission might have issued, and there was a petitioning creditor's debt still existing at the time of the commission, it matters not what happened in the mean time as to the payment of the first debt, the balance throughout containing sufficient for a petitioning creditor's debt (Shaw v. Harvey, M. & M. 526).

Time when due.] The debt must be proved to have been contracted before,

and subsisting at the time of the act of bankruptcy (*Clarke v. Askew*, *Pea. 458, n.). Where it was necessary to prove a good petition-
 [*361] ing creditor's debt on the 20th May, it was held not sufficient to show that, on the 20th Jan. preceding a sum of 700*l.* was due from the bankrupt; there being subsequent receipts and payments, and other continuing transactions, between the petitioning creditor and the bankrupt; for, after a period of three months, it was considered impossible to say, under these circumstances, whether 1000*l.* or 5*l.* were really due (*Gressly v. Price*, 2 C. & P. 48, overruling *Jackson v. Irwin*, 2 Camp. 50), where it was held that, from proof of the existence of the debt before the act of bankruptcy, it would be presumed to be still in existence when the act was committed. The case where a bill or note is produced for the purpose of proving a good petitioning creditor's debt is an exception to the general rule, that the date of an instrument is *prima facie* proof of the time of its execution, and it may be taken to be now settled that some evidence is necessary besides the date to show that the instrument produced for that purpose had its existence before the act of bankruptcy took place, and for this reason, that a proceeding in bankruptcy is retrospective, to invalidate all transactions between the act of bankruptcy and the fiat, and therefore it may be necessary to require more proof than in ordinary cases (per *Bosanquet, J.*, in *Anderson v. Weston*, 6 Bing. N. C. 301). Therefore, an I O U, bearing date before the bankruptcy, is not evidence of a petitioning creditor's debt, without some proof that it was in existence before the bankruptcy (per *Abinger, C. B.*, *Wright v. Lainson*, 2 M. & W. 739); and so, as to a promissory note (*Fletcher v. Manning*, 12 M. & W. 571; the case of *Taylor v. Kinlock*, 1 Stark. 175, to the contrary, proceeded on a mistaken report of a case on the Northern Circuit, 2 Stark. 594; 2 Stark. Ev. 161); and so, where the debt arises on the indorsement or acceptance of a bill, the indorsement of a bill or acceptance itself must be proved to have been made before the commission or fiat, no presumption arising from the date of the bill (*Rose v. Rowcroft*, 4 Camp. 245; per *Tenterden, C. J.*, *Cowie v. Harris, M. & M. 141*). But the indorsement may be after the act of bankruptcy (*Glaister v. Hewer*, 7 T. R. 498); but if the course of dealing between the parties raise a presumption to that effect, that is sufficient, as, if it be shown that about that time goods were sold of a corresponding amount (*Cowie v. Harris, ib.*). So, where a note bore date before the bankruptcy, and was proved to be in existence before the docket was struck, this was considered *prima facie* proof that it was in existence before the act of bankruptcy (per *Tenterden, C. J.*, *Obbard v. Betham, ib.* 486).

The debt must be complete and perfect before the act of bankruptcy. A verdict in an action for a tort is insufficient, unless a judgment thereon be entered before the act of bankruptcy (*Ex parte Charles*, 14 East, 197; 16 Ves. 256, *supra*). Where the act of bankruptcy is founded on a lying in prison, and the debt was contracted after the arrest, it was holden insufficient (*Ex parte Doggett, Whitm. B. L. 42*). Before the 6 Geo. IV. c. 16, s. 15, it would not be a good debt if the credit given were unexpired at the time of the bankruptcy (*Hoskins v. Duperoy*, 9 East, 498; S. C. 6 Esp. 55; *Parslow v. Dearlove*, 4 East, 438; *Sarratt v. Austin*, 4 Taunt. 200; but see *Henbest v. Brown, Pea. 75*); unless, in pursuance of 7 Geo. I. c. 51, and 5 Geo. II. c. 30, a written security were given for the payment (*Price v. Mixon*, 5 Taunt. 338; *Cothay v. Murray*, 1 Camp. 335). But a bill of exchange was a sufficient debt from the date, and before the day of payment (*Macarty v. Barrow, Stra. 946*; *Bingley v. Maddison, Co. B. L. 28*; *Glaister*
 [*362] *v. Hewer*, 7 T. R. 498; *Anon.* 2 Wils. *135, *ante*, 360); and, in the hands of an indorsee, it would be a good debt, though the indorsement were made after the act of bankruptcy; but it should be proved to

have been made before suing out the fiat (*Ib.*; *Rose v. Rowcroft*, 4 Camp. 245; *Ex parte Bolton*, 1 Mont. & B. 412). The acceptor of an accommodation bill, paying the amount after an act of bankruptcy, has not a sufficient petitioning creditor's debt (*Ex parte Holding*, 1 Glyn & J. 97); nor, where there is an exchange of acceptances between two persons, and, before the maturity of the bill, one of them commits an act of bankruptcy, can the other prove under the commission, till he has paid his own bill (*Sarratt v. Austin*, 4 Taunt. 200). We have seen that a bill of exchange drawn upon an infant, and accepted by him when he came of age, is sufficient to support the commission (*Stevens v. Jackson*, 4 Camp. 164, *ante*, 358). Where a bankrupt drew a bill in favour of A., to whom he was previously indebted, and committed an act of bankruptcy before either the bill was due or had been presented for acceptance, it was held that the bill was a good petitioning creditor's debt, although it appeared that, subsequent to the commission, the bill had been paid by the acceptors (*Ex parte Douthat*, 4 B. & A. 67; *Eden*, 48).

By the 6 Geo. IV. c. 16, s. 15, it was enacted, that "every person who has given credit for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may so petition, or join in petitioning as aforesaid, whether he shall have had any security in writing for such sum or not." This paragraph is re-enacted verbatim in 5 & 6 Vict. c. 122, s. 91, and 12 & 13 Vict. c. 106, s. 91.

Under this clause, a debt for money lent on mortgage, payable after six months' notice, such notice not to expire before a certain day, is sufficient without any notice given, and before that day (*per Tenterden, C. J.*; *Hill v. Morris*, M. & M. 448). But where a creditor, for the value of goods sold and delivered, took a bill of exchange from the debtor for the amount, and negotiated it, and the debtor committed an act of bankruptcy while the bill was in the hands of a third party, it was considered very doubtful whether the debt and act of bankruptcy would support a fiat (*Ex parte Magnus*, 6 Jur. 808, C. R.); and where a creditor sold the debtor's goods, and took in payment bills of exchange accepted by the bankrupt, and negotiated them, and they were not in his hands, or due, when he issued the fiat, he had not a good debt (*Ex parte Smith*, 3 Mont. Dea. & De. 341).

By 6 Geo. IV. c. 16, s. 19, no commission shall be deemed invalid, by reason of an act of bankruptcy, prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt (see 12 & 13 Vict. c. 106, s. 88, a similar clause). Before this statute, though the bankrupt himself could not, yet a debtor to the estate might, in an action by the assignees, upon proof of an act of bankruptcy prior to the petitioning creditor's debt, and of a sufficient debt, upon which a commission might be supported, resist the claim, and defeat the commission (*Eden*, 43).

Substitution of another Debt.] The 6 Geo. IV. c. 16, s. 18, provides, "that if, after adjudication, the debt or debts of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors, having proved any debt or debts sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or *debts of the petitioning creditor or [*363] creditors, to order the said commission to be proceeded in, and it shall by such order be deemed valid." This section is re-enacted as follows, by 12 & 13 Vict. c. 106, s. 103: "That if after adjudication of bankruptcy the debt of the petitioning creditor be found by the court to be insufficient to support such adjudication, it shall be lawful for the court, upon the application of any other creditor having proved any debt sufficient to support an

adjudication, to order the petition for adjudication of bankruptcy to be proceeded in, and it shall by such order be deemed valid, which order may be in the form contained in the schedule (T) to this act annexed, or to the like effect."

The 18th section of 6 Geo. IV. applied not only to a deficiency in the amount of the original debt (*Ex parte Rogers*, 4 Dea. & Ch. 623; 2 Mont. & Ayr. 153; *Byers v. Southwell*, 8 Sco. 238; 6 Bing. N. C. 39); but to a defect in the nature of it, as where it was the debt of several persons, but was sworn as the debt of two only (*Ex parte Hall*, M. & W. 39). A promissory note of the bankrupt, payable to the new petitioning creditor and seen in the hands of the latter, is evidence of a debt at that time, but not of a debt at the date of the note (*Fletcher v. Manning*, 12 M. & W. 571). A creditor substituted for the petitioning creditor, under 5 & 6 Vict. c. 122, s. 4, need only have proved his own debt and the trading and act of bankruptcy, and was not bound to prove the original creditor's debt (*Kynaston v. Davis*, 15 M. & W. 705). It must have been found insufficient before the Lord Chancellor could order a new debt to be substituted (*Muskett v. Drummond*, 10 B. & C. 153; M. & R. 210); and, therefore, an order by the Lord Chancellor (now the Court of Bankruptcy) was invalid, if it did not find, or call upon the commissioners to find, that the original debt was insufficient, and directed them to inquire only into the sufficiency of the debt proposed to be substituted (*Ib.*). Where the commissioners find the first debt insufficient they should expressly find the debt proposed to be substituted to have been incurred "not anterior" to it (*Ex parte Hunter*, 2 Dea. & Ch. 507), unless the court be satisfied of that fact from other evidence (*Ex parte Pubery*, 2 Mont. Dea. & De. 184). It seems that the order of substitution is itself evidence of the petition, but the sufficiency of the substituted debt and the time when it was contracted, must be shown by other evidence (*Fletcher v. Manning*, 12 M. & W. 571). It is sufficient to constitute the second debt "not anterior" to the original one, that the principal sum was due before the accruing of the substituted debt, although the interest may have been accruing up to a period subsequent thereto (*Fletcher v. Manning*, 12 M. & W. 571; 13 L. J., N. S., Ex. 150). Where an order was obtained for substituting one of the partners in the firm of Jones Loyd and Co. as a new petitioning creditor, and the order stated that, that firm had proved a debt sufficient to support the fiat, that it was an existing debt, and that it was incurred not anterior to that of the original petitioning creditor, it was held that this order was not *per se* evidence that the substituted debt was contracted not anterior to that of the original petitioning creditor, or that it was of the requisite amount, or that it was incurred before the act of bankruptcy (*Ib.*). Where such an order for substitution was obtained, the petition on which it was made could not be used to explain any ambiguity in the order, and therefore, if the order did not distinctly state that the second debt had been proved before the petition was presented, it was bad (*Christie v. Unwin*, 3 P. & D. 204; 4 Jur. 363);

but a mere clerical error will not vitiate the order, as stating the [*364] debt of *the N. & C. Bank (the new petitioning creditors) to have been incurred not anterior to the debt of the said banking company (instead of J. C.) (*Ib.*). Where a new debt had been substituted, it was sufficient to prove the petition for substitution to the Chancellor, his order referring the sufficiency of the new debt, &c., to the commissioners, and the commissioners' finding thereon, without producing the Chancellor's order confirming such finding (per *Tindal*, C. J., *Batchelor v. Vyse*, 1 M. & Rob. 331). It was doubted whether an order for substitution was sufficient to support a fiat in an action commenced by the assignees against a debtor before the order was made (*Muskett v. Drummond*, *supra*); or whether it

could be used to the prejudice of a party who had commenced an action, in which he sought to impeach the validity of the fiat by reason of the insufficiency of the petitioning creditor's debt (*Aireton v. Davis*, 3 M. & Sc. 138). Where an application for substitution was made pending an action, in which the deft. had given notice to dispute the debt, the order must be without prejudice to the defence in the pending action (*Ex parte Watson*, 3 Deac. 310; 3 Mont. & Ayr. 609). But a deft. is not, in such a case, entitled to an order requiring a notice to be given him of any application for substitution (*Ex parte Humberstone*, 6 Jur. 672, C. R.).

Mode of proving Petitioning Creditor's Debt.] "It is an established rule, that assignees must prove the petitioning creditor's debt by the same evidence which must have been produced in an action against a bankrupt" (per Buller, J., *Abbot v. Plumbe*, 1 Doug. 216). Therefore, if the debt of the petitioning creditor is on a bill of exchange drawn by the bankrupt, and indorsed by him to the petitioning creditor, besides adducing evidence that it was indorsed before the commission, it will be necessary, in order to prove the debt, to go regularly through the several proofs required in an action by an indorsee against the drawer. Where the debt arose on a bond, an acknowledgment of the bankrupt to a witness, that he owed the debt upon which the commission was sued out, will not supersede the necessity of calling the subscribing witness (*Abbott v. Plumbe*, 1 Doug. 216; see p. 365, as to proof by bankrupt's admissions, and title "ADMISSIONS"). Where the petitioning creditor had, upon an application for a loan from a bankrupt, delivered to him a check on his banker for 100*l.*, which check had got back again to the hands of the petitioning creditor, as if satisfied, but he was unable to give positive proof that the check was *actually paid*, the check of itself was, in this case, held not sufficient evidence of a petitioning creditor's debt (*Bleasby v. Crossley*, 2 C. & P. 213).

So, where the plts. produced certain cancelled cheques drawn by the bankrupt upon the petitioning creditors, and called one of their (the petitioning creditors') clerks, who stated (from recollection merely) that at the time of these cheques being drawn the bankrupt's account was greatly overdrawn, it was held not sufficient proof of a debt, for the cancelled cheques were *prima facie* evidence of a payment of a debt due from the petitioning creditors to the bankrupt (*Fletcher v. Manning*, 12 M. & W. 571; 13 L. J., N. S., Ex. 150). So, where the debt was an acceptance of the bankrupt, and the assignees had had notice to prove the consideration, it was held, that though they were not bound to prove the consideration, until impeached, yet that, not having adduced any evidence, and the jury, from circumstances of suspicion attached to the case, having found a verdict for the deft., the court could not disturb that verdict (*Abraham v. George*, 11 Pri.

423). But if a sufficient petitioning *creditor's debt on bills be [*365] legally proved before the commissioners, and they thereupon declare the acceptor a bankrupt, the subsequent loss on the bills affords no ground to impugn the fiat, in an action by the assignees, for the conversion of goods belonging to the estate (*Pooley v. Millard*, 1 C. & J. 411; 1 Tyrw. 331). An award of a separate debt due from the bankrupt to the petitioning creditor, upon a deed of reference by them and other persons, is sufficient evidence of the existence of the debt, on proof of the execution by all the parties (*Antram v. Chase*, 15 East, 209). So, an award is evidence of a petitioning creditor's debt, though a bill be filed to set it aside (*Ex parte Lingood*, 1 Atk. 240; *Marson v. Barber*, Gow, C. 17; *ante*, p. 359). Where the petitioning creditor is assignee of another bankrupt, and his title, as such, comes in question incidentally, it must be strictly proved (*Doe v.*

Liston, 4 Taunt. 741; Drummond v. Muskett, 10 B. & C. 153); but, in the absence of any notice of an intention to dispute the debt, it is sufficiently proved by the production of the proceedings under the commission, unless they contain facts not in themselves sufficient to sustain the bankruptcy (Skaife v. Howard, 2 B. & C. 560; 4 D. & R. 37); and, if the debt be due to the petitioning creditor, as executor, it is not necessary to produce the probate, in order to prove that he was executor (per Abbott, C. J., *ib.*, 562); though, in Rogers v. James, 7 Taunt. 147; 2 Marsh. 425, it was held, an executor might support a commission, though the probate was on an insufficient stamp, if a valid probate be afterwards obtained, for it will have relation back; and, upon the same principle, an executor will be a good petitioning creditor, though there be no probate when the commission is sued out, if there be one before the adjudication of the commissioners (Ex parte Paddy, Buck, 235; 3 Mad. 241); and so, *semble*, would an administrator now, the letters of administration also being held to relate back (Foster v. Bates, 7 Jur. 1093; 12 M. & W. 226).

Proof by Bankrupt's Admissions.] An acknowledgment or admission of the bankrupt before his bankruptcy is also evidence of the petitioning creditor's debt (Watts v. Thorpe, 1 Camp. 376; Hoare v. Coryton, 4 Taunt. 560); but an acknowledgment or declaration after the bankruptcy is not admissible in evidence (Smallcombe v. Bruges, 13 Pri. 136; S. C. McClell. 48; Sanderson v. Laforest, 1 C. & P. 46). Admissions made after the act of bankruptcy, but before the issuing of the commission, are not sufficient (Robson v. Kemp, 4 Esp. 234; Hoare v. Coryton, 4 Taunt. 560; *sed vide* Dowton v. Cross, 1 Esp. 168; Brett v. Levett, 13 East, 213). The demeanor and conduct of the bankrupt before the commissioners, has been held to be evidence of an implied admission that a balance is due, and a question to be left to a jury; but it is not evidence of an adjudication by the commissioners, or of an award made by consent of the parties (Jarrett v. Leonard, 2 M. & S. 265; Eden, 336); but an admission by the bankrupt, of a debt to the executors of D., is not sufficient to support an averment that the debt was due to *plts.* as executors of D., without also proving that they assented to act in discharge of the trust (Rex v. Barnes, 1 Stark. 243). The debt will be sufficiently established, by proving entries of the bankrupt, or an account signed by him before his bankruptcy (Hoare v. Coryton, 4 Taunt. 560; Watts v. Thorpe, 1 Camp. 376). Such entries must, however, be clear and unequivocal, and proved to have been made before the bankruptcy. See further, *post*, p. 369, and *ante*, "ADMISSIONS."

**Who are Traders.*] It is enacted by 12 & 13 Vict. c. 106, [*366] s. 65, "that all alum-makers, apothecaries, auctioneers, bankers, bleachers, brokers, brickmakers, builders, calenderers, carpenters, carriers, cattle or sheep salesmen, coach proprietors, cowkeepers, dyers, fullers, keepers of inns, taverns, hotels, or coffee houses, limeburners, livery-stable keepers, market gardeners, millers, packers, printers, ship-owners, shipwrights, victuallers, warehousemen, wharfingers, persons using the trade or profession of a scrivener receiving other men's moneys or estates into their trust or custody, persons insuring ships or their freight or other matters against perils of the sea, and all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail, and all persons who, either for themselves or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt; provided

that no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated commercial or trading company established by charter or act of parliament, shall be deemed as such a trader liable to become bankrupt."

Sect. 66. "That if any such trader having privilege of parliament shall commit any act of bankruptcy, he may be dealt with under this act in like manner as any other trader; but such person shall not be subject to be arrested or imprisoned during the time of such privilege, except in cases made felonies or misdemeanors by this act."

Proof of Trading. The trading should be proved, by showing that the party comes within the denomination of *persons* exercising some one of those particular trades specified in the above sections, or within the *general description of a trader*. Whether a party was a trader within the meaning of the acts is a question for the decision of the judge upon the several facts found by the jury. The general words in the commission of the bankrupt being a "dealer and chapman," and that he got his living by buying and selling, will admit of evidence of any species of trading, though the commission also describe the particular trade carried on by the bankrupt (*Hale v. Small*, 2 B. & B. 25; *Ex parte Herbert*, 2 Rose, 248; 2 V. & B. 299).

Where the bankrupts were described as "bankers, being traders according to the statute," it was held that the word "bankers" might be considered only a description of the person (*Bernasconi v. Farebrother*, 10 B. & C. 349). The declarations of the bankrupt before the bankruptcy have been admitted, to prove the trading *against* himself in an action brought by him against the assignees, to dispute the fiat (*Parker v. Barker*, 1 B. & B. 9), though they are inadmissible in an action by the assignees against a third party (per Best, C. J., *Bromley v. King*, R. & M. 228); and where the question was as to the intention with which the party had made certain purchases, his declarations at the time, as to the mode in which he intended to dispose of the goods, were received to prove his trading (see *Gale v. Half-knight*, 3 Stark. 56, and *infra*.)

Who a Trader within the general Description in the Statute.] We shall first consider what person is a trader within the statute, under the general description, "all persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and selling for hire, or by the workmanship of *goods or commodities." Secondly, what person is a trader using the particular trades specified [*367] in the statutes; and, lastly, who cannot be made a bankrupt.

Buying and Selling.] To prove a person a trader by *buying and selling* within the above general description in the act, it must be shown that he purchased articles of merchandise for the purpose of selling them again at a profit (*Hankey v. Jones*, Cowp. 750; *Eden*, 3). And, generally, whenever a man buys with the *intention of selling again, with a view to profit*, he is liable; and the intention may be proved by the declarations or acts of the bankrupt (*Gale v. Halfknight*, *supra*; *Milliken v. Brandon*, 1 C. & P. 330). If a man purchase the whole impression of a daily newspaper, to sell again, with a view to profit, and risks the loss of such as remain unsold, it is a sufficient trading (*Gimingham v. Laing*, 2 Marsh. 236; 6 Taunt. 532); and "a farmer's servant buying commodities of his master, and selling them, would be a trader" (per Gibbs, C. J., *lb.*). If a man buys horses to sell again, with a view to profit, he is liable to be a bankrupt (*Ex parte Gibbs*, 2 Rose, 68; *Wright v. Bird*, 1 Pri. 20); but, if he sell only such as he reared

himself, he is not (Ib.). And, if a butcher buy sheep and cattle, and kill and sell them with a view to profit, he is liable to be made a bankrupt (*Dally v. Smith*, 4 Burr. 2148); but, if he kill and sell only such as he reared himself, he is not (Ib.). If a fisherman be in the habit of purchasing fish from others to sell again, with a view to profit, it is a sufficient trading (*Mannay v. Birch*, 3 Camp. 233); but it is not, if he merely sell the fish he has caught (Ib.). Where a person buys coals, for the purpose of again selling them, it is a trading (*Cooke*, 48, 73); but not, if such person merely sell those which are produced from his own mines; or, if such person rent a mine, work it, and sell the ore, it is not a trading, as he does not buy (*Port v. Turton*, 2 Wils. 169). Where it appeared that the party had ordered goods, for the purpose, as he alleged, of exporting them abroad, and had promised to give other goods in exchange for them, and it was objected that this was an insufficient proof of trading, as it was proof of buying, but not of selling, *Abbott, C. J.*, observed, "I cannot say, that if a man buys, and represents himself as a dealer, and offers goods in exchange, that he does not buy to sell again; at least I must leave it to the jury" (*Milliken v. Brandon*, 1 C. & P. 380). Buying and selling horses, with an avowed intention to take out a license and become a dealer, is sufficient to constitute a trading within the bankrupt laws, however limited the trading, and though no license has been actually taken out (*Wright v. Bird*, 1 Pri. 20). And, where A. was a horse-dealer and livery-stable keeper, and, after his death, his widow carried on the business of the livery-stable, and bought horses to let, which she occasionally sold to customers, it was held a sufficient trading (*Martin v. Nightingale*, 3 Bing. 421). An executor disposing of his testator's stock is not a trader, though he purchase other articles to make it marketable, unless he increase the stock, and continue to sell (*Ex parte Nutt*, 1 Atk. 102; *Eden*, 5). Where a party purchases goods for his own use, that will not make him a trader within this section of the statute, though he afterwards sell such as he has no occasion for, because he does not seek his living *by buying and selling* (*Parker v. Wells*, 1 T. R. 34). Where a party, having no other visible occupation, was made a bankrupt as a dealer in yachts, and the only evidence of trading was that upon three several occasions he bought and sold [*368] a yacht for profit, and on one *of those occasions said to a broker whom he employed "that he thought it no disgrace thus to increase his profit," and there was no direct evidence that he thus dealt for the purpose of gaining his livelihood, or was considered a trader by any person who knew or dealt with him; it was doubted whether this was sufficient evidence of a trading to support a fiat (*Ex parte Cromwell*, 1 Mont. Dea. & De. 158). So, where before the recent statute a man made bricks from the earth on his own land, for his own use, though he sold some of them which he did not want to use (*Parker v. Wells*, *supra*), or though he made them entirely for sale, as a mode of enjoying the profits of his land, and even purchased land and fuel for the purpose of making them, he was not a trader (*Sutton v. Wealy*, 7 East, 442; *Paul v. Dowling*, M. & M. 263; *Heave v. Rogers*, 9 B. & C. 577); but he would have been a trader if he made them of earth dug from the waste, for which he afterwards paid the lord (*Ex parte Harrison*, 1 Bro. C. C. 173; *Ex parte Ridge*, 1 Rose, 316). If a man sell the milk of his own cows, and the cows too, occasionally, when unfit for milking, it is no trading (*Carter v. Dean*, 1 Swanst. 64); nor is it a trading, if a person sell only the cheese which he has made from the milk of his own cows, or the cider which he makes from the fruit of his own trees (*Parker v. Wells*, 1 T. R. 34); but if he buy the cheese or cider to sell again, it will (Ib.; *ante*, p. 366, as to "brickmakers" and "cowkeepers").

If a person make a purchase and sale ancillary to a business which is not

itself a trading, that does not constitute a sufficient act of trading; as where a person buys an article for the purpose of mixing it with his own produce, with a view to sell the mixture more advantageously than his own produce could be sold unmixed (*Patten v. Browne*, 7 Taunt. 409); or a surgeon sells drugs as ancillary to his business of a surgeon (*Ex parte Daubeny*, 3 Mont. & Ayr. 16; 2 Deac. 72); and so a farmer who occasionally buys hay, corn, horses, &c., with a view to sell again for profit, the buying and selling being incidental to the occupation of the farm, does not thereby become a trader (*Stewart v. Ball*, 2 N. R. 78); but where a farmer bought horses unfit for farming, and resold them, and avowed his intention to take out a license and become a horse dealer, these facts were held to be evidence of trading (*Wright v. Bird*, 1 Pri. 20; *Martin v. Nightingale*, 3 Bing. 421); and prior acts of buying will in such case be evidence to explain the quality of subsequent acts (*Worth v. Budd*, 2 B. & Ad. 172; 1 Dowl. P. C. 328).

Quantum of Dealing immaterial.] *The quantum of the dealing, or the smallness of the profit*, is immaterial, if it be proved that it was the party's intention to deal generally, in which case evidence of one act of buying and selling is sufficient to constitute a trader within the bankrupt laws (*Newland v. Bell*, Holt, 221, per Gibbs, C. J.; *Ex parte Lavender*, 4 Deac. & Ch. 487; 2 Mont. & Ayr. 11). And the purchase of one lot of timber, with intent to sell again, will make a man a trader, even if the timber be standing at the time of the purchase (*Holroyd v. Gwynne*, 2 Taunt. 176); *Patman v. Vaughan*, 1 T. R. 572; *Gale v. Halfknight*, 3 Stark. 56; *Eden*, 3). But, if a person is not in a line of life to subject him to the bankrupt laws, he will not be deemed a trader by occasional acts; as, where a schoolmaster sells books to his own scholars only (*Valentine v. Vaughan*, Pea. 76); or where a contractor for victualling the fleet sells off the surplusage (*Gibbins v. Thompson*, 1 Vent. 270); so where one buys more of an article than he wants, and sells the surplus, he does not thereby become a trader (*Newland v. Bell*, *ante*, p. *368); or the colonel of a regiment selling horses occasionally at [*369] *Tattersall's* (*Ex parte Blackmore*, 6 Ves. 3); or a person who keeps hounds, buying dead horses, and selling the skins and bones (*Summersett v. Jarvis*, 3 B. & B. 2; 6 Moo. 56); or a person, finding that he has bought more of an article than he wants, selling the residue, such parties will not be traders (*Bolton v. Sowerby*, 11 East, 276). And, where a cow keeper, who lived by selling milk, occasionally sold such cows as were unfit for use, such sale was held not to be a trading (*Carter v. Dean*, 1 Swanst. 64). So, where a party holds shares in a joint-stock company for only six days and receives no profits (*Ex parte Atkinson*, 1 Mont. Dea. & De. 300). It will, however, be a question, in such cases, for the jury, whether it affords evidence of an intention to deal generally (*Martin v. Nightingale*, 3 Bing. 421; *Eden*, 4). And a declaration by the party of the object of his buying (*Gale v. Halfknight*, 3 Stark. 56); or his representing himself as a dealer, and buying goods, and offering them in exchange for others (*Milliken v. Bandon*, 1 C. & P. 380), will be received as evidence of his intention in this respect. Where a farmer buys and sells articles incidental to the occupation of his farm, as pigs, and feeds them on his stubbles, and resells them, this is no evidence of trading (*Potten v. Browne*, 7 Taunt. 409; *Martin v. Nightingale*, 3 Bing. 421). Where a farmer bought horses, not for farming, and re-sold them, held evidence of trading, he having declared his intention of taking out a license and becoming a horse dealer (*Wright v. Bird*, 1 Pri. 20). A continued drawing and re-drawing bills and notes with a view to gain a profit on the exchange, is a trafficking in exchange, and a trading (*Richardson v. Bradshaw*, 1 Atk. 128; *Hankey v. Jones*, Cowp. 754). And where

brick-making was adopted as a mode of enjoying the profits of a real estate, it did not before the 12 & 13 Vict. c. 106, s. 65, make the manufacturer liable to bankruptcy unless it had been carried on really as a trade (*Paul v. Dowlton*, M. & M. 263; *Heane v. Rogers*, 9 B. & C. 577).

The *legality or illegality* of the buying and selling, &c., makes no difference. Smuggling may constitute a trading, and the person carrying it on may be a trader, within 21 Jac. I. c. 15, s. 2, as being a person who seeks his trade or living by buying and selling (*Cobb v. Symonds*, 5 B. & Ad. 516; 1 D. & R. 111; *Ex parte Meymott*, 1 Atk. 199). But, where there is distinct proof that a person bought goods in conjunction with others, to carry on a system of fraud, by making away with the goods, and never selling any of them, it is no trading (*Milliken v. Brandon*, 1 C. & P. 380). A trader may become a bankrupt, although he has not taken out a license, to render his trading legal (*Sanderson v. Bowles*, 4 Burr. 2066).

The buying and selling should be of "*goods or commodities*," within the meaning of this section of the act. Buying and selling land, or any interest in land, is not a trading (*Port v. Turton*, 2 Wils. 169). Nor is buying and selling government stock, or other public stocks or securities (*Colt v. Netterville*, 2 P. Wms. 308).

Buying and Letting for Hire.] The *buying and letting for hire* of "goods and commodities," or buying them with intent to let them for hire, is sufficient to constitute a trading, and render a party liable to the bankrupt laws. It would now probably be held, that a person having a share in a ship, which is let out on charter, may be considered as a trader (*Ex parte Bowes*, 4 Ves. jun. 168; *Eden*, 8). This provision will include a large class *of persons, such as job-masters, livery-stable keepers, hackney-
[*370] men, furniture brokers, &c. (*Deac.* 27). In this respect, the repealed acts differ from the present, and it was formerly held, that buying horses for the purpose of letting them out to hire, was not deemed a trading; as there was no selling, nor intent to sell (*Martin v. Knightingale*, 3 Bing. 421; 1 Vent. 29).

Workmanship of "Goods and Commodities."] Purchasing the raw materials of trade, and selling them again under another form, or improved by the labour of manufacture, as in the case of bakers, who buy the flour, of which they make bread (3 Mod. 330); butchers, who purchase cattle, and kill them for the purpose of sale (*Dally v. Smith*, 4 Burr. 2148); shoemakers, who purchase the leather, of which they make shoes (*Crampe v. Barne*, Cro. Car. 31); smiths (*Cooke*, 48); tanners (3 Mod. 330); tailors, &c. (*Parker v. Wells*, *Cooke*, 56); have always been held to be traders, subject to the bankrupt law. The above section of the present act, however, "extends the description still further, so as to comprehend those manufacturers, on an extended scale, who are not excluded from its operation by the subsequent proviso as to "common labourers or workmen for hire" (*Eden*, 8); and the words are of so extensive a meaning, "as not to imply a buying to be necessary, but, on the contrary, are put in contradistinction to the words *buying and selling* in a preceding part of the clause; and it would, therefore, seem that all persons who manufacture goods for sale, with a view to profit, are within it, whether they purchase the raw materials, or have it from their own land, &c., without purchase" (*Arch. B. L.* 44). But it is necessary, in this case, as in that of buying and selling, that it should be

the general practice of the party, or that there should have been a commencement of it coupled with an intention to continue it, as an occasional act would be insufficient (*Ib.*; and *ante*, p. 369).

It has been held that where two parties took a lease of certain saltworks and brine pits for the purpose of manufacturing and selling salt, which they made chiefly from the springs and rock salt upon the premises demised, but some of the brine they obtained by channels from adjoining premises, it was not a trading within this part of the clause (*Ex parte Atkinson*, 1 Mont. Dea. & De. 300).

Secondly, what Person is a Trader using the particular Trade specified in the Act. Agents who make their living by buying and selling, alum makers, apothecaries, auctioneers, bankers, bleachers, brickmakers, brokers, builders, calenderers, carpenters, carriers, cattle or sheep salesmen, coach proprietors, cow-keepers, dyers, fullers, keepers of inns, taverns, hotels, or coffee-houses, lime burners, livery-stable keepers, market gardeners, millers, packers, printers, shipowners, shipwrights, victuallers, warehousemen, and wharfingers, persons using the trade or profession of a scrivener receiving other mens' moneys or estates into their trust or custody, persons insuring ships or their freight or other matters against perils of the sea, are named in the statute (see *ante*, p. 366).

Bankers.] A person may be deemed a banker if he act as such, and it is not necessary that he keep an open shop; and one who receives money as a banker, although his books are kept in a manner different from that in which bankers' books usually are, and although, on receiving any large sum, he pay it to his own established banker, upon whom he gives drafts for the payment of large bills upon him, he only keeping cash to answer small drafts, is a banker *within the statute (*Ex parte Wilson*, 1 Atk. 218).

So is a person who has only held shares in a joint-stock [*371] banking company for two years, and has received two years' dividends upon them (*Ex parte Wyndham*, 1 Mont. Dea. & De. 146); and a creditor of the company may issue a fiat against him, without proceeding in the first instance to the public officer of the company (*Ex parte Wood*, ib. 92). An army or navy agent is not, as such, deemed a banker (*Eden*, 6; 1 Mont. 12).

Brokers.] This term includes not only brokers concerned in the purchase and sale of merchandise, but also stock brokers, (*Cott v. Nettvill*, 2 P. Wms. 308; *Cullen*, 68); pawnbrokers (*Rawlinson v. Pearson*, 5 B. & A. 124); ship brokers (*Pott v. Turner*, 6 Bing. 702; 4 M. & P. 5). See *infra*, as to insurance brokers.

Builders.] These were not considered traders within the former bankrupt laws (*Blake v. Lawrence*, 4 Esp. 147; *Williams v. Stevens*, 2 Camp. 300). Where two attorneys in partnership took possession of the carcasses of houses, which had been forfeited to them as mortgagees, and finished them at their own expense, for the purpose of selling or letting them, and also purchased a few other carcasses, and employed a builder to finish them for the same purpose; it was held not a joint trading as builders (*Ex parte Edwards*, 1 Mont. Dea. & De. 3).

Carpenter—Shipwright.] This seems to mean such a person as purchases timber and other materials, which he works up as a carpenter, and

not a person who is merely a labourer or workman for hire (*Kirney v. Smith*, Raym. 741).

Cowkeeper.] A farmer, who had one hundred acres of land, only two of which were pasture, on which he kept four cows, the milk of which he sold to a cowkeeper, is not a cowkeeper (*Ex parte Deering*, 16 Law J., N. S., Bankr. 3).

Persons Insuring Ships or Freight, or other Matters, against Perils of the Sea.] Underwriters, the description of persons here alluded to, could not, formerly, be made bankrupts in that character (*Ex parte Bell*, 15 Ves. 335). Insurance brokers are not, it has been said, within this section of the act (*Ex parte Stevens*, 4 Madd. 256; *Pott v. Turner*, 6 Bing. 708; but see *Eden*, 7; *Milford v. Hughes*, 16 M. & W. 174).

Persons acting as *agents* or *factors* for others, seeking their living by buying and selling, are within this section.

A Schoolmaster.] A schoolmaster *eo nomine* is not a trader (*Re Harvey*, 10 Law J. 172).

Shipowners.] Before the 5 & 6 Vict. c. 122, s. 10, the share-holders of a steam-packet were held not to be traders (*Ex parte Weswoud*, 1 Mont. 263).

Scriveners.] "In order to make a man a money-scrivener, he must carry on the business of being trusted with other people's moneys, to lay out for them, as occasion offers" (per Gibbs, C. J., *Ralph v. Malkin*, 3 Camp. 534; *Hamson v. Harrison*, 2 Esp. 555; *Lott v. Melville*, 3 Sco. N. R. 346).

Where money is usually lodged in the hands of an attorney by [*372] his clients and others, for the purpose *of being invested in securities, and upon his so investing the money, he charged, not only for the conveyances, but also a certain bonus or compensation for himself, and he was a conveyancer, as well as an attorney, then, it seems, he would be deemed a scrivener within the above clause (*Hutchinson v. Gascoigne*, 1 Holt, 507). But a man who had money of other persons in his possession, and who discounted bills with it for his own emolument only, was holden not to be a scrivener (*Hamson v. Harrison*, 2 Esp. 555). So it has been holden, that an attorney purchasing and selling estates, negotiating loans, &c., for his clients, in the common course of his profession, and making only the regular professional charges for the conveyance, &c., was not a scrivener within the statute of Jac. I. (*Ex parte Malkin*, 1 Rose, 406; 2 East, 27. 28; *Re Lewis*, 2 Rose, 59; *Hurd v. Brydges*, 1 Holt, 554). Nor is he a scrivener within the 6 Geo. IV. c. 16, s. 2, though he charges a procuration fee to the borrowers (*Lott v. Melville*, 3 M. & G. 40; 3 Sco. N. R. 346; 9 Dowl. P. C. 882); but he is liable to the bankrupt laws as a money broker, and person receiving other men's moneys into his trust and custody (*Ex parte Gem*, 2 Mont. Dea. & De. 99; 5 Jur. 683).

Victuallers, Keepers of Inns, Taverns, Hotels, or Coffee-houses.] There was formerly a distinction, that neither victuallers nor inn-keepers could be made bankrupts, so long as they confined themselves to supplying their guests in the house, unless they showed an intention to deal out of doors (*Crisp v. Pentt*, Cro. Car. 549; *Eden*, 8).

Keeper of Lodging-house.] The keeper of a private lodging-house, who

seeks a profit by furnishing her guests with provisions, is subject to the bankrupt laws as an hotel keeper, though the provisions are set apart as the separate property of each guest (*Smith v. Scott*, 2 Moo. & S. 35; 9 Bing. 14). So is the keeper of a board and lodging-house, who keeps a stock of wine, which she supplies to her guests by a bottle at a time, as each requires it (*Gibson v. King*, 10 M. & W. 667; 1 Car. & M. 458, per Alderson, B.), or whose guests are entertained by the month, week, or other definite time, each having a bed-room to himself, but taking his meals with her (S. C. 3 Jur. 1044, Exch.).

Infants are not liable to be made bankrupts (*O'Brien v. Currie*, 3 C. & P. 283), except in cases where they have traded, and held themselves out as adults (*Ex parte Watson*, 16 Ves. 265; *Ex parte Keck*, cited *ib.*, Cooke, 40; *Ex parte Adam*, 1 V. & B. 494); but, unless this is the case, a commission will be superseded, though he have a partner of mature age (*Ex parte Banvis*, 6 Ves. 601; *Ex parte Henderson*, 4 Ves. jun. 163; *Ex parte Layton*, 6 Ves. jun. 440; *Ex parte Hehir*, 3 Dea. & Ch. 107). A fiat against an infant is not merely voidable, but void (*Belton v. Hodges*, 2 Moo. & S. 496; 9 Bing. 365). Nor can a fiat be maintained against a person of age by reason of trading during infancy (*Stevens v. Jackson*, 4 Camp. 164; 1 Marsh. 469; 6 Taunt. 106; *Ex parte Moule*, 14 Ves. jun. 603).

Lunatics.] It has been laid down that lunacy is no defence against a commission of bankruptcy (*Anon.* 13 Ves. 590; *Eden*, 2). It has been once held, however, that he is incapable of committing an act of bankruptcy while labouring under the influence of the malady (*Ex parte Priddy*, 1 Co. B. L. 37).

**Market Gardeners.*] A tenant of 130 acres, under a farming lease, which obliges him to fallow or plant with peas or potatoes [*373] (among other things) every third year, has on his farm twelve acres of young potatoes and twenty acres of green peas growing in open fields every year, and consigns the produce for table consumption to London salesmen, to whom he allows such commission as is usually allowed by market gardeners: held, that he was not a market gardener within 5 & 6 Vict. c. 122, s. 10 (*Ex parte Hammond*, 1 De Gex, 93; 14 Law J. 14, Bankr.).

Artist.] An artist (a painter) is not a trader (*Re King*, 6 Law T. 522).

Attainted Person.] It would seem that he is subject to a commission of bankruptcy (*Ramsey v. McDonald*, Foster, 61; 1 Bl. R. 30; 1 Wils. 217; *Ex parte Bullock*, 14 Ves. 464).

Persons who may or may not be made Bankrupts.] Sec. 135 of the 6 Geo. IV. c. 16, extends "to aliens, denizens, and women, both to make them subject thereto, and to entitle them to all the benefit given thereby."

Aliens and Denizens.] Under 21 Jac. I. c. 19, s. 15, which is in substance the same as the above section, it has been held that aliens or subjects trading to or from this country, buying goods here, and sending them abroad for sale, or buying them abroad and sending them here for sale, may, if they come here and commit an act of bankruptcy, be made bankrupt, though residing in Scotland (*Alexander v. Vaughan*, Cowp. 398; *Dodsworth v. Anderson*, T. Raym. 375); in the British Colonies (*Ex parte Smith*, cited by Ld.

Mansfield, Cowp. 402); in the Isle of Man (*Allen v. Cannon*, 4 B. & A. 418); or in any foreign country (*Bird v. Sedgwick*, 1 Salk. 110).

Women.] A married woman can only be made a bankrupt in those cases which, according to the principle laid down in *Marshall v. Rutton*, 8 T. R. 546, she can be sued, and taken in execution for her debts, or where she cannot plead her coverture (*ante*, 7), viz., where the husband has abjured the realm, become an exile, been transported, &c. (*ib.*; *post*, "HUSBAND AND WIFE"). She may be made a bankrupt where he is only on board the hulks, under sentence of transportation, and she has occasional intercourse with him (*Ex parte Franks*, 7 Bing. 762; 1 Moo. & S. 1). It should seem, in such a case, that he should be under sentence for felony, as a conviction for a misdemeanor does not involve a forfeiture of chattels. Therefore, where a *feme sole*, being a trader, marries, a commission issued after the marriage cannot be supported, the creditors, upon the wife's marriage, becoming the creditors of the husband (*Ex parte Mear*, 2 Bro. C. C.; *Preston v. Green*, Cooke, 40). A *feme covert*, who is a *sole* trader according to the custom of London may be a bankrupt (*Lavie v. Phillips*, 3 Burr. 1776; 1 Bl. R. 570; *Ex parte Carrington*, 1 Atk. 206; *Ex parte Franks*, 7 Bing. 762).

Peers and Members of Parliament may be made bankrupts (*Ex parte Meymott*, 1 Atk. 201); so may ambassador's servants, by 7 Anne, c. 12.

Public Officers, as excisemen, may be bankrupts if they are traders (*Highmore v. Molloy*, 1 Atk. 206).

**Clergymen*, though prohibited by statute from entering into [*374] trade, may be made bankrupts (*Hankey v. Jones*, Cowp. 745; *Ex parte Meymott*, 1 Atk. 196); a commission, however, against a clergyman, founded on a debt arising out of a contract made after he has become such in the course of trade, cannot be supported (*Deac.* 94).

Where a Person ceases to be subject to the Bankrupt Law, by leaving off his Trade.] If a person leave off his trade for some other employment, or has ceased to buy, but is selling off his stock, he may still be liable to be made a bankrupt, unless there be no intention on his part to exercise or resume it, which is a question for the jury (*Ex parte Paterson*, 1 Rose, 402). A pawnbroker who had formerly taken in goods upon pledge, but had ceased to do so, but still continued to sell the unredeemed pledges, thereby carries on the trade of a pawnbroker, and is subject to be made a bankrupt (*Rawlinson v. Pearson*, 5 B. & A. 124). And, if a trader cease to manufacture, but still continues to solicit orders, and to execute them, and he holds himself out to the world as capable of executing them, he is an object of the bankrupt laws (*Wharam v. Routledge*, 5 Esp. 235). Where trade has been carried on by the party with another in partnership, though the partnership had been dissolved some years before, and no act of trading had occurred for two or three years before the time when the petitioning creditor's debt accrued, but the concerns remained unsettled, and part of the stock in the warehouse of the parties undisposed of, the jury found, under the direction of the court, that the trading continued (*Backhouse v. Tarleton*, *cor. Ld. Ellenb.* 2 Stark. Ev. 143; *Ex parte Cundy*, 2 Rose, 357; *Doe v. Lawrence*, 2 C. & P. 134). And, though a trader retires altogether from business; yet, if he owes debts contracted in the course of his trade, or even before he entered into trade, and afterwards commit an act of bankruptcy, he is still liable to be made a bankrupt (*Ex parte Bamford*, 15 Ves. 449); and a debt contracted before he

entered into trade will support the fiat (*Baillie v. Grant*, 2 M. & Sc. 193; 9 Bing. 121; 1 Cl. & Fin. 238). *Semble*, that a party who has ceased to be a trader cannot afterwards avail himself of the 41st section of the 7 & 8 Vict. c. 96, unless at the time he owes the debt, upon which, if a trader, he could have been made a bankrupt at the instance of a creditor (*Ex parte Mitchell*, 10 Jur. 188). When a testator directs his trade to be carried on after his death that part of his assets will be liable only in case of bankruptcy which he had directed to be embarked in the trade (*Thompson v. Andrews*, 1 Myl. & K. 116).

Joint-stock Companies.] Corporations aggregate were not liable to the old bankrupt laws, but the 7 & 8 Vict. c. 111, provides that commercial or trading companies incorporated by charter or statute, privileged associations under stat. 1 Vict. c. 73, or subject to its provisions, companies registered provisionally or completely under 7 & 8 Vict. c. 110, and joint-stock companies within the definition of the 2nd sect. of 7 & 8 Vict. c. 100, may become bankrupts by committing the following acts of bankruptcy: viz., sect. 4, By filing a declaration of insolvency in pursuance of a resolution of the directors; sect. 5, By not paying, securing, or compounding for a judgment debt within fourteen days after demand; sect. 6, By not obeying an order in equity, lunacy, or bankruptcy, to pay money within fourteen days after a peremptory day fixed; sect. 7, By neglecting for a calendar month to pay, secure, or compound for a debt due to a creditor who has filed an affidavit of debt and issued a writ against them in one of the superior courts, unless they satisfy a judge of *their intention to defend the action on the merits and enter an appearance accordingly within a month, and [*375] see *post*, "PUBLIC COMPANIES;" 5 & 6 Vict. c. 122.

By 9 & 10 Vict. c. 28, a dissolution of a company voted at a regular meeting may be an act of bankruptcy.

By 12 & 13 Vict. c. 106, s. 4, it is provided that nothing in this act contained shall affect the provisions of the Joint-stock Companies Act, 1848, "or any of the acts therein recited or of any act amending such act, except so far as regards the abolition of the fiat in bankruptcy, and the substitution of a petition for the adjudication of bankruptcy."

By a deed of settlement of a company twelve persons were appointed to be the committee of management; and it was declared that the majority of the members of the committee of management for the time being present as members of such committee, consisting of not less than five persons, should have power to bind the company. A meeting of the committee was summoned, at which three members only attended. At this meeting a resolution was passed, that the company was unable to meet its engagements; and a declaration and minute were filed, as required by the 7 & 8 Vict. c. 111; and a fiat issued against the company. On a petition presented by two other members of the committee, that the fiat should be annulled: held, that the resolution passed in this case was not a resolution "duly passed," within the meaning of the act 7 & 8 Vict. c. 111, and that the fiat ought to be annulled (*Ex parte Morrison*, re London and Birmingham Extension, and Northampton, Daventry, Leamington, and Warwick Railway Company, 16 Law J. 11, Bankr.; 11 Jur. 567, 719).

Act of Bankruptcy.] It must be proved that the trader committed an act of bankruptcy sufficient to support the fiat.

The 67th sect. of the 12 & 13 Vict. c. 106, enacts, "that if any trader liable to become bankrupt shall depart this realm, or being out of this realm shall remain abroad, or shall depart from his dwelling-house, or otherwise

absent himself, or begin to keep his house, or suffer himself to be arrested or taken in execution for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or taken in execution, or his goods, money, or chattels to be attached, sequestered, or taken in execution, or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made, any fraudulent surrender of any of his copyhold lands or tenements, or make, or cause to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels, every such trader doing, suffering, procuring, executing, permitting, making or causing to be made any of the acts, deeds, or matters aforesaid, *with intent to defeat or delay his creditors,*" shall be deemed to have thereby committed an act of bankruptcy.

But it is enacted by sect. 68, "that if any such trader shall execute any conveyance or assignment by deed, to a trustee or trustees, of all his estate and effects, for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a petition of adjudication be filed within three calendar months, from the execution thereof, provided such deed shall be executed by every such trustee within fifteen days after the execution thereof by the trader, and the execution by the trader, and by every such trustee, be attested by an attorney or [*376] solicitor, and notice thereof be given *within one month after the execution thereof, by such trader, in case such trader reside in London, or within forty miles thereof, in the London Gazette, and also in two London daily newspapers, and in case such trader does not reside within forty miles of London, then, in the London Gazette, and also in one London daily newspaper, and one provincial newspaper, published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode, respectively, of every such trustee, and attorney or solicitor."

Sect. 69 enacts, "that if any such trader, having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall, upon such or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days," "or, having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him and not discharged, every such trader shall thereby be deemed to have committed an act of bankruptcy; or if any such trader having been arrested, committed, or detained for debt, shall escape out of prison, or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment or detention."

Sect. 70. "That if any such trader shall file in the office of the Lord Chancellor's secretary of bankrupts, a declaration in writing, in the form contained in schedule (D) to this act annexed, signed by such trader, and attested by an attorney or solicitor, that he is unable to meet his engagements, every such trader shall be deemed thereby to have committed an act of bankruptcy at the time of filing of such declaration, provided a petition for adjudication of bankruptcy shall be filed by or against such trader within two months from the filing of such declaration."

Sect. 71. "That if any such trader, after the issuing of any fiat or filing of any petition for adjudication of bankruptcy against him, shall pay money to the petitioning creditor, or give or deliver to such petitioning creditor any satisfaction or security for his debt or for any part thereof, whereby such petitioning creditor may receive more in the pound in respect of his debt than the other creditors, such payment, gift, delivery, satisfaction, or security shall

be an act of bankruptcy; and if adjudication of bankruptcy shall have been made under such fiat or petition, the court may either declare such adjudication to be valid, and direct the same to be proceeded in, or may order it to be annulled, and a petition or new petition for adjudication may be filed, and such petition or new petition may be supported either by proof of such last mentioned or any other act of bankruptcy."

Sect. 72. "That if any plt. shall recover judgment in any action personal for the recovery of any debt or money demand, in any of her Majesty's courts of record, against any such trader, and shall be in a situation to sue out execution upon such judgment, and there be nothing due from such plt. by way of set-off against such judgment, and such trader shall not, within seven days after notice in writing personally served upon such trader, requiring immediate payment of such judgment debt, pay, secure, or compound for the same to the satisfaction of such plt., every such trader shall be deemed to have committed an act of bankruptcy on the eighth day after service of such notice; provided always, that if such execution shall in the mean time be suspended or restrained by any rule, order, or proceeding of any court of justice having jurisdiction in that behalf, no further proceeding shall be had on such notice, but *that it shall be lawful neverthe- [*377] less for such plt., when he shall again be in a situation to sue out execution on such judgment, to proceed again by notice in manner aforesaid."

Sect. 73. "And be it enacted, that if any decree or order shall be pronounced in any cause depending in any court of equity, or any order shall be made in any matter of bankruptcy or lunacy against any such trader to pay any sum of money, and such trader shall disobey such decree or order, the same having been duly served upon him, the person entitled to receive such sum under such decree or order, or interested in enforcing the payment pursuant thereto, may apply to the court by which the same shall have been pronounced to fix a peremptory day for the payment of such money, which shall accordingly be fixed by an order for that purpose; and if such trader, being personally served with such last mentioned order seven days before the day therein appointed for payment of such money, shall neglect to pay the same, any such trader shall be deemed to have committed an act of bankruptcy on the eighth day after the service of such order."

Sect. 74. "That the filing of a petition in the court for the relief of insolvent debtors in England by any such trader who shall be in actual custody for his discharge from custody, and who shall apply by petition to such court for his discharge from custody, according to the laws for the relief of insolvent debtors in England, shall be deemed to be an act of bankruptcy from the time of filing such petition; and any petition for adjudication of bankruptcy filed against such trader, and under which he shall be adjudged bankrupt, before the time appointed by the said court for the relief of insolvent debtors, and advertised in the London Gazette, for such prisoner to be brought up to be dealt with according to the laws for the relief of insolvent debtors in England, or at any time within two months from the time of making any order vesting the estate and effects of any such prisoner in the provisional assignee of such court, whether upon the petition of such prisoner or the petition of a creditor, shall have the effect of divesting the real and personal estate and effects of such person out of the provisional assignee: provided always, that the filing of such petition shall not be deemed an act of bankruptcy, unless such trader be adjudged bankrupt before the time so advertised as aforesaid, or within such two months as aforesaid."

Sect. 75. "That the filing of a petition under an act passed in the eleventh year of the reign of her present Majesty (c. 21), intituled 'An Act

to consolidate and amend the Laws relating to Insolvent Debtors in India,' by any trader liable to become bankrupt under this act, and the adjudication of an act of insolvency under that act, shall, for the purposes of this act, be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such trader at the time of filing such petition, or of filing the petition on which the adjudication of an act of insolvency shall be made; and any creditor or creditors of such trader whose debt or debts shall be of sufficient amount to enable him or them to petition for adjudication of bankruptcy under this act may, at any time within two months after notice of the insolvency shall have been given in the London Gazette as directed by the said act for amending the laws relating to insolvent debtors in India, petition for adjudication of bankruptcy under this act against such trader, under which petition all such proceedings may be had and taken as are authorized and directed by this act, subject to such exceptions and provisions as are contained in the last-mentioned act in this behalf."

*Sect 76. "That the filing of a petition by any such trader [*378] for an arrangement between such trader and his creditors, under the provisions of this act with respect to arrangements between debtor and creditor under the superintendence and control of the court, shall be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such trader at the time of filing such petition, provided a petition for adjudication of bankruptcy shall be filed against him within two months after such petition for arrangement shall have been dismissed: provided also, that no adjudication shall be made on any such act of bankruptcy unless and until after such petition for arrangement shall have been dismissed."

Sect. 77. "That if any creditor or creditors of any such trader having privilege of parliament to an amount hereinafter declared to be requisite to support a petition for adjudication of bankruptcy, shall file an affidavit in any court of record at Westminster that such debt is justly due to him, and that such debtor, as he verily believes, is such trader, and shall sue out of the said court a writ of summons, in the form contained in schedule (E) to this act annexed, against such trader, and serve him with a copy of such summons, if such trader shall not, within one month after personal service of such summons, pay, secure, or compound for such debt to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with two sufficient sureties, as any of the judges of the court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action, together with such costs as shall be given in the same, and within one month next after personal service of such summons cause an appearance to be entered to such action in the proper court in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons."

Sect. 78. If any creditor shall file an affidavit of the truth of his debt, and of the debtor, as he verily believes, being such trader, and of the delivery to such trader personally, or to some adult inmate at his usual or last known place of abode or business, of an account in writing of the particulars of his demand, with a notice requiring immediate payment, the court shall issue a summons in writing, calling upon such trader to appear before such court, and stating the purpose for which such trader is called upon to appear.

Sect. 79. And upon such appearance the court shall require him to state whether or not he admits the demand of the creditor, or any and what part thereof, and if he shall admit such demand, or any part thereof, to reduce

such admission into writing which he is required to sign, and the court shall allow such trader upon his said appearance to make a deposition upon oath, in writing under his hand, that he verily believes he has a good defence upon the merits to such demand, or to some and what part thereof; and in such case it shall be lawful for the court at the same time to require such trader to enter into a bond, in such sum and with such two sufficient sureties as the court shall approve of, to pay such sum or sums as shall be recovered, together with costs of action for the recovery of such demand.

Sect. 80. "That if any such trader so summoned as aforesaid shall not come before the court at the time appointed (having no lawful impediment made known to and proved to the satisfaction of the court, and allowed), or if any such trader, upon his appearance to such summons, or at any enlargement or adjournment thereof, shall refuse to admit such demand, and shall not make a deposition, in the *form aforesaid, that he believes he has a good defence upon the merits to such demand, or some [*379] part thereof, and (if required by the court so to do) enter into such bond as last aforesaid, then and in either of the said cases, if such trader shall not, within seven days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure, or compound for such demand to the satisfaction of such creditor, or enter into a bond, in such sum and with two sufficient sureties as such court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in such action, as the case may be, every such trader shall be deemed to have committed an act of bankruptcy on the eighth day after service of such summons, provided a petition of adjudication of bankruptcy shall be filed against such trader within two months from the filing of such affidavit."

Sect. 81. "That if any such trader so summoned as aforesaid shall upon his appearance sign and file an admission of such demand in form aforesaid, and shall not within seven days next after the filing of such admission pay or tender and offer to pay to such creditor the amount of such demand, or secure or compound for the same to the satisfaction of the creditor, every such trader shall be deemed to have committed an act of bankruptcy on the eighth day after the filing of such admission, provided a petition for adjudication of bankruptcy shall be filed against such trader within two months from the filing of such affidavit."

Sect. 82. "That if any such trader so summoned as aforesaid shall upon his appearance sign an admission for part only of such demand in the form aforesaid, and shall not make a deposition in the form aforesaid that he believes he has a good defence upon the merits to the residue of such demand, and (if required by the Court so to do) enter into such bond as aforesaid to pay such sum or sums as shall be recovered, together with such costs as shall be given in any such action as aforesaid for the recovery of such residue, then and in such case, if such trader, as to the sum so admitted, shall not, within seven days next after the filing of such admission, pay or tender and offer to pay to such creditor the sum so admitted, or secure or compound for the same to the satisfaction of the creditor, and as to the residue of such demand shall not, within seven days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure, or compound for the same to the satisfaction of such creditor, or enter into a bond, in such sum and with two sufficient sureties as the court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in such action, every such

trader shall be deemed to have committed an act of bankruptcy on the eighth day after service of such summons, provided a petition for adjudication of bankruptcy shall be filed against such trader within two months from the filing of such affidavit."

Sect. 83. "That if any such trader so summoned as aforesaid shall upon his appearance refuse to sign the admission in that behalf required, whatever may be the nature of his statement, or whether he makes any statement or not, it shall be deemed, for the purposes of this act, that every such trader thereby refuses to admit such demand: provided always, that it shall be lawful for the court, upon reasonable cause shown, to enlarge the time for calling upon such *trader to state whether or not he admits such demand, or any part thereof, and for entering into such bond, or for any or either of such matters, for such time as the court shall think fit."

Sect. 84. "That an admission of any debt made after such summons, and signed by any such trader elsewhere than before the court, may be filed in court, and shall be of the same force and effect to all intents and purposes as an admission signed by such trader on his appearance in court, provided such admission be made in the form contained in schedule (L) to this act annexed, and there be present some attorney of one of her Majesty's superior courts of law on behalf of such trader, expressly named by him and attending at his request, to inform him of the effect of such admission before the same is signed by such trader, and provided also, that such attorney do subscribe his name thereto as a witness to the due execution thereof, and in such attestation declare himself to be attorney for the said trader and state therein that he subscribes as such attorney."

Sect. 88. "And be it enacted, that no person shall be liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the issuing of any fiat in bankruptcy or the filing of any petition for adjudication of bankruptcy against him, and that no adjudication of bankruptcy shall be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt.

Preliminary Observations.] Having enumerated the legislative enactments relative to what constitutes an act of bankruptcy, it should be observed, before entering into a detail of the evidence necessary to constitute such act, that the 67th section of the Bankrupt Act renders the *intent* of the trader a necessary ingredient in the acts of bankruptcy therein mentioned; whereas, under the other sections, the intent is not at all material. The intention may be either inferred from the act itself, as a necessary consequence of it, or shown by other circumstances accompanying the act, or proved by the admissions of the bankrupt, and these declarations need not be contemporaneous if they be so connected as to be part of the *res gestæ* (*Rouch v. Great Western Railway Company*, 1 Q. B. 57). As a further preliminary it should be observed that the act of bankruptcy must be committed in England or Wales, unless otherwise provided against by the statutes, as remaining out of the realm, &c. (*Cowp.* 402); that it must not have been "committed more than twelve months prior to the issuing" of the fiat (12 & 13 Vict. c. 106, s. 88). It should never have been of several years standing (4 Ves. 175; 1 Lev. 13); but must have been committed and been complete prior to the issuing of the fiat (*Glassington v. Rawlins*, 3 East, 407; 4 Esp. 224); how soon before is immaterial, as after docket struck (*Wydown's case*, 14 Ves. jun. 86; *Ex parte Dufrene*, 1 Ves. & Bea. 51; *Simpson v. Sikes*, 6 M. & S. 295); or on the day of the date of the fiat (*Hopper v. Richmond*, 1 Stark. 507); and

even a fraction of the day will be taken into consideration (Wydown's case, *supra*). Formerly concert was an objection to a fiat (B. N. P. 39; 2 T. R. 594; Pea. 27). But now no fiat in bankruptcy shall be annulled, nor any petition for adjudication of bankruptcy dismissed, nor any adjudication reversed, by reason only that the fiat, petition, or adjudication, or act of bankruptcy, has been concerted or agreed upon between the bankrupt, his solicitor or agent, or any of them, and any creditor or other person (12 & *13 Vict. c. 106, s. 15). By 5 & 6 Vict. c. 122, s. 8, no fiat [*381] shall be deemed invalid by reason of the act of bankruptcy "having been concerted or agreed upon between the bankrupt and any creditor or other person;" sect. 42 of 1 & 2 Will. IV. c. 56, was similar to this except that it included only acts concerted between the petitioning creditor and the bankrupt and their solicitors or agents; and that section was held not to protect fiats fraudulently concerted for the benefit of the bankrupt (Ex parte Taylor, 4 D. & C. 125; Ex parte Lewis, 1 M. D. & D. 365; Ex parte Edwards, ib. 8; Ex parte Barnett, ib. 325; Ex parte Clare, 4 Deac. 156); nor to apply to concerted acts of bankruptcy, so as to give validity to fiats founded thereon (Marshall v. Barkworth, 4 B. & Ad. 508; 1 Nev. & M. 279; Ex parte Mills, 1 M. & Ayr. 311). It is no objection to an act of bankruptcy that the trader has been advised to have recourse to it by a friend (Roberts v. Teasdale, Pea. 27). But, in a case where the attorney for the bankrupt was also attorney for the petitioning creditor, a concerted act of bankruptcy was considered fraudulent, though the denial was without the knowledge of the petitioning creditor (Rosser v. Smith, Holt's N. P. 442).

An act of bankruptcy committed after a party has retired from trade, provided it be during the existence of a debt contracted whilst in trade, or even before he entered into trade, is sufficient (Ex parte Bamford, and Baillie v. Grante, *ante*, 221). In the case of a partnership, and a joint fiat against the firm, each of the partners must have committed an act of bankruptcy in order to support the fiat (Mills v. Bennett, 2 M. & S. 556; 19 Ves. 543). When an act of bankruptcy has been once committed, it remains always an act of bankruptcy, and its effect cannot be purged by subsequent acts explaining it, or otherwise (B. N. P. 39; 2 T. R. 59; 3 Esp. 245; 1 Taunt. 479; Pulling v. Tucker, 4 B. & Ad. 382). But, if the alleged act of bankruptcy be equivocal, circumstances may be given in evidence to prove it was not committed with an intent to defeat or delay creditors (Ex parte Hall, 1 Atk. 201). We shall hereafter see the assignees, &c., are not tied down to the proof of any one specific act of bankruptcy (*post*).

We shall now consider in detail, and in the order of the above different enactments, the various acts which will constitute an act of bankruptcy.

Departing the Realm.] The word "realm" seems to mean nothing more than the extent of the jurisdiction of the courts in this country, for leaving this country to go to Ireland is a departing the realm (Williams v. Nunn, 1 Taunt. 270; Windham v. Paterson, 1 Stark. 144). And if a trader residing in Ireland, or elsewhere, come to this country upon some temporary business, and again quit it to avoid being arrested by a creditor, it is a departing of the realm within the meaning of the statute (Ib.; Holroyd v. Gwynne, 2 Taunt. 176; and see Warner v. Barber, Holt's N. P. 175). The departure must, however, be with the *intent* to delay his creditors in the recovery of their debts (Windham v. Paterson, 4 Camp. 286; 1 Stark. 146). Slight evidence will in general be sufficient to manifest such an intention; as, if it appear he was in embarrassed circumstances, that would be *prima facie* evidence of such intention (Ex parte Osborne, 2 Ves.

& Bea. 177; 1 Rose, 387); if it appear that the creditors were in fact delayed, that will be *prima facie* evidence, as "a person may be supposed to foresee and to intend whatever is the necessary consequence of his own acts" (Ramsbottom v. Lewis, 1 Camp. 280; *Holroyd v. White- [*382] head, 3 Camp. 530; Warner v. Barber, Holt, C. 175). Where a trader departs the realm to avoid a criminal prosecution (Woodier's case, B. N. P. 39); or in defiance of the rules of morality, as where a married man ran away with a young lady, so as to manifest a neglect of the interest of the creditors, he will thereby be deemed to have committed an act of bankruptcy (Raikes v. Porcan, 1 Cole, B. L. 73; Vernon v. Hankey, ib. 98). An intention to delay the creditors would be rebutted, if it appeared that the trader had evinced a regard, previous to his departure, to the interest of his creditors, or if he has *advertised* his going, or if he leaves a partner behind (Ramsbottom v. Lewis, 1 Camp. 280). The intent with which the party departs the realm, is, however, a question for the jury (Warner v. Barber, Holt, C. 175). If at the time of departure he has some intention of returning, but does not return, or make provision for the payment of all his debts (being indebted to several); and at the end of two years a fiat in bankruptcy is sued out against him, his continued absence under these circumstances is *prima facie* an act of bankruptcy (Ex parte Kirkman, 3 D. & C. 451). Where a trader departed the realm, leaving a letter behind him, and on the following date wrote another from Calais; it was held that both letters were admissible to show with what intention he departed (Rawson v. Haigh, 2 Bing. 99; Ridley v. Gyde, 9 Bing. 349).

Being out of this Realm, and remaining Abroad.] The intention of the party in delaying his creditors must be proved in the same manner as already noticed, *supra*. A trader protracting his residence abroad, for an unreasonable length of time, without assigning a sufficient cause for his absence, or leaving funds, or making other arrangements here for the payment of his debts, is, *prima facie*, sufficient evidence of the intention (Deac. 47); though he may have been pursuing his regular course of business, and remained away only three years (Ex parte Rhodes, 5 Jur. 580, Ch.).

Departing from his Dwelling-house.] Departing from the party's counting-house or place of business, although he have a dwelling-house elsewhere, is an act of bankruptcy (Judine v. Da Cossen, 1 N. R. 234). And a trader who has no settled home, but takes up a temporary abode at a public-house, in the place in which his business carries him, commits an act of bankruptcy by departing from such public-house with intent to delay his creditors (Holroyd v. Gwynne, 2 Taunt. 176). The departure must be voluntary and not compulsory; for, where a man is arrested, and thereby obliged to leave his house, such a departure is not an act of bankruptcy (Phillips v. Essex (Sheriff), 1 Cole, B. L. 85). The distance that a person departs to, after leaving his dwelling-house, or the length of time that he is absent from it, are perfectly immaterial, if the object be to delay his creditors: where a trader went to his neighbour's house, and told him he expected every moment to be arrested, upon which he concealed himself, and desired his neighbour to watch, but returned home immediately the officer was gone, such temporary absence was held to be an act of bankruptcy (Chenoweth v. Haley, 1 M. & S. 676; Bayly v. Schofield, ib. 338). And, if the party go to a distant place, among strangers, it may be an act of bankruptcy, though he is visible there; and going only to the next house may also be the same, if he is not visible (per Buller, J., cited Aldridge v. Ireland, cited 1

Taunt. 273). Where a man rode out of town in order to avoid being arrested, and returned in the evening, and *the next morning sent for the bailiff, and told him he went out in order to get the term of [*383] the plt., this was held to be such a departing from the dwelling-house as was sufficient to constitute an act of bankruptcy (Maylin v. Eylve, 2 Stra. 809). And, if a trader, on being applied to for payment by a creditor, leave his house under pretence of getting money, but goes to a billiard-table, and remains there the whole evening, this has also been held an act of bankruptcy (Bigg v. Shooner, 2 Esp. 651).

The departure must be with the *intention* to delay his creditors, and *seem* to delay them absolutely, and not merely in case a particular event should occur (Fisher v. Boucher, 10 B. & C. 705); and it is, in such case, immaterial whether any creditor was delayed or not in his absence (Robertson v. Liddell, 9 East, 487; Hammond v. Hicks, 5 Esp. 1; ib. 334; Williams v. Man, 1 Taunt. 270; Rouch v. Great Western Railway Company, 4 P. & D. 686; 1 Q. B. 51); or whether or not he departed from a groundless apprehension of being arrested (Ex parte Bamford, 15 Ves. 449). The intention may, as in other cases, be presumed as the necessary consequence of the party's act (*ante*, 224). When the departure is evidently for a laudable purpose, although creditors be delayed, it is not an act of bankruptcy; as, leaving home to recover a debt (Fowler v. Padget, 7 T. R. 509); or to arrange with a creditor, leaving word where he is gone (Aldridge v. Ireland, cited 1 Taunt. 273; *sed vide* Deffle v. Desanges, 8 Taunt. 671; 3 Moo. 7); or for any other lawful purpose (Robertson v. Liddell, 9 East, 492; 4 Taunt. 603); or for avoiding altercation (Ib.). The intent with which the bankrupt departed may be proved by evidence of what he said as part of the *res gestæ* (Ambrose v. Clendon, Hardw. 267); and concurrence of time is not essential, though it is material to show the connection between the act done and the expressed intention (Rouch v. Great Western Railway Company, *supra*). His declarations before leaving home have been admitted (Smith v. Cramer, 1 N. C. 585). So after his return home assigning a reason for his absence (Bateman v. Bailey, 5 T. R. 512; Ridley v. Gyde, 9 Bing. 349); and where it is proved that he said that he departed to avoid arrest, no proof of the writ, debt, or even of creditors, was required (Newman v. Stretch, Moo. & M. 838; Rouch v. Great Western Railway Company, *supra*).

Otherwise absenting himself.] These words are not confined to an absenting from a dwelling-house; for if a trader absent himself from any place, with intent to delay his creditors, it is an act of bankruptcy (Hallen v. Homer, 1 C. & P. 108; Curteis v. Willis, ib. 211; Robson v. Rolls, 2 Moo. & S. 786; 9 Bing. 648); where a trader, who carried on business at a counting-house, went away, taking his books with him (Judine v. Da Gossen, 1 N. R. 234); or where a trader went into the back shop in a neighbour's house, to avoid being seen by an officer, who, he said, had a writ against him (Chenoweth v. Hay, 1 M. & S. 676); or, being arrested for debt, escapes to the house of another person, and is there denied to the officer (Bailey v. Schofield, ib. 338); or secretly withdraws himself after he has been arrested (Phillips v. Peak, Green, 52). If a trader has no dwelling-house or counting-house, his withdrawing himself from the usual place where he transacts his business, or is to be found, is an act of bankruptcy, therefore, if a man takes up a temporary abode at a public-house, and leaves it for fear of his creditors (Holroyd v. Gwynne, 2 Taunt. 176); so if a man, having no known place of abode, but who is in the habit of attending the Royal Exchange, *to transact his business there, leaves it on the approach of his [*384] creditors, desiring a friend to say he is not there, or breaks an ap-

pointment he has made with a creditor to meet him there, to pay his debt, if it be done with the intention to delay his creditors (*Ginmingham v. Laing*, 2 Marsh. 236; 6 Taunt. 532); or where the proprietor of a theatre retired behind the scenes, to avoid a sheriff's officer, desiring to be denied to him (*Ib.*). A trader leaving his shop, and desiring his servant to make some excuse for his absence, in the event of a creditor calling, is sufficient evidence to lay before a jury of an act of bankruptcy (*Deffle v. Desanges*, 8 Taunt. 671; 3 Moo. 7, 4). Where a trader goes to the office of the creditor's attorney to avoid being arrested in the street, it has been held, that by so doing he did not commit an act of bankruptcy (*Mills v. Elton*, 3 Price, 142). So if a banker, having given up his business, ceases to frequent, but without any intention to delay his creditors, the banking-house, it is not an act of bankruptcy (*Bernasconi v. Farebrother*, 10 B. & C. 549). Where a trader abstained from going to a place to make an inquiry as to an execution against him, to which he would have gone but for fear of an arrest, it was held an "absenting himself" (*Robson v. Rolls*, *ante*, p. 383).

A failure to keep appointments to settle with creditors, with intent to delay payment, is an act of bankruptcy (*Russell v. Bell*, 10 M. & W. 340; *Robinson v. Carrington*, 1 Mont. & Ayr. 12; see *Ex parte Lavender*, 2 Mont. & Ayr. 11); but (per Parke, J., in *Lees v. Marton*, 1 Moo. & R. 212) no case has gone the length of deciding that a breach of an appointment to meet a creditor at the creditor's place of business is an act of bankruptcy. But see *Robson v. Rolls*, *supra*. So, a statement in a deposition that the bankrupt promised to meet a creditor at a particular place, in relation to giving a security for a debt, and failed to do so, is not, in an action at the suit of the assignees, sufficient evidence of an act of bankruptcy (*Tucker v. Jones*, 2 Bing. 2; 9 Moo. 24; *Schooling v. Green*, 3 Stark. 149); but, in an action by the bankrupt to try the validity of the commission, such an appointment and failure will be *prima facie* evidence of an act of bankruptcy, and the plt. cannot recover unless he tender evidence to rebut the presumption that he absented himself with intent to delay his creditors (*Widger v. Browning*, 9 D. & R. 306). So, where a creditor having called by appointment upon a party, he left the room and did not return, and his wife told the creditor that he had gone out, it was held sufficient evidence of an act of bankruptcy (*Charrington v. Brown*, 11 Moo. 341); and so, where a trader, having attended a meeting of his creditors, was desired by them to withdraw until they could come to some resolution on the state of his affairs, and he retired accordingly into an outer room, where being served with a copy of a writ, he abruptly left the place of meeting altogether, and did not return for an hour, when the meeting had broken up, it was held an act of bankruptcy (*Ex parte Dean*, 2 Mont. Dea. & De. 127); and a trader having offered a composition to his creditors, and the next day his solicitor concurred in calling a meeting of the creditors at the trader's place of business, his non-attendance at the meeting was an act of bankruptcy, though his solicitor attended to explain the state of his affairs, and he himself personally made no promise to attend (*Ex parte Beer*, 1 Mont. Dea. & De. 390; 5 Jur. 104).

Beginning to keep his House.] If a trader seclude himself up in his house, to avoid the fair importunity of his creditors, who are *thus [*385] deprived of the means of communicating with him, he begins to keep house (per Lord Ellenborough, *Dudley v. Vaughan*, 1 Campb. 271). As where, shortly after having been denied to a creditor, he is seen peeping over his wife's shoulder, and upon another occasion, upon seeing a creditor coming, retired behind a partition in the shop, and is denied by his wife (*Key v. Shaw*, 8 Bing. 320; 1 Moo. & S. 462). Where partners in a

banking-house reside in the same place where the business is carried on, and they close the windows and shutters of the bank during hours of business, this is within the above words (*Cumming v. Bailey*, 6 Bing. 363). But it is no act of bankruptcy in those partners who are not resident there (*Mills v. Bennett*, 2 M. & S. 566; *Ex parte Mavor*, 19 Ves. 543). Proof of a *denial* is not in all cases requisite to substantiate an act of bankruptcy, by the trader beginning to keep his house, though formerly it was indispensable (*Garrat v. Moule*, 5 T. R. 575); as, where a trader removed from his counting-house to his parlour, to avoid personal application to him (*Dudley v. Vaughan*, 1 Campb. 271); or where he retired from the place where he usually sat into a back room, and drew the curtains (*King v. Bebb*, 1 M. & S. 354); or where he confined himself for nearly a month to his bed-room, except Sundays (*Bayley v. Scholefield*, ib. 338); or where he ordered his doors to be kept shut, and not opened till it was ascertained from the window who the person was who sought admittance (*Harvey v. Ramsbottom*, 1 B. & C. 55; 2 D. & R. 142). A trader's secreting himself in the house of a friend, where persons have been in the habit of calling on him, will constitute a sufficient act of bankruptcy (*Curteis v. Willis, R. & M.* 58; *S. C.* 4 D. & R. 224).

A general order to be denied to all creditors, followed by a denial to some one in particular, is alone sufficient evidence of a beginning to keep house (*Lloyd v. Heathcote*, 2 B. & B. 338; 5 Moo. 129; *Mucklow v. May*, 1 Taunt. 479; *Colkett v. Freeman*, 2 T. R. 59); but not, unless followed by an actual denial, or some other act, as retiring to an unusual part of the house, &c. (*Fisher v. Boucher*, 10 B. & C. 705; *Ex parte Wydown*, 14 Ves. jun. 86; but see same point raised but not decided in *Ware v. Waring*, 3 M. & W. 362). Nor is an order to be denied to a particular person not followed by a denial, or by the party concealing himself, or by some other act which is evidence of a beginning to keep house (*Fisher v. Boucher*, 10 B. & C. 705).

The order to deny must be proved to have been given by the trader himself (*Dudley v. Vaughan*, 1 Camp. 271; *Ex parte Foster*, 17 Ves. 416). But it is not necessary that he should give directions to that effect, if he knowingly permit himself to be denied in his own house to a creditor with intent to delay creditors (*Smith v. Moon*, M. & M. 458); and an order given by a trader to his wife to deny him is sufficient evidence of keeping house (*Lloyd v. Heathcote*, 2 B. & B. 388; *Ex parte Hall*, 1 Atk. 201). If a trader give a general order to be denied, and is denied to a particular creditor, it is evidence of keeping house, though the party calling is not the objectionable person, and such fact is made known to him (*Mucklow v. May*, 1 Taunt. 479; *Colkett v. Freeman*, 2 T. R. 59). It will still be evidence of a keeping house, though the trader be seen by the creditor at the time of denial (*Ex parte Bamford*, 15 Ves. 451). A denial on a Sunday has been deemed not to be evidence of a keeping house, even though the trader appointed the creditor to come on that day for the purpose of settling accounts (*Ex parte Preston*, 2 V. & B. 312). A denial to a person merely demanding payment of a debt, but not demanding an interview with the trader himself, is *not evidence of a beginning to keep house (*Dudley v. Vaughan*, [*386] 1 Camp. 271); nor is the denial to a person calling to obtain the trader's execution of a bail-bond, according to a promise made by him when arrested (*Schooling v. Lee*, 3 Stark. 149; but see *Deacon*, 65, n.). But a denial made to a creditor, under an idea that his object in calling was to demand payment of a debt, is evidence of keeping house, though, in fact, that was not his object (*Ex parte White*, 3 V. & B. 128; *S. P.* *Ex parte Harris*, 2 Rose, 67). It matters not whether the denial be to a creditor or not (*Eden*, 23). A denial to several persons, whom the trader's servant supposed to be creditors, is evidence for a jury as to the trader's intention (*Jameson v. Eamer*,

1 Esp. 381). So, a denial to a collector of taxes is evidence of a beginning to keep house (Sanderson v. Laferest, 1 C. & P. 46, 336); or where the party called in consequence of the dishonour of a bill, and was denied (Bleasby v. Crossley, 2 C. & P. 213); or a denial to the collector of the church and highway rates (Lloyd v. Heathcote, 2 B. & B. 388; 5 Moo. 129); for it is the intention of the party in being denied, and not the object of the person calling, which will be considered to constitute a keeping house (Deac. 55); the act of bankruptcy depending on the intent to delay, and not on the intent being productive of the effect (per Bailey, J., Chenoweth v. Hay, 1 M. & S. 679). A banker stopping payment, or refusing to pay money when called on for that purpose, does not thereby commit an act of bankruptcy, if he keeps his shop open, and does not conceal himself (7 Mod. 139).

The period during which the trader keeps his house is not material (Palm. 325). A denial once having been made, is evidence of a beginning to keep house, though the creditor be afterwards admitted in consequence of his importunity (Wood v. Thwaites, 3 Esp. 245); and though the trader deny himself, and afterwards appear in public, and pay the debt (Colkett v. Freeman, 2 T. R. 59). Where a general order to be denied is given, the fact of the trader's being subsequently denied on account of illness will not affect the act of bankruptcy, as the intention will be referrible to his previous orders (Lazarus v. Waithman, 5 Moo. 863). Where a trader was in the rules of the K. B., and had come to his house out of the rules, and was there denied, it was held to be evidence of keeping his house (Hughes v. Gilman, 2 C. & P. 32); and a denial at a trader's lodgings, not his usual place of residence, is also evidence (Park v. Prosser, 1 C. & P. 176).

The intention in a trader's being denied may be explained away, and the presumption of its having been done with the supposed intent to delay creditors may be repelled; as, by his being denied whilst at dinner, or engaged in business (Shew v. Thompson, Holt, 159; Lloyd v. Heathcote, 2 B. & B. 392); or at an unseasonable hour; and, on many other occasions, which may easily be imagined, he may refuse to see his creditors, without meaning to delay them, and therefore without committing an act of bankruptcy, although they should for a time be delayed (per Lord Ellenborough, Smith v. Currie, 3 Camp. 350). So, as we have just seen, a denial on a Sunday is not evidence of an act of bankruptcy (Ex parte Hall, 1 Atk. 201; Stafford v. Clarke, 1 C. & P. 27; Ex parte Preston, 2 Ves. & Bea. 312).

Suffering himself to be Arrested for any Debt not due.] The object of this enactment, as observed by Mr. Deacon, is, no doubt, to provide against a voluntary submission to an arrest for a fictitious debt; but the suffering himself to be arrested upon a bill of exchange **not due*, or, indeed, for [*387] any debt *solvendum in futuro* (if the *intention* is to defeat or delay a creditor), would, it is apprehended, come within the meaning of the statute (Deac. 61).

Yielding himself to Prison.] Where a trader, capable of paying, from fraudulent motives, voluntarily goes to prison, it is a sufficient act of bankruptcy (Ex parte Barton, 7 Vin. 61; Rex v. Page, 7 Pri. 616). It must be done, however, with an intent to delay his creditors (*ante*, 280). A *bona fide* surrender in discharge of bail will not constitute an act of bankruptcy within the meaning of this clause.

Suffering himself to be Outlawed.] To render outlawry an act of bankruptcy, it must have been suffered with an intent to defraud creditors (Radford v. Bludworth, 1 Lev. 13); and the outlawry must be in England or

Wales. An outlawry in a county-palatine will be sufficient (Stone, 124; Com. Dig. Bankrupt); an outlawry in Ireland will not (Ib.; Deac. 62).

Procuring himself to be Arrested, or his Goods, Moneys, or Chattels, to be Attached, Sequestered, or Taken in Execution.] Any arrest made by a man's own procurement will come under this provision: it being immaterial whether the arrest is for a real or a fictitious debt (7 Vin. Abr. 61); and, if the party procure himself to be outlawed, it will be equally an act of bankruptcy, whether the debt be a just debt or not (Ex parte Barton, ib.). The last words of this provision were not included in 1 Jac. I. c. 15, s. 2; under which it had been held, that a fraudulent execution, though void as against creditors, was not a procuring of goods to be attached, which meant only a proceeding by foreign attachment (Clarey v. Hayley, Cowp. 427; Cooke, 118). An attachment out of any court for mere default or *laches* would not be an attachment within the meaning of the statute; for such an attachment could not be considered as done by deft.'s own *procurement* (see Com. Dig. Bankrupt, C 2; Deac. 63). Where a trader, hearing that a writ of *fi. fa.* was issued against him, clandestinely conveyed his goods out of his house, and concealed them privately, in order to prevent them from being levied in execution, this, it was held, though a palpable fraud, was not an act of bankruptcy (Cole v. Davies, 1 Ld. Raym. 724).

So where, in May, 1842, a tenant in arrear for rent gave, upon the pressing solicitation of the landlord, a warrant of attorney for the arrear, and the current year's rent upon the understanding that judgment was to be entered up thereon, and a *fi. fa.* delivered to the sheriff, but not to be executed till other writs against the tenant should come into the sheriff's hands, and upon such writs coming into his hands in November, it was executed; it was held that the giving of the warrant of attorney was not an act of bankruptcy under this head (Gore v. Lloyd, 12 M. & W. 463; 13 Law J., N. S. Ex. 366). The arrest, attachment, sequestration, or execution, must be proved to have been procured by the bankrupt, with intent to defeat or delay his creditors.

Procuring Bills to be taken in Execution.] The procuring bills of exchange to be taken in execution with intent to delay creditors, is an act of bankruptcy (Edwards v. Cooper, 10 Law J. 160, Q. B.).

Fraudulent Conveyance.] Making or causing to be made, either within this realm or elsewhere, any *fraudulent grant or conveyance* of any of his lands, tenements, goods, or chattels; or making, *or [*388] causing to be made, any fraudulent surrender of any of his copyhold lands or tenements; or making, or causing to be made, any *fraudulent gift, delivery, or transfer*, of any of his goods or chattels. These acts of bankruptcy will be considered together, as there is in principle a strict analogy between them; for all those acts which have heretofore been deemed to be fraudulent preferences will, under the latter of these provisions, be henceforth considered as acts of bankruptcy (Eden, 25). It must be observed, that a creditor who has executed, or been privy to, or acted under a fraudulent deed, cannot himself set it up as an act of bankruptcy (Bamford v. Baron, 2 T. R. 594, n.; Tope v. Hockin, 7 B. & C. 101).

This provision created a new act of bankruptcy, by extending the operation of the 1 Jac. I. c. 15, s. 2, to deeds executed *abroad*. It also created a new act of bankruptcy by the words—"any fraudulent gift, delivery, or transfer, of any of his goods or chattels;" thereby removing a great inconsistency that formerly prevailed in the bankrupt law: for, though a fraudulent gift or transfer by *deed* was held an act of bankruptcy, it was decided

that a sale, or any transfer of goods not by deed, however fraudulent the scheme might be in preference of one creditor to another, and as such void, was, nevertheless, not an act of bankruptcy (Deac. 75; 4 Burr. 2478). A fraudulent delivery of goods will not be an act of bankruptcy, unless it be in the nature of a gift or transfer; so that where goods are removed with intent to delay a creditor, but the party in whose custody they are placed has no claim given him over them, this is not an act of bankruptcy (Cotton v. James, Moo. & M. 273).

The fraudulent conveyances contemplated by this provision are those which are void at common law, or under the Statute of Fraudulent Conveyances (13 Eliz. c. 5); and those which are fraudulent, as being in contravention of the policy of the bankrupt laws, in preventing a fair and equal distribution amongst the creditors, or in preferring one creditor to another. Those conveyances which are void at common law, or under the Statute of Fraudulent Conveyances, will be considered, *post*, "TROVER," "SHERIFF," "FRAUDULENT CONVEYANCE"); the present considerations will be confined to those conveyances which are fraudulent, as being in contravention of the policy of the bankrupt laws.

To constitute an act of bankruptcy under the first part of this clause, the conveyance must appear to have been made by *deed* (Martin v. Pewtress, 4 Burr. 2478; 17 Ves. 202); and the deed must be a valid one; therefore, a conveyance by deed without a stamp (Whitwell v. Dimsdale, Pea. 168); or not executed by a person who must have been a party to it (Antram v. Chase, 15 East, 212; Beech v. Gouch, Holt, C. 15), does not constitute an act of bankruptcy; nor does it where, in evidence, it appears that the conveyance was made contrary to the intention of the bankrupt himself (Ex parte Norris, 1 G. & J. 233). Where the deed was intended for execution by three persons, and was incapable of operation unless executed by them all, the court was of opinion that it could not be considered an act of bankruptcy where executed only by one (Dutton v. Morrison, 17 Ves. 190).

An assignment of *all* a trader's effects may be an act of bankruptcy, whether it be upon trust for the benefit of one creditor (Wilson v. Day, 2 Burr. 877; Siebert v. Spooner, 1 M. & W. 714); or of several (Compton v. Bedford, 1 W. Bl. 362); or of all, to the exclusion of one (Ex parte Foord, cited 1 Burr. 477); or even of all without exception (Ex parte Bourne, 16

Ves. jun. 149; Ex parte Smith, 1 Ves. & B. 518; Eckhardt v. [*389] Wilson, 8 T. R. 140; Kettle v. *Hammond, 1 Cooke, B. L. 89);

or of all who should execute who should assent to the arrangement (Ex parte Zurlchenbart, 8 Jur. 1081, C. R.; 13 Law J., N. S. 19); and though he did not thereby intend to defeat, defraud, or delay his creditors, as that being the necessary consequence of the assignment, he must in law be taken to have intended it (Siebert v. Spooner, 1 M. & W. 714; Stewart v. Moody, 1 C. M. & R. 777; 5 Tyrw. 493); or though it is not signed by the trustee or any creditor, and is not further acted on, and has not been out of the trader's possession (Botcherby v. Lancaster, 3 Nev. & M. 383; 1 Ad. & E. 77); or though it does not purport to convey all his effects, and may have been executed in the hope of obtaining further advances from the creditor, and with the intention of conveying, and though the advances are accordingly obtained, and the trade carried on for several weeks, and no possession taken in the mean time under the instrument, a bill of sale (Surdon v. Sharpe, 7 Sco. N. R. 730; 13 Law J., N. S. 67). And, as it is the execution of the deed that creates the act of bankruptcy, the conveyance produces that effect, although there be a proviso that it shall be void if the trustees think fit (Ib., 4 East, 230); or if any one of the creditors refuse his acquiescence (Kettle v. Hammond, 1 Cooke, B. L. 106; Eckhardt v. Wil-

son, 8 T. R. 140); or if all the creditors do not sign, or if a commission of bankruptcy be taken out within a given period (*Dutton v. Morrison*, 17 Ves. 199; 1 Rose, 213). It is immaterial whether the assignment is made to secure a present debt, or to indemnify a surety who is only likely to become a creditor (*Hassells v. Simpson*, Doug. 89).

An assignment, however, of all the trader's property, to trustees for the benefit of all the creditors, does not constitute an act of bankruptcy, unless a petition of adjudication be filed within three months from the execution thereof; provided the deed is executed by every trustee within fifteen days after the execution of it by the trader, and the execution of it, both by the trader and by every trustee, be attested by an attorney or solicitor, and notice be given within one month after the execution by the trader (if he reside in London, or within forty miles thereof), in the London Gazette, and in two London daily newspapers; and, if he reside beyond that distance, then in the London Gazette and one London daily newspaper, and one provincial newspaper, published near to the trader's residence; which notice must contain the date and execution of the deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor (s. 68, 12 & 13 Vict. c. 106). And such an assignment will only constitute an act of bankruptcy, when the creditors do not all assent to the deed; as no creditor, who is either a party or privy to the assignment, or has even acted under it, can afterwards set it up as an act of bankruptcy (*Bamford v. Baron*, 2 T. R. 594, n.; *Marshall v. Barkworth*, 1 Nev. & M. 279; *Ex parte Cawkwell*, 1 Rose, 313; 1 P. Smith, 118; *Ex parte Crawford*, 1 Christ. B. L. 137, 182; *Back v. Gooch*, 1 Holt, 13; 4 Camp. 232; *Hicks v. Burfitt*, ib., 233, n.; *Ex parte Shaw*, 1 Mod. 598; 1 G. & J. 84; *Ex parte Kilner*, Buck, 104; *Ex parte Battier*, ib., 426). This, however, only estops such a creditor as petitioning creditor, and the assignees under a fiat sued out by him (*Tope v. Hockin*, 9 D. & R. 881; 7 B. & C. 101), and they cannot rely on any other act of bankruptcy on which he could not (Ib.), and not a person who may happen to be elected an assignee under the commission (*Tappenden v. Burgess*, 4 East, 230); nor is a party estopped from suing out a commission upon a different act of bankruptcy, committed by the trader previously to, and independent of, the deed (*Doe v. Anderson*, 1 Stark. 262).

*A colourable exception in a grant or conveyance of an inconsiderable part of a trader's property, will not prevent the same [*390] being considered as an act of bankruptcy; as, where a trader made an assignment of the bulk of his property (except his household goods, and some other articles), to trustees, in trust for the benefit of themselves, and the creditors mentioned in a schedule, and in which schedule one creditor was purposely omitted, it was considered an act of bankruptcy (*Ex parte Foord*, 1 Burr. 477); and see *Berney v. Davison*, 1 B. & B. 408; *Compton v. Bedford*, 1 Bl. R. 362). And so, where a trader mortgaged all his stock in trade, excepting household goods and debts, which were very inconsiderable (*Law v. Skinner*, 2 Bl. R. 996).

There is a distinction between an assignment by a trader of all his effects for the benefit of his creditors, or to secure a pre-existing debt, and an assignment of all his property for a valuable consideration (*Whitall v. Thompson*, 1 Esp. 72; see *Manton v. Moore*, 7 T. R. 67; *Hunt v. Mortimer*, 10 B. & C. 44). So, a sale to a *bona fide* purchaser of the whole of a trader's stock in trade, he intending to abscond with the money and defraud his creditors, is not an act of bankruptcy (*Baxter v. Pritchard*, 1 Ad. & E. 456; *Harwood v. Bartlett*, 6 N. C. 61). But an assignment by a trader to a creditor of all his effects and stock in trade is of itself an act of bankruptcy, and the question of fraud should not be left to the jury (*Siebert v. Spooner*, 1

M. & W. 714). A sale at a price under circumstances to raise a suspicion in the mind of the buyer as to the intention of the seller to defraud his creditors, is an act of bankruptcy, and trover lies for the goods (*Cook v. Caldecote*, Moo. & M. 522).

Assignment of Part of Property.] An assignment of *part* of a trader's effects to a particular creditor, as it carries with it no intrinsic evidence of fraud, must, to constitute it an act of bankruptcy, be expressly shown in evidence to have been done in contemplation of bankruptcy, and consequently with the *intent* to give the grantee a preference over the other creditors; for, generally speaking, a *solvent* trader has a right to make over any portion of his property that he chooses, either in satisfaction of a debt, or for any purpose (*Jacob v. Shepherd*, 1 Burr. 478; *Robinson v. Carrington*, 1 Mont. & Ayr. 1); and it is *prima facie* lawful (*Chase v. Goble*, 2 Man. & G. 930). It is only, therefore, when his circumstances are such as must render him unable to pay all his creditors their demands in full that an assignment of *part* of his effects to any one creditor can be considered to have been done with *intent*, to give that creditor an *undue preference* over the rest, and in contemplation of bankruptcy (Deac. 71); and consequently "it is incumbent on the party who sets up an act of bankruptcy of this description to show the general situation of the property to have been such that insolvency would be the effect of the transfer" (per Cur., 4 B. & Ad. 834); and, therefore, unless it is an assignment of so large a part as would prevent the trader from carrying on his trade, and render him insolvent, it is not an act of bankruptcy (*Wedge v. Newlyn*, 4 B. & Ad. 831; and per Parke, B., 1 C. M. & R. 447); as where a miller assigned his wagon and horses to a creditor who had arrested him; it not appearing but that he might have money to purchase others (*Ib.*). So, where a trader assigned all his effects at a particular place, it was held not an act of bankruptcy unless it was shown that he had no other effects (*Chase v. Goble*, 3 Sco. N. R. 245; 2 Man. & G. 930).

Whether such partial assignment is an act of bankruptcy, is a question for the jury, and they will have to find whether it was *voluntary [*391] or made in contemplation of bankruptcy (*Bannatyne v. Leader*, 10 Sim. 350).

So, where traders in embarrassed circumstances convey the machinery in their mills (they having other property) to secure the payment of a debt of 3029*l.*, with interest, by certain instalments, it is not an act of bankruptcy unless the jury say it is a fraudulent preference (*Balme v. Hutton*, 2 Y. & J. 101). So, where a trader assigned to a banking company as a security for past and future advances, his leasehold property, stock in trade, utensils, and effects, with a proviso that he should remain in possession until default, and the assignment did not include another part of his property equal in amount to the debt covered by the security, and the jury found it was not executed in contemplation of bankruptcy, it was not an act of bankruptcy (*Carr v. Burdess*, 1 C. M. & R. 443).

But, on the other hand, where an innkeeper, being insolvent, assigned to a creditor all the furniture and effects at his inn, except his stock in trade, money, and book debts, in trust to sell and pay himself, returning the surplus, it was held an act of bankruptcy, inasmuch as it disabled him from pursuing his business (*Porter v. Walker*, 1 Man. & G. 686; 1 Sco. N. R. 568). So, where a trader, who could only pay 8*s.* in the pound, and who was threatened with an attachment out of Chancery for not paying a debt assigned a lease, being part of his estate, to secure certain creditors, and then in trust for himself (*Devan v. Watts*, Doug. 85); or, where a trader, three days before he absconded, made an assignment to his son (who was a creditor

to a much larger amount) of part of his real and personal estate (Round v. Byde, Co. B. L. 100); these, and similar transactions, have been considered acts of bankruptcy (Wilson v. Davy, 2 Burr. 827; Compton v. Bedford, 1 Bl. R. 362; Butcher v. Easto, Doug. 282; Newton v. Chantler, 7 East, 138). An assignment by an insolvent is void if made with the intention of petitioning the court for his discharge, though made more than three months before the commencement of the imprisonment (Becke v. Smith, 2 M. & W. 191); and a payment may be void as a fraudulent preference, though the immediate object of it was not to benefit the creditor preferred, but to free the bankrupt's wife's estate from an incumbrance (Marshall v. Lamb, 5 Q. B. 115). So, also, where a trader, the night before he absconded, inclosed bills of exchange to a creditor (Harman v. Fisher, Cowp. 117; *vide* Wilson v. Balfour, 2 Camp. 579); or making a pretended sale on the eve of bankruptcy (Rust v. Cooper, Cowp. 629); or paying a bill of exchange before it became due (Singleton v. Butler, 2 B. & P. 283); have all been considered fraudulent preferences; and, in a recent case, a voluntary payment, under circumstances which might reasonably lead the creditor to believe bankruptcy probable, though not inevitable, was considered a preference (Poland v. Glyn, 2 D. & R. 310; Eden, Bl. 30). It is undecided whether a settlement made by a trader previous to, and in anticipation of marriage, is fraudulent, and an act of bankruptcy; if, however, it can be proved that the wife was a party to any intent to defeat or delay the creditor, such a settlement would be an act of bankruptcy (Ex parte Rutherford, 17 Ves. 268; Campion v. Cotton, ib.). Where a trader, being in insolvent circumstances, borrowed 120*l.* of his brother, and, in consideration of this loan, assigned to him one-third of all his effects, and absconded two days after the assignment, though the brother took immediate possession of the goods, and exerted clear acts of ownership, by exposing them to sale, and carrying on the trade, and had not the least knowledge of the insolvency, the court held the deed invalid, by reason of the preference (Linton v. Bartlett, 3 Wils. 47). And, even where

*a trader continued to carry on his trade for three years after the [*392] execution of a conveyance of part of his property in favour of particular creditors, and the conveyance itself remained in the possession of the bankrupt, it was held to be a question for a jury to consider, whether such a conveyance was not fraudulent, as being voluntarily made, and in order to give an *undue preference*, to the prejudice of the general creditors (Pulling v. Tucker, 4 B. & A. 382). It need not be proved that the trader actually had in contemplation an act of bankruptcy at the time the creditor pressed for payment or security, and thereby obtained such payment or security; it suffices if, from the facts, such contemplation may be inferred, or that the transaction was fraudulent at common law (Hartshorn v. Slodden, 2 B. & P. 583; Crosby v. Crouch, 11 East, 261).

But an assignment of any part of a trader's effect will only be fraudulent, if made voluntarily in contemplation of bankruptcy, and with a view to prefer one creditor to another (Gibbons v. Phillips, 7 B. & C. 529; Morgan v. Brundrett, 5 B. & Ad. 289); for, if made *bona fide* for a just debt, and without contemplating such an event, it will then neither be void, nor an act of bankruptcy. As, where a trader, some months before his bankruptcy, assigned certain goods in the hands of his factors, for a particular creditor, in trust for himself and certain other creditors, and the trusts of the deed were at once openly carried into execution, such an assignment was deemed not to constitute an act of bankruptcy (Jacob v. Shepherd, 1 Burr. 478). So, the assignment of several debts mentioned in a schedule annexed to the assignment to indemnify the sureties of the assignor, has been held good, the party not becoming a bankrupt till a month afterwards, and not having his bank

ruptcy in contemplation at the time of the assignment (*Unwin v. Oliver*, 1 Burr. 481). So, where a trader being entitled to large freehold and leasehold estates, and being greatly embarrassed, conveyed, under advice, those estates to trustees to sell or mortgage, with a view to an arrangement with his creditors, to which he was considered incompetent from the state of his health, it was held not to be an act of bankruptcy (*Greenwood v. Churchill*, 1 Myl. & K. 546; see *Carr v. Beardiss*, 1 C. M. & R. 444; *Abbott v. Burbage*, 2 N. C. 443). So, where one of two partners conveyed his separate estate to trustees for the joint creditors of both, the joint creditors agreeing that they should remain in possession of their stock with a view to retrieve themselves, and that on paying 4s. 6d. in the pound by certain instalments they should receive a general release, it was held not an act of bankruptcy, and that it was properly left to the jury to say whether the conveyance was *bona fide* to enable the traders to retrieve themselves, or with intent to defraud the separate creditors of the grantor (*Abbott v. Burbage*, 2 Bing. N. C. 444; 2 Sco. 656). But, if made voluntarily, and in contemplation of bankruptcy, though in satisfaction of a just debt, it is an act of bankruptcy (*Bevan v. Nunn*, 2 Moo. & S. 132; 9 Bing. 107). A transfer to one to whom no debt was due, would be of itself evidence of fraud and an act of bankruptcy (*Scott v. Thomas*, 6 C. & P. 611; per Parke, B.).

The mere circumstance of the trader's being in insolvent circumstances, or contemplating insolvency, at the time of the assignment, is not conclusive evidence that he contemplated bankruptcy, there being no fraud, and no design to put the property in a train of distribution different from that of the bankrupt law (*Burney v. Viney*, 1 B. & B. 482; and see 5 Taunt. 109; 1 B. & C. 5; 2 D. & R. 25). Where A., a trader, purchased goods from B. on the 8th October, for exportation, but finding that he must stop [*393] payment, and that he *could not apply the goods to the purpose for which they were brought, he returned them on 16th October to B., and on the 17th he stopped payment; though expecting remittances from abroad more than sufficient to pay his debts, he had no doubt that his creditors would give him time: they, however, refusing, he was made bankrupt on 2d November. Under these circumstances it was held, that the jury were warranted in finding that the delivery of the goods was not made in contemplation of bankruptcy (*Fidgeon v. Sharp*, 1 Marsh. 196; see *Wheelwright v. Jackson*, 5 Taunt. 549; *Moore v. Barthrop*, 1 B. & C. 5). Whether a party contemplated bankruptcy is a question for the jury under all the circumstances of the case (*Poland v. Glyn*, 4 Bing. 22 n.; *Flook v. Jones*, 4 Bing. 20). To make out a case of fraudulent preference. The trader's knowledge that he was insolvent is not sufficient, unless actual bankruptcy was contemplated (*Atkinson v. Brindall*, 2 N. C. 225).

Conveyance Voluntary.] The assignment must be *voluntary* to constitute an act of bankruptcy (*Gibbons v. Phillips*, 7 B. & C. 529). If a trader give preference to his creditor, under threat, or apprehension of an arrest or legal process, however groundless, such preference is no act of bankruptcy (*Thompson v. Freeman*, 1 T. R. 155). A delivery, under a threat of criminal prosecution, is not an act of bankruptcy (*Carrol v. De Tastet*, 2 Rose, 462); nor is it so where the trader acts under the importunity of his creditor (*Cooper v. Cough*, 1 T. R. 156, n.; *Smith v. Payne*, 6 T. R. 152; *Ex parte Scuddamore*, 3 Ves. 85; *Arbonir v. Hanbury*, Holt, C. 504, 575). A trader, complying with an importunate demand for a further security for a debt not yet due, does not thereby commit an act of bankruptcy (*Crosby v. Crouch*, 3 Camp. 168; *Hartshorn v. Slodden*, 2 B. & P. 582; *Belcher v. Jones*, 2 M. & W. 258). Payment of a debt by cheque may be a fraudu-

lent preference. When such payment was made without pressure, after a resolution had been come to by the debtors to suspend payments of their debts generally, it was held, under the circumstances of the case, a fraudulent preference, whether the debtors contemplated bankruptcy or not (*Ex parte Simpson*, 1 De G. 19; 14 Law J. 1 Bankr.). A trader who assigns his property after service of writ will be deemed to have been guilty of fraudulent preference as against the creditor for whose debt such action was brought. It is his duty to file a declaration of insolvency (*Re Harnell*, 6 Law T. 285). The fact that goods have been made over by a debtor to a creditor as security for an antecedent debt, and without any new advantage, does not amount to a fraudulent preference (*Turquand v. Smith*, 6 Law T. 315). Where a trader, without solicitation, and in contemplation of stopping payment, put three checks into the hands of his clerk, to be delivered to a creditor, at the counting-house of the latter, but, before delivery, the creditor called upon the trader, and demanded payment of his debt, it was ruled, that the intention of making a voluntary preference not having been consummated, the payment stood good (*Bayley v. Ballard*, 1 Camp. 416; but see *Singleton v. Butler*, p. 394, and *Cook v. Rogers*, *infra*, where *Bayley v. Bolland* is doubted). But where a trader being pressed for payment or security, gave a bill of sale of apparently the whole of his stock, the court held that, inasmuch as the act did redeem him even from any present difficulty, which is the ordinary motive for such an act, when done under the pressure of a threat, it was evident it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor, in contemplation of bankruptcy (*Thornton v. Hargreaves*, 7 East, 544). And where a trader, on being pressed, conveyed estates in trust to *sell, and pay the pressing creditor, with a further trust to pay debts to [*394] certain relatives, the court considered this to be an undue preference, in contemplation of bankruptcy, and an act of bankruptcy (*Morgan v. Horseman*, 3 Taunt. 241; *Eden*, 32). Where the acceptor of a bill, two days before the expiration of the time for which the bill was originally drawn, called upon the indorser, and informed him, privately, that he was insolvent; the indorser insisted on being paid the amount of the bill, offering at the same time to become security to the creditors for so much as the estates should produce; whereupon the acceptor paid it, and, four days afterwards became a bankrupt; it appeared also, that the bill had been altered, so as to make it fall due before this transaction, but without the indorser's knowledge: these circumstances were held sufficient evidence of a fraudulent preference, and act of bankruptcy (*Singleton v. Butler*, 2 B. & P. 283; see *Cook v. Rogers*, 7 Bing. 446). A debtor being insolvent and in prison went under a day rule to receive a sum of money due to him from an officer; a creditor met him there and demanded and received out of the money payment of his debt, having no notice of the debtor's insolvency and imprisonment. Eight days afterwards a commission issued against the debtor: held, no fraudulent preference (*Churchill v. Crease*, 5 Bing. 177). In these cases the length of time elapsing between the transaction and the bankruptcy is a material consideration, and with regard to the contemplation of bankruptcy, the question is not what was the real state of the trader's affairs, but what was their state in his own judgment (*Belcher v. Prettie*, 10 Bing. 408). If evidence of a threat was given, to show that the transaction was not a voluntary one on the part of the bankrupt, it is still matter of consideration for the jury whether that threat had any operation or not, and the motives of the trader may be properly inquired into (*Cook v. Rogers*, 7 Bing. 438). Where a payment is clearly made in contemplation of bankruptcy, and voluntarily, the question, whether it be a fraudulent preference, becomes a

matter of law rather than of fact (*semble*, Gibson v. Muskett, 4 Man. & G. 160). A trader having overdrawn his banker's account to the extent of 864*l.* promises a guarantee for 550*l.* and assigns all his property to the bankers by a deed, in which 1000*l.* is stated to be due, and which contains a power of sale upon non-payment of that sum upon demand, but no stipulation for further advances; though further advances are in fact made. Held, an act of bankruptcy (Lindon v. Sharpe, 6 M. & G. 895).

Must be his own Property.] The assignment must be proved to be of the trader's own property, and not of property conveyed by another person, to, or in trust for him. Where A. and B., being partners and insolvent, A. assigned certain property to B., in trust for the wife of B. (who was a daughter), it was held to be no act of bankruptcy by B., though he was a party to the deed (Whitwell v. Thompson, 1 Esp. 68, 71). A return to the lender of a check given for a specific purpose, and not applied to it, would not, it seems, be considered fraudulent, so as to constitute an act of bankruptcy (Moore v. Barthrop, 1 B. & C. 5; 2 D. & R. 25); so, as to a return of goods by hirer to lender under a threat of issuing a fiat in bankruptcy (Ex parte Whitby, 1 Mont. & Ch. 671).

So it must be of Goods and Chattels..] A payment of money is within the latter part of sect. 3 of Geo. IV. c. 16; "Gift, delivery, or transfer of goods or chattels" (Ex parte Simpson, in re Hunt, 8 Jur. 1151, C. R.; contra, Abell v. Daniel, Moo. & M. 370; per *Tenterden, C. J., and [*395] per Tindal, C. J., in Bevan v. Nunn, 9 Bing. 107; 2 Moo. & S. 132; and see 8 Jur. 1154). So is a delivery of a bill of exchange (Cumming v. Bailey, 4 Moo. & P. 36; 6 Bing. 363); or a country bank note (per Gurney, B., at N. P.; but left undecided in banc; Carr v. Burdiss, 1 C. M. & R. 782; 5 Tyrw. 309).

Sale not an Act of Bankruptcy.] A sale of all a trader's goods is not within that section, unless it takes place under such circumstances that the buyer ought to suspect fraud on the part of the seller, and that the sale is for that purpose (per Tenterden, C. J., Cooke v. Caldcott, 1 Moo. & M. 522). If this is not the case, though the sale is of all the trader's goods (Rose v. Haycock, 3 Nev. & M. 645; 1 Ad. & E. 460); or made with the intention of absconding with the money (Baxter v. Pritchard, 3 Nev. & M. 638; 1 Ad. & E. 456); or, in contemplation of bankruptcy, and with the intention of raising money for himself and a particular creditor (Harwood v. Bartlett, 6 Bing. N. C. 61; 8 Sco. 171); it is not an act of bankruptcy if the purchaser acts *bona fide*, and is ignorant of the trader's intention (Ib.); and, in the case of such a sale, the party impeaching it must show some facts from which fraud may be inferred (Rose v. Haycock, *supra*).

Protected Transactions.] A trader took possession of goods under an agreement with the owner that he should keep possession for a twelvemonth on payment of a certain sum; but, if the money was not paid on a certain day, the owner should be at liberty to retake them. The goods continued in the possession of the trader until the stipulated time for payment, when, the money not having been paid, the owner sold them after an act of bankruptcy committed by the trader, but before the fiat issued: held, that this was a transaction protected by the 2 & 3 Vict. c. 29, s. 1 (Young v. Hope, 2 Exch. 105).

Operation of Executions.] On February 27th the debtor's goods were

seized in execution on a judgment recovered against him by one L., in the Lord Mayor's Court. On March 4th the debtor's landlord distrained upon the same goods for rent; and later on March 4th the Sheriffs of London entered upon the debtor's premises under a writ of *fi. fa.* upon a judgment recovered against him in the Court of Common Pleas by the deft. On March 9th a fiat in bankruptcy issued against the debtor. On April 6th the landlord sold all the goods, and out of the proceeds satisfied his own claim and L., and the residue was paid into court to abide the event of an interpleader issue between the plts. and the deft.: held, that, as against the assignees, the entry by the sheriff on March 4th was an execution served and levied by seizure upon the property of the bankrupt before the bankruptcy, within the meaning of the stat. 6 Geo. IV. c. 16, s. 108 (Ib.).

As to the Mode of Proving the Grant, Conveyance, or Transfer, &c.] In the case of a deed, it must be proved in the usual way, by calling a subscribing witness (*ante*, "ATTESTING WITNESS;" *post*, "DEED"). An admission by the deft. of the execution of the deed, will not dispense with this evidence, not even if the deft. is a party to the deed (*Abbott v. Plumbe*, 1 Doug. 216; 4 East, 53), and notwithstanding the deft., at the trial, should produce the deed, in compliance with a notice (*Gordon v. Secretary*, 8 East, 548, *sed qu.*; see *ante*, "ADMISSIONS"). But, if the deft., in pursuance of a notice, produces a deed to which he is not only a party, but under which he holds property, or claims any beneficial estate, it will then not be necessary that plt. should call an attesting witness to prove the execution (*Pearce v. Hooper*, 3 Taunt. 82; *Orr v. Morise*, 3 B. & B. 139; *Carr v. Burdiss*, 1 C. M. & R. 433). And, upon this principle, it seems that, where a fraudulent bill of sale is given by the bankrupt to the deft., the admission by the bankrupt, of the execution of the deed, in his examination before the commissioners, would, in an action of trover, brought by the assignees to recover the property claimed by the deft. under the deed, supersede the necessity of calling the subscribing witness (*Bowles v. Lacyworthy*, 5 T. R. 366). It has been held, that an agreement not stamped cannot be received as evidence, even to show that the party meant to commit a fraud by such deed (*Whitwell v. Dimsdale*, Pea. 167); however, the conveyance will enure, as an act of bankruptcy, although it is void through fraud, as in the case of an insolvent trader, who conveys to an infant son (*Whitwell v. Thompson*, 1 Esp. 68). As to the proof of a gift or transfer, that must depend on the particular circumstance of the case. Where a deed cannot be produced before the commissioners, they may receive parol evidence of its contents (*Ex parte Cawkwell*, 19 Ves. 234); and, where the party, in whose possession it is, refuses to produce it, he may be committed (6 Geo. IV. c. 16, s. 24); *Buck*, 17; see 12 & 13 Vict. c. 106). Proof of the fraudulent nature of the conveyance or transfer may be inferred from extrinsic circumstance, as the situation of the trader and his affairs, &c., as well as from the deed itself, or from the grant or transfer. The circumstances which, extrinsic of the deed *or transfer, usually afforded evidence of fraud, are [*396] the embarrassed state of the trader's affairs, or that he was actually insolvent at the time, and that he knew that he was so (*Newton v. Chantler*, 7 East, 138); and was on the eve of a contemplated bankruptcy (*Devon v. Watts*, 1 Doug. 85); that he intended to give an undue preference to a particular creditor (*Morgan v. Horsman*, 3 Taunt. 241); or that there was nothing due (*Scott v. Thomas*, 6 C. & P. 611); and this is proved by his conduct, and contemporary declarations, or other acts; that he executed the deed at an unseasonable hour of the night, or under other suspicious circumstances (*Compton v. Bedford*, 1 Bla. 362). And it would be sufficient

to show in evidence, that this would be the effect of the conveyance; and it would be no answer to show, that, as between the parties themselves, the transaction was fair and honourable (*Mont. B. L. 66*), and for a good and valuable consideration, or that it was the result of importunity (*Butcher v. East, Doug. 294*); or even of compulsion (*Newton v. Chantler, 7 East, 135*) on the part of the creditor, if the necessary consequence would be to give an undue preference to one or more creditors, to the prejudice and exclusion of the rest (*Worsley v. Demattos, 1 Burr. 467*); though it might show the trader's solvency at the time of executing the deed, and the benefit resulting to the creditors in general. The declaration of the trader connected with the fraudulent assignment, are evidence towards establishing the act of bankruptcy (*Ridley v. Gyde, 9 Bing. 349*). To prove, as an act of bankruptcy, that goods had been fraudulently given to certain creditors by the bankrupt, the plt. tendered evidence that they had since the fiat returned them to the assignees. Held inadmissible as against a third party, for it only amounted to an expression of an opinion by them that they were not entitled (*Backhouse v. Jones, 6 N. C. 65*).

Though *remaining in possession* of the property after the assignment is *prima facie* evidence of fraud (*Martindale v. Booth, 3 B. & Ad. 498*; *post*, "TROVER") yet, when such possession is given to the creditor as the nature of the case will admit, that will remove any imputation of fraud, as, in cases where the goods being bulky, or in a place of distant deposit, there cannot be an actual delivery; in which case, a delivery of a symbol of ownership will then be sufficient (*Manton v. Moora, 7 T. R. 67*; *Barney v. Davison, 1 B. & B. 408*; *4 Moo. 126*; *ib. 482*; *post*, "TROVER"). Where a trader assigned all his estate and interest in certain premises, and also all his stock in trade, to a particular creditor, for the purpose of securing him the repayment of advances, at the same time remaining himself in possession of everything conveyed by the deed, and having in fact nothing of value, but what was comprised therein, he was held to have committed an act of bankruptcy (*Worsley v. De Mattos, 1 Burr. 467*). And so, where a trader, finding he could not stand his ground, assigned to one of his creditors, everything he had in the world, to secure an unliquidated debt, keeping possession of the property, and giving a letter of attorney to his own clerk, to collect in the debts (*Wilson v. Day, 2 Burr. 927*); and so where he executed a bill of sale of all his effects to a creditor, as a security for an antecedent debt, in the hope of obtaining further advances, and with the intention of continuing to trade, though the advances were subsequently made, and the bill of sale did not purport to convey all his effects, and no possession was taken under it for several weeks afterwards, during which he carried on the business as before (*Lindon v. Sharpe, 7 Sco. N. R. 730*); and knowledge by the creditor that it comprises all the property, was held notice to him that it was an act of bankruptcy (*Ib.*).

*It must be remembered, that the *intent and purpose* of the [*397] bankrupt in making the grant or conveyance must be always considered in deciding whether such grant or conveyance was fraudulent, and contrary to the policy of the bankrupt laws (*ante, 375*). The intent must be to *defeat and delay* the trader's creditors. An assignment made by a trader resident in India, of all his effects, in trust for creditors, in certain proportions, agreed upon by all parties there, has been held not to be an act of bankruptcy, the transaction appearing perfectly fair at the time, and without any fraudulent intention (*Englis v. Grant, 5 T. R. 530*).

Fraudulent Conveyance.] In order to render a preference on the eve of bankruptcy valid, it is not necessary that there should be a threat or pres-

sure, with an immediate power of rendering it available by taking legal steps (Van Casteel v. Booker, Exch. 691; 18 Law J., Exch. 9).

To defeat a payment or transfer made to a creditor, the assignees must show it to be fraudulent as against the body of creditors by proving it to be voluntary on the part of the bankrupt, and in contemplation of his bankruptcy, and if it be made in consequence of the act of the creditor, it is not voluntary (Ib.).

A trader being indebted to his bankers gave them a receipt for 1000*l.*, purporting to be in full for the purchase of the furniture, plate, wines, and effects in his house; but no possession was given of the goods, till a year afterwards, when the trader's solicitor applied to the bankers on his behalf for a loan of 10,000*l.*, stating that a creditor of the trader would obtain judgment, on which he could issue execution, but that if this creditor refused to give the trader time the bankrupt would protect himself and his other creditors. The day after this communication, and in consequence of it, the bankers sent a man to take possession, which was delivered to him by the trader, who on the same day filed a declaration of insolvency, and sued out a fiat against himself: held, that the delivery of possession was not a fraudulent preference (Majoribanks, Ex parte, 1 De Gex, 466).

Making or causing to be made, any Fraudulent Surrender of any of his Copyhold Lands or Tenements.] This is an act of bankruptcy created to remedy an inconvenience in the old law, under which it was held, that no process of execution could issue to levy a debt upon a copyhold estate. And a surrender of copyhold property, however fraudulent, was not an act of bankruptcy (Ex parte Cockshott, 3 Bro. C. C. 502; 1 Cooke, B. L. 162).

Lying in Prison.] See ante, 376. There needs no *intent to delay* creditors on the part of the trader, to constitute any of these acts an act of bankruptcy (9 East, 487). The arrest must be a legal arrest, and it will be insufficient to ground an act of bankruptcy, however lawful it subsequently becomes, if it were illegal in its conception (Deac. 77). The debt for which the arrest is made, must be a real subsisting legal debt (Eden, 35). Therefore, an arrest by an executor before probate, is insufficient (3 Lev. 439; S. C. T. Raym. 478); so an arrest on a bond, before the day of payment, and so is an arrest on an equitable demand, when the remedy is by bill for specific performance (Ex parte Hillyard, 1 Atk. 147; 2 Ves. 407; Eden, B. L. 35). A penalty due to the crown is a sufficient debt (Cobb v. Symonds, 1 D. & R. 111; S. C. 5 B. & A. 516). And a party lying in prison under a magistrate's warrant of commitment, in force at the time he was under civil process for debt, is an act of bankruptcy (Rex v. Page, 7 Pri. 616; 3 Moo. 656; S. C. 1 B. & B. 368; Eden, 34).

The lying in prison must be for the uninterrupted period of, and the bankrupt must be in actual custody, twenty-one days, under the arrest or commitment; and, where an interruption has taken place, the act of bankruptcy will have relation to the subsequent imprisonment (King v. Leith, 2 T. R. 141; Coppedale v. Brigden, 2 Burr. 814). As, where a trader is arrested, and, before the expiration of the twenty-one days, is bailed out, and afterwards render in discharge of his bail, and remain in custody twenty-one days, it is the second imprisonment, from the time of his render, which constitutes the act of bankruptcy (Tribe v. Webber, Willis, 464; Ex parte Dufresne, 1 B. & B. 50; Cane v. Coleman, 1 Salk. 109); or, where he is allowed to go at large for a few days, the period is computed from his return (Barnard v. Palmer, 1 Camp. 509). But, where the bail was matter of form, and put in without justification, only with the view of turning the party over

from the custody of one party to that of another, it was considered a continuation of the same imprisonment, and the twenty-one days were reckoned from the first arrest (*Rose v. Green*, 1 Burr. 437). The word prison does not necessarily mean the county gaol, or any of the county prisons; it will suffice that the bankrupt was in actual custody during the twenty-one days. Where a trader was arrested in his own house, but, being too ill to be removed, remained there in custody of the follower of the sheriff's officer, and was afterwards imprisoned, the *period was held to commence [*398] from the day of the arrest (*Stevens v. Jackson*, 1 Marsh. 464; *S. C.* 4 Camp. 164; but see *Benton v. Sutton*, 1 B. & P. 24); and so, where the party had the benefit of the day rules, the period was not considered to be interrupted, for he was still deemed to be in custody (*Soames v. Watts*, 1 C. & P. 400). Where a trader was in custody at the suit of one plt., and was detained at the suit of another, the period was computed from the arrest (*Coppendale v. Bridgen*, 2 Burr. 814). The *docket* being struck previous to the expiration of the twenty-one days, will not affect the act of bankruptcy. But the *fiat* cannot be supported, unless issued subsequent thereto (*Gordon v. Wilkinson*, 8 T. R. 507; *Ex parte Dufresne*, 1 V. & B. 51; 1 Rose, 333). The day of the arrest or going to prison, is reckoned the first day, or part of the twenty-one days, and on the termination of the whole of the last day, the act of bankruptcy will be complete (*Glas-sington v. Rawlins*, 3 East, 407; *Saunderson v. Greg*, 3 Stark. 72); but does not relate back to the first day, as under the 21 Jac. I. c. 19, but only to the last (*Moser v. Newman*, 6 Bing. 556; *Higgins v. McAdam*, 3 Y. & J. 1; *Tucker v. Barrow*, 3 C. & P. 85).

In order to prove an act of bankruptcy by lying in prison, the arrest, detention, and cause of such arrest or detention, must be proved. The arrest may be proved by an examined copy of the writ and the return of *cepi corpus*, or by proof of the writ, the warrant, and the arrest (see *post*, "SHERIFF," *index*, "ARREST"). The detention may be proved by producing the prison book, containing entries of the date of the several commitments and discharges to and from prison (*Rex v. Aickles*, 1 Leach, 436); but they are not evidence of the *cause* of the commitment, for the commitment itself is higher proof, and, if in existence, ought to be produced (*Salte v. Thomas*, 3 B. & P. 188). The cause of commitment may be proved by the production of the *committitur* (lb.).

Escaping out of Prison or Custody, after having been Arrested, Committed, or Detained for Debt.] No evidence of debt's *intent* to delay his creditors is necessary to constitute this an act of bankruptcy. The arrest, commitment, or detainer, must be legal (see *ante*, 397). The statute comprehends every arrest for debt, whatever the amount may be for which the trader is arrested (Deac. 81; see the Uniformity of Process Act). The escape must be with an intention of running away, and against the will of the officer; and it must not be by mere implication. Therefore, where a trader prisoner was carried, by permission of the sheriff, through a different county, on his road to a judge's chambers, upon a *habeas corpus*, to be committed to another prison, it was holden not to be an escape within the bankrupt acts (*Rose v. Green*, 1 Burr. 437). The act of bankruptcy, in this case, by the words of the statute, is from the time of the arrest, commitment, or detainer.

Filing a Declaration in the Office of the Secretary of Bankrupts, signed by himself, and attested by an Attorney or Solicitor, that he is Insolvent, or unable to meet his Engagements.] This was first constituted an act of

bankruptcy by the 6 Geo. IV. c. 16, s. 6, which required that the filing of the *declaration of insolvency* should be advertised in the Gazette within eight days after filing the declaration; after which the declaration was considered an act of bankruptcy from the time it was filed (Deac. B. L. 83). This act, as well as 5 & 6 Vict. c. 122, s. 22, is now repealed (see the section under the new bankrupt act, *ante*, p. 376). A copy of the declaration, purporting to be certified by the Lord Chancellor's secretary *of bankrupts, or any of his clerks, shall be received as a true copy as evidence of [*399] such declaration having been filed (12 & 13 Vict. c. 106, s. 238).

If any Trader, after the Issuing of any Fiat, or Filing Petition for Adjudication of Bankruptcy against him, shall pay Money to Petitioning Creditor, or give or deliver any Satisfaction or Security for his Debt, or any Part thereof, whereby such Petitioning Creditor may receive more in the Pound, in respect of his Debt, than the other Creditors—an adjudication of bankruptcy may be either proceeded in or superseded, as the court shall think fit; in which latter case, a new petition may be filed, either upon this or any other act of bankruptcy. The petitioning creditor, as a penalty for such compounding, forfeits his whole debt, and may also be compelled to repay or deliver up the money, satisfaction, or security he has received, or the full value thereof, to the assignees of the bankrupt, for the benefit of the creditors of the bankrupt (see 12 & 13 Vict. c. 106, s. 368; *Ex parte Thompson*, 1 Ves. 157; *Ex parte Paxton*, 15 Ves. 464; *Ex parte Browne*, ib., 473; *Ex parte Brine*, Buck, 19, 108; see Deac. 84).

Filing a Petition to take the Benefit of the Insolvent Act.] This was an act of bankruptcy created by the Insolvent Act (7 Geo. IV. c. 57). It is now an act of bankruptcy, under 12 & 13 Vict. c. 106, ss. 74, 75. See it, *ante*, p. 377. Under the 7 Geo. IV. c. 57, the petition was held not to be filed so as to constitute an act of bankruptcy till it reached its final destination—the custody of the proper officer in the office (*Garlic v. Sangster*, 2 Moo. & S. 68; 9 Bing. 46).

By 12 & 13 Vict. c. 106, s. 239, it is enacted, “that a copy of any petition filed in the court for the Relief of Insolvent Debtors in England, or in any court for Relief of Insolvent Debtors at Calcutta, Madras, or Bombay, or at the Settlement of Prince of Wales Island, Singapore, and Malacca, and of any vesting order, schedule, order of adjudication, and other orders and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication, or other order or proceedings, and appearing to be sealed with the seal of such court, shall at all times be admitted under this act as sufficient evidence of the same, and of such proceedings respectively having taken place, without any other proof whatever given of the same.”

Sect. 240. “That a copy of the London Gazette, and of any newspaper containing any such advertisement as is by this Act directed or authorized to be made therein respectively shall be evidence of any matter therein contained, and of which notice is by this Act directed or authorized to be given by such advertisement; and all proceedings or notices required by this act to be inserted in the London Gazette shall be marked with the seal of the court from which such proceedings or notices shall be issued and certified by one of the registrars of the said court.”

Neglecting to pay, or secure the debt, or to give a bond with proper sureties, &c., to pay the amount to be recovered in an action with costs, &c., or to

render in execution, &c., see sections 78, 79, 80, 81, 82, 83, of 12 & 13 Vict. c. 106, *ante*, p. 378]. The following cases were decided on 1 & 2 Vict. c. 110, s. 8:—If a creditor consent to the deferment of payment beyond the twenty-one days, and accepts security *pro tempore* before the twenty-second day, so as to satisfy the notice given under the statute, he [*400] cannot afterwards sue out *a fiat upon it (Ex parte Brown, 1 Mont. & Ch. 198); and so if the deed of security is prepared but not executed, the delay in its execution being with the consent of the creditor (Ex parte Budd, 1 Mont. Dea. & De. 436; 5 Jur. 272). So if the creditor keeps out of the way for a fortnight out of the twenty-one days limited by the statute in order to avoid receiving payment of the debt, and in his absence it is tendered to his managing clerk, who refuses to take it, he cannot sustain a fiat upon the non-payment within the twenty-one days (Ex parte Gratton, 1 M. D. & D. 401); and so *semble* if he has taken the proceedings for the purpose not of obtaining payment of his own debt but of forcing the bankrupt to pay the alleged debt of a third person (Ib.).

Where the trader and his sureties have entered into the bond required by the statute before the twenty-first day, but the commissioner's approval is not obtained till the twenty-third day, the creditor may issue a fiat on the latter day (Ex parte Gooddy, 1 Mont. Dea. & De. 677); but if the commissioner has once approved of it, without any circumstance of fraud on the part of the trader, but on a subsequent day revokes his approval, and cancels his signature to the indorsement of it on the bond, a fiat grounded on the failure to give security according to the act, cannot be supported (Ex parte Neale, 6 Jur. 876, C. R.).

It is doubted whether the day on which the notice is served is to be reckoned in the computation of the twenty-one days (Gibson v. Muskett, 3 Man. & G. 150; 3 Sco. N. R. 429). The affidavit may be sworn by one partner without the others joining (Ex parte Rhodes, 4 Deac. 125; 1 Mont. & Ch. 319); or by an agent duly authorized (Ex parte Hall, 1 Mont. & Ch. 567; 3 Deac. 405); and need not be intitled in any court, or in any matter (Ib.). It may be sworn before a Master Extraordinary of the Court of Chancery (Ib.). It is looked upon as strictly analogous to an affidavit to hold to bail, and as a substitute for it, and not as a process tending to a fiat (per Sir G. Rose, Ex parte Hall, 1 Mont. & Ch. 445). It may be filed with the Registrar of the Court of Bankruptcy (S. C. ib. 467); and the day of its being filed is to be reckoned the first day of the two months within which the fiat may issue (Ex parte Whitby, 4 Deac. 139; 1 Mont. & Ch. 671).

It has been doubted whether the affidavit need state the consideration of the debt (Ex parte Brown, 1 Mont. & Ch. 198); and whether where the affidavit was for a debt of 100*l.* and upwards, and the notice for a debt of 361*l.*, and the trader was ordered by the commissioner to enter into a bond for 200*l.*, and the creditor proceeded on a fresh affidavit and notice for the debt of 361*l.*, and after a lapse of twenty-one days issued a fiat, it could be supported on such second affidavit and notice (Ex parte Rhodes, ib. 319).

The form of proceeding under the 1 & 2 Vict. c. 110, s. 8, has been virtually superseded by the 5 & 6 Vict. c. 122, ss. 11, 13, 14, 15, 16, 17, 20, 21, which has been repealed by the Bankrupt Act (*supra*; see them *ante*, p. 378). The decisions upon it may be useful in the application of the new act.

That if any Trader so Summoned shall sign and file an Admission of Demand, and shall not within Seven Days afterwards Pay, &c., the Amount, or secure or Compound for the same, he shall have committed an Act of Bankruptcy on the Eighth Day, and a Petition for Adjudication be filed within

Two Months from the filing of such Affidavit.]. Proceedings being taken against a debtor under stat. 5 & 6 Vict. c. 122, ss. 11 & 12, by obtaining a summons from the Court of Bankruptcy, upon a debt of 149*l.* 4*s.* the debtor filed an admission *that he was indebted to the creditor [*401] in the sum of 149*l.* Held, that the omission of the 4*s.* being obviously accidental, and not implying a denial that the 4*s.* was due, did not prevent that admission from constituting an act of bankruptcy. On the fourteenth day after the filing of that admission (an action having been in the mean time commenced), an agreement was entered into between the debtor and creditor, whereby the latter agreed to accept six bills of exchange and a judge's order for the payment of the amount of the debt by weekly instalments. The bills were handed by the debtor to the creditor's attorney at the time, but were immediately restored by him, because, as a matter of professional etiquette, he wished to receive them through the hands of the debtor's attorney; and on the next day but one the judge's order, containing the terms agreed upon, was obtained, and the bills were sent by the debtor's to the creditor's attorney. Held, that the agreement entered into on the fourteenth day, was a "compounding" of the debt within the meaning of the stat. 5 & 6 Vict. c. 122, s. 14; and that therefore no act of bankruptcy was committed, although the fulfilment of the terms of the agreement was not complete until some days after the fourteenth (*Pennel v. Rhodes*, 7 Law T. 205; see *ante*, p. 378).

Members of Parliament committing an Act of Bankruptcy, by neglecting to make Payment or Satisfaction, and entering Appearance within one Month after Personal Service of Summons for Debt; ante, 378.] The debt must be of the amount required for a petitioning creditor in other cases. If, after personal service, the trader does not by the 12 & 13 Vict. c. 106, s. 77, within one month, pay, secure, or compound, or enter into a bond with two sureties, before a judge of the court out of which the summons issued, and enter an appearance to the action within one month, it is an act of bankruptcy (*Eden*, 37). It has been said, that, though some of the circumstances attending this act of bankruptcy must be proved by a creditor, yet, as necessity alone justified the exception to the rule, that his testimony could only be received as to facts of which evidence could not be obtained from other sources, that the commissioners ought to proceed upon direct evidence, as to the character of the person, not upon depositions incorporating the substance of an affidavit, in which, in another court, those essentials had been attested (*Ex parte Harcourt*, 2 Rose, 203). It seems, also, that it ought to appear that the summons required to be served was taken out after the affidavit was filed (*Eden*, 37). It is not absolutely necessary to call the creditor to prove that the debt has not been paid, or secured (*Burton v. Green*, 3 C. & P. 306, per Tenterden).

Traders commit an Act of Bankruptcy, by disobeying the Order of Court to pay Money.] This comprises decrees and orders made in equity, and orders in bankruptcy or lunacy. The party to whom the money is to be paid, is to apply to the court for a peremptory-day, with the order for which the trader is to be served seven days previous to the appointed day for payment (*Eden*, 38; 1 P. Wms. 782; 12 & 13 Vict. c. 107, s. 73; *ante*, p. 377).

When Notice of Intention to prove different Acts of Bankruptcy necessary.] Before concluding this branch of evidence relative to the act of bankruptcy, it is to be observed, that the plt. or opposite party is not restricted in proof to

the *specific* act of bankruptcy, upon which the commission was founded; he may repudiate that, and rely on any other (Reed v. James, 1 Stark. [*402] 134). If, indeed, the Lord *Chancellor directs an issue or action at law, though, in general, he will permit other acts of bankruptcy to be given in evidence, yet, this being considered a favour to the party endeavouring to support the commission, such party will be required to show, by affidavit, on what particular acts of bankruptcy he relies, and to give notice to the other party by what evidence he intends to prove his case (Ex parte Burgess, Buck, 233; Ex parte Bogen, ib. 137). Where, indeed, the commission was proved on the trial of an issue to have been founded on a concerted act of bankruptcy, Lord Eldon refused to direct another issue, with liberty to prove other acts (Ex parte Rosser, Buck, 77).

The defts. being creditors of B., on the 3d of December, 1840, filed an affidavit, and gave notice under 1 & 2 Vict. c. 110. B. did not pay or compound within the twenty-one days; and on the 31st of December a fiat issued on the petition of the plts.; and, on the 30th of January, 1841, that fiat was annulled on the petition of the defts., who, on the following day, issued a second fiat. They did not proceed on that fiat, and on the 9th of September, 1842, the second fiat was annulled, and a third fiat issued on the petition of the plts., who were chosen assignees under it. Defts., on the 17th of February, 1841, while the second fiat was in force, received a sum of money in payment of their debt, being more in the pound than the other creditors. Held, first, that as this payment constituted an act of bankruptcy, under 6 Geo. IV. c. 16, s. 8, the fiat of the 9th of September, 1842, which, though it issued more than a year after such payment, issued before the 5 & 6 Vict. c. 122 came into operation, was well supported by such payment: secondly, that the plts. were entitled to sue as assignees, in the absence of any special appointment by the commission of a person to sue (Ellis v. Russell, 16 Law J. 428, Q. B.; 11 Jur. 821).

Proof as to Time when Act of Bankruptcy committed.] The act of bankruptcy, whether it be the specific one on which the commission was founded, or not, must be proved to have been committed *before* the issuing of the commission, and *after* the petitioning creditor's debt was contracted (Ex parte Wamman, Cooke's B. L. 23). It is immaterial how many acts of bankruptcy may have been committed by the bankrupt (12 & 13 Vict. c. 106), or how recently the act of bankruptcy was committed before the commission issued (Hopper v. Richmond, 1 Stark. 507). If the issuing of the commission and the act of bankruptcy happen on the same day, evidence is then admissible against the assignees, to show that the commission was issued (that is, sealed) before the act of bankruptcy (Wydown's case, 14 Ves. 80). A verdict upon an issue directed out of chancery, to which only one of the defts. was a party, may be received against all the defts. to prove the *time* of the act of bankruptcy (Lowfield v. Bancroft, B. N. P. 40).

Mode of Proof.] The act of bankruptcy must be proved by some person who can speak to the fact from his own knowledge. If the execution of a deed constitute it, see the mode of proof, *ante*, 395. As to the mode of proving the bankrupt's intent, *ante*, 380. As to proving bankrupt's imprisonment, *ante*, 398.

Notice of Act of Bankruptcy.] Where notice of the act of bankruptcy is necessary to be brought home to the deft., it must be proved. By the 12 & 13 Vict. c. 106, s. 87, notice to an accredited agent of a body corporate or public company, is notice to the body *or company.

Notice of a docket having been struck, was not notice of an act of bankruptcy under the 2 & 3 Vict. c. 29 (*Hocking v. Acraman*, D. & L. 934).

But knowledge by a creditor that a bill of sale which did not on the face of it purport to convey all a trader's property did actually comprise all, is notice of an act of bankruptcy (*Lindon v. Sharpe*, 7 Sco. N. R. 730; 13 Law J., N. S. 67). • *Quere*, whether a general notice that a party has committed an act of bankruptcy, is a notice of an act of bankruptcy within the meaning of the statute 2 & 3 Vict. c. 89? A notice to the following effect:—"J. S. has committed an act of bankruptcy; he signed a declaration of insolvency yesterday; J. S. will be declared bankrupt immediately; I have sent for a fiat," is not such a notice as will deprive an execution-creditor of the protection of the 2 & 3 Vict. c. 29; the sixth section of the 6 Geo. IV. c. 16, requiring the declaration of insolvency to be filed, and to be advertised in the "London Gazette," before it is a complete act of bankruptcy (*Conway v. Wall*, 1 C. B. 643; see *Udall v. Walton*, 14 M. & W. 254).

Notice of an act of bankruptcy to one of two co-trustees is at least *prima facie* notice to the other; and *semble*, per Coleridge, J., it is conclusively so (*Edwards v. Cooper*, 13 Law T. 163, Q. B.).

Notice that a trader has filed a declaration of insolvency under the 5 & 6 Vict. c. 122, s. 22, is sufficient notice of an act of bankruptcy to deprive an execution-creditor of the protection of the 2 & 3 Vict. c. 29, although no fiat has been issued, and two months have not elapsed from the declaration of insolvency (*Green v. Laurie*, 11 Jur. 997, Ex.; see *post*).

CAUSE OF ACTION.—*Evidence in Action to recover the Personal Property of Bankrupt in general.*] The present and all the future personal property of the bankrupt, until his certificate be obtained, wheresoever it be, is by the appointment vested in the assignees, for the benefit of the bankrupt's creditors. The bankrupt, however, is allowed to retain all the necessary wearing apparel for himself, his wife, and family. Property obtained by the bankrupt by fraud, will not pass to the assignees, but will still remain the property of the party defrauded (*Harrison v. Walker*, Pea. 111; *Gladstone v. Hadween*, 1 M. & S. 517; and see 1 Stark. 109; 12 East, 656); but, if the property be obtained upon a contract of sale, though with intent to defraud, it will pass to the assignees (*Millward v. Forbes*, 4 Esp. 171; *Haswell v. Hunt*, 5 T. R. 231, n.). As to stock in the funds, see 6 Geo. IV. c. 16, s. 80; now 12 & 13 Vict. s. 106.

Property of the wife, which comes to the husband either upon the marriage, or after it, vests in the assignees, upon his bankruptcy, the same estate which the husband has in it by law (see Com. Dig. Bankrupt, D. 2; *Mace v. Cadell*, Cowp. 232; Archb. 164). Debts and choses in action of the wife, unsettled, vest in the assignees upon the husband's bankruptcy (*Turner's case*, 1 Vern. 7), in the same way, and to the same extent only as they vest in the husband; and therefore where a promissory note was given to the bankrupt's wife before marriage, and payable to her, but not to her order, they alone cannot recover upon it (*Sherrington v. Yates*, 12 M. & W. 855; D. & L. 1032, reversing judgment of the Exchequer in S. C. 11 M. & W. 42; 2 Dowl. N. S. 803). So, property vested in trustees for the wife's separate use, does not vest in the assignees (*Bennet v. Davies*, 2 P. Wms. 316; 10 Ves. 139; Archb. 165). As to marriage-settlements, *ante*, p. 391. A person, who was formerly a commissioner of bankrupts, and entitled to an annuity, by way of compensation, *under the 5 & 6 Vict. c. 122, s. 58, took the benefit of the Insolvent Debtor's [*404] Act. A petition presented by his assignee to one of the Vice-Chan-

cellors in bankruptcy, praying for a direction to the accountant-general in bankruptcy to pay the annuity to the assignee, was dismissed (*Ex parte Spooner, re Payne*, 17 Law J. 11, Bankr.).

The debtors, who were the solicitors of S. who had become indebted to them for work done, received certain sums belonging to S. from his agent, and applied them in discharge of their claim upon S. S. having afterwards become bankrupt, and his assignees having brought an action against the debtors to recover this money: held, that it was a misdirection in the judge to tell the jury that if the debtors, before the bankruptcy, received the money to the use of the bankrupt, they held it after the bankruptcy to the use of the assignees (*Pennell v. Aston*, 14 Law J. 309, Exch.).

On the petition for the appointment of a new trustee in the place of the bankrupt, and that the new trustee might use the bankrupt's name in certain proceedings, the petitioner was ordered to pay the costs of the bankrupt and the assignees to them respectively. The bankrupt, who was a solicitor, and acted for himself in the matter of the petition, had not obtained his certificate: held, that the costs ordered to be paid to the bankrupt belonged to him, and did not pass to the assignees. (*Ex parte Grimstead*, 1 De G. 72).

The evidence in support of this cause of action must necessarily depend on the property sought to be recovered, or the wrong that has been done to the bankrupt in his right thereto. The bankrupt's right must be proved in the same manner as if he were plaintiff. See the various titles of actions throughout the work.

Evidence in Action to recover the Debts, Contracts, and other Choses in Action, of the Bankrupt.] All debts due or to be due to the bankrupt, wheresoever the same may be found or known, and the property, right, and interest in such debts shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt by virtue of their appointment by 12 & 13 Vict. c. 106, 141, *ante*, p. 322. So, the assignees have the benefit of all contracts made with the bankrupt, particularly if made for a valuable consideration (*Schondles v. Wace*, 1 Camp. 487; *Splidt v. Bowles*, 10 East, 279). The assignees, however, are only entitled to the benefit of contracts in which the bankrupt was beneficially interested (see 2 Vern. 194; 3 B. & P. 40; 13 East, 279; 3 East, 320; 1 T. R. 619); and the assignees are bound by the agreements of the bankrupt made before the bankruptcy, where such agreements are set up as a defence to any proceeding upon the part of the assignees (see *Dobson v. Lockhart*, 5 T. R. 133). So they take all the bankrupt's debts, rights, and choses in action, &c., subject to the same rights which the bankrupt had over them (see *Wallace v. Hardacre*, 1 Camp. 46; *Willis v. Freeman*, 12 East, 656; *Ex parte Harrison*, 2 G. & J. 93; 1 Stra. 555; 3 P. Wms. 146; 5 D. & R. 603). A right to bring a real action passes to the assignees (*Smith v. Coffin*, 2 H. Bl. 451); so does a right of action for a compensation under an act of parliament (17 Ves. 343); or for money lost by the bankrupt at play (2 H. Bl. 308; 2 Ves. 514; 2 D. & R. 575; S. C. 1 B. & C. 444); but a right of action for a tort, as for slander (*Jon. W.* 215), or for a trespass *q. c. f.* (*Clark v. Calvert*, 3 Moo. 96; 8 Taunt. 742; *Spence v. Rogers*, 2 Dowl. N. S. 99; 11 M. & W. 191), or for the personal annoyance and [*405] injury resulting from breaking *and entering his house, and seizing his goods under a pretended claim of debt (*Brewer v. Dew*, D. & L. 383); for the seduction of his daughter, (*Howard v. Crowther*, 8 M. & W. 601; 5 Jur. 91); or for the breach of a contract for his personal service (*Beckham v. Drake*, 8 M. & W. 845), does not pass to them (*ante*, p. 323, 324).

The evidence of the cause of action will be found under the various titles of action throughout the work. It must be established in the same manner as if the bankrupt himself were suing.

Evidence in Action, to recover Property claimed by Plaintiffs, as being in the Bankrupt's Possession, as Reputed Owner.] By the 12 & 13 Vict. c. 106, s. 125, it is enacted, "If any bankrupt, at the time he becomes a bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition, as owner, the court shall have power to order the same to be sold and disposed of, for the benefit of the creditors under the bankruptcy," provided that nothing therein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of the 8 & 9 Vict. c. 29, An Act for the Registration of British Vessels. The object of this enactment is for the protection of the general creditors of a trader, against that false credit which might be acquired by his being suffered to have the possession and power of disposition of property as his own, which does not really belong to him; and evidence must therefore be adduced accordingly.

It would be beyond the limits of this work to enter into a detail of the various cases that have been decided on this section of the act; they will be found collected in Eden, 271; Deac. 403; Archb. 207, 223, Index, "Reputed Ownership."

It must be proved that the property was goods and chattels of a *personal* and moveable nature; that the bankrupt had them in his *possession, order, or disposition*, as the *reputed owner*, or had taken upon him the sale, alteration, or disposition of them as owner, and that by the *consent and permission of the true owner*, and *at the time he became a bankrupt*.—

As Reputed Owner.] The possession of property is *prima facie* evidence of reputed ownership, and more or less strong, according to the circumstances under which it was obtained or retained. It is however a question of fact for the jury (Doug. 317; 1 B. & P. 89; Edwards v. Scott, 1 M. & G. 962). The true criterion for determining every question as to reputed ownership seems to be whether or not the bankrupt had such a possession as would *deceive his creditors*, by any appearance of the property forming part of that stock to which they might reasonably give credit (Ex parte Marrable, 1 Glyn & J. 402; Deac. 411). When a bankrupt has once been the ostensible owner of property, and he continues in the visible possession of it at the time of his bankruptcy, that is a very strong case of reputed ownership, and can only be rebutted by clear proof, not only that there has been a transfer of the property from the bankrupt, but that such transfer was notorious to the world; for, when a man has been at one time the real owner of property, the presumption is that he continues so, where there is no change of possession (per Holroyd, J., Lingard v. Messiter, 1 B. & C. 314; Deac. 405). The possession however must be always accompanied with some evidence of reputation; and where the possession is consistent *with the fact of a person being absolute owner, and [*406] also of his not being such absolute owner, from the mere possession an inference ought not to be raised as to the nature of the ownership (per Abbott, C. J., Storer v. Hunter, 3 B. & C. 376; see Fairburn v. Eastwood, 6 M. & W. 679); and so the mere continuance in possession by an assignor (under peculiar embarrassments) of property assigned, though

always suspicious, is not of itself a *conclusive* badge of fraud (*Hoffman v. Pitt*, 5 Esp. 25; *R. & M.* 312; *Deac.* 406); and in all cases where facts are proved, amounting to a disposition of the property by the bankrupt as owner, *general evidence* may be given of his being *reputed* to be the owner (*Oliver v. Bartlett*, 1 B. & B. 269). But the inference of ownership from possession, and even from reputation of ownership, may be rebutted by evidence contradicting that reputation (*Gurr v. Rutton*, Holt, C. H. P. 327; *Deac.* 406). B., on the 1st of July, fraudulently bought from the plts. a quantity of goods, without any intention of paying for them. After the sale and delivery he became a bankrupt, and a fiat issued against him on the 8th of July. The defts., who were his assignees, thereupon took possession of the goods, as being in the order and disposition of the bankrupt, with the consent of the true owner, within the 72d section of the Bankrupt Act (6 Geo. IV. c. 16), whereupon the plts. brought an action of trover for the goods. Held, that as at the time of the bankruptcy the bankrupt was not the apparent but the real owner of the goods, the section did not apply, and the plts. were entitled to recover. *Quere*, whether the case would have fallen within the 72d section if the plts. had discovered the fraud *long before* the act of bankruptcy, and had omitted, for an unreasonable time, to rescind the contract? (*Load v. Green*, 15 Law J. 113, Exch.; 10 Jur. 163). A. employed B. to build him a greenhouse for 50*l*. When it was completed, B. gave A. notice, and requested him to remit the price. A. remitted the amount, and desired B. to keep the greenhouse till sent for. Afterwards B. (unknown to A.) deposited the greenhouse with C., telling him it was the property of A., and requesting him to keep it for A., which he agreed to do. B. having become bankrupt, his assignees took possession of the greenhouse. Held, first, that the property in the greenhouse passed to A., there having been an appropriation of it to him by B., and an assent on his part to such appropriation; secondly, that the greenhouse was not in the possession, order, and disposition of B. as reputed owner (per Maule, J., *Wilkins v. Bromhead*, 6 M. & G. 963). By a marriage settlement, executed in 1841, some furniture, the property of the intended husband, was conveyed to trustees for his use, and continued after the marriage to be used by him and his wife. In 1846 he committed an act of bankruptcy, and was made bankrupt: held, that the furniture did not pass to his assignees under the 6 Geo. IV. c. 16, s. 72, as goods in the possession, order, or disposition of a bankrupt (*Simmonds v. Edwards*, 11 Jur. 592, Exch.). A., being possessed of twenty tons of oil, deposited in a railway company's warehouse, and being indebted to B., on the 3d of June gave B. an authority to take the oil and sell it, and place the produce to A.'s account. On the 5th of June (a Saturday) A. gave B. an order on the railway company to deliver the oil to B. B., on presenting the order on Monday morning, found that the oil had, the same morning, been removed to A.'s manufactory. On the 11th of June A. became bankrupt. Held, that B. had a lien on the twenty tons of oil (*Ex parte Bell*, re Tunstall, 17 Law J., 9 Bankr.). Where the bankrupt held furniture under an agreement, which was notorious in the neighbourhood, it was held not to pass to his assignees (*Muller v. Moss*, 3 M. & S. 335). D. having agreed [*407] to lend *1000*l*. to W., upon a policy of insurance on his life, gave directions for effecting it to his attorney, L., of Tiverton, who was agent there of the West of England Insurance Company. L. accordingly transmitted proposals for a policy to the head officer at Exeter, without mentioning that D. was the beneficial owner, and obtained it therefrom, and delivered it to D. L. was authorized by the company to receive notices of assignments of policies on their behalf. W. became bankrupt: held, that there was sufficient notice to take the policy out of the order and disposition

of W., and to give the assignment validity as against his assignees, inasmuch as notice to L. was notice to the company, and notice communicated to him in his character of attorney to D., for the purpose of being transmitted to the company, was effectual as a notice to him in his capacity as agent to the company. The question, whether a principal is bound by knowledge possessed by his agent, is a question of law depending on facts found by the jury (*Gale v. Lewis*, 11 Jur. 730, Q. B.; 16 Law J. 119, Q. B.). So, where he had a barge with his name painted on it, but there was a notorious custom in the coal trade for a mere hirer of a barge to paint his name on it, it was held not to pass (*Watson v. Peache*, 1 Bing. N. C. 327). So where, being a hotel keeper, he had furniture on hire, and there was a custom for hotel keepers to hire a portion of their furniture (*Mullett v. Green*, 8 C. & P. 382); and the question for the jury is whether the custom is so general as to raise a fair doubt and presumption in the minds of persons trusting him that the goods were not his (*Ib.*, per Gurney, B.). In all cases where the *best delivery* is made upon the sale of goods which the nature of the property sold, and the circumstances under which it was sold, will admit, the case will not then be considered as one of reputed ownership (see *Manton v. Moore*, 7 T. R. 67). Independent of any consideration of bankruptcy, it is a general rule of law, that all secret sales, and transfers of personal property unaccompanied by possession, are fraudulent and void as against creditors, since the effect of them is to enable a party to gain a false credit from the world (*Deac.* 406; *Edwards v. Harben*, 2 T. R. 587; 1 Camp. 333; *Bamford v. Baron*, 2 T. R. 594; *Toussant v. Hartopp*, Holt, C. H. P. 335).

Two partners trade under the name of one of them only, and upon a dissolution that one continues the business, the other retiring, but no apparent change takes place in the firm. By the agreement on the dissolution, the stock in trade belongs to the continuing partner, who afterwards becomes bankrupt. The stock in trade is sold by his assignees as his separate property, and the retired partner, though cognizant of the fact, makes no objection or claim on the partner becoming bankrupt. Held, that the stock in trade was not in the reputed ownership of the two, but ought to be administered as the separate estate of the continuing partner (*Ex parte —*, 1 De G. 134). By a composition deed between A. and B., scheduled creditors of A., reciting an agreement that A. should pay the creditors 10s. in the pound; and that B. had agreed to join in the deed, for better securing payment of the composition, on having such an assignment made to him as was therein-after contained; it was witnessed, first, that A. and B. covenanted to pay the creditors the composition: secondly, that in consideration of this covenant A. assigned all his stock in trade, machinery, and effects to B., to hold as B.'s own goods and chattels; thirdly, that the creditors covenanted on receiving the composition to release A. contemporaneously with this deed: the leasehold trade premises were assigned by A. to B. with the privity of the creditors. At the time of the execution of the deed all the assigned property was in the *possession of certain mortgagees of the lease- [*408] hold premises and machinery, who afterwards gave up possession to B. on his guarantying payment of the mortgage money. Immediately after the execution of the deed, B. gave the creditors his promissory note for the amount of the composition. B. remained in possession till he became bankrupt, and after his bankruptcy a fiat was sued out against A. by a creditor who knew of the deed, though he had not executed it. He was a friend of A., and indifferent to the payment of his debt, but permitted his name to be used by the creditors who had signed the deed, for the purpose of suing out the fiat. Held, first, that the composition deed was an act of

bankruptcy, and not a sale for value: secondly, that the assigned property was not in the reputed ownership of B.: thirdly, that the circumstances under which the fiat was sued out against A., did not prevent A.'s assignees from recovering the property (*Re Marshall*, 1 De G. 273). A. being indebted to B. and pressed by him for payment, gives him a promissory note made by C. payable to A. (without the words "or order"), and indorsed by A.; B. takes the note, but in consequence of its not being negotiable, returns it to A. in order that A. may give him a negotiable security instead of it; and C. does, at A.'s request, accept negotiable bills of exchange, drawn by A. upon him, instead of the note, and, at the same time that this is done, A. desires C. to hand the bills to B.; and, on the same day, A. absconds to France, thereby committing an act of bankruptcy. Held, that it not appearing on this state of facts, that C. had any notice of the transaction that had passed between A. and B., or that the bills were given in substitution of the note, or that he had assented to B.'s title in any way, A.'s assignees were entitled to them (*Belcher v. Campbell*, 15 Law J. 11, Q. B.; 9 Jur. 1073; 8 Q. B. 1).

They must be Goods or Chattels of a personal or moveable nature.] Things affixed to the freehold do not come within this section (*Horn v. Baker*, 9 East, 215, 237; *Clark v. Crounshaw*, 9 Bing. 804; *Coombe v. Beaumont*, 2 Nev. & M. 235; 5 B. & Ad. 72; *Hubbard v. Bagshaw*, 4 Sim. 326; *Ex parte Wilson*, 4 D. & C. 314; *Ex parte Belcher*, ib. 703; *Ex parte Loyd*, 1 M. & Ayr. 494; *Ex parte Spicer*, 3 ib. 213; *Arch.* 207; see *Grady on Fixtures, &c.*); not even tenant's fixtures (*lb. Boydel v. Mitchel*, 1 C. M. & R. 177; *Trappes v. Harter*, 2 C. & M. 153; 3 Tyrw. 603, where certain fixtures were held to pass to the assignees; it was decided upon the peculiar circumstances of the case); nor shares in a company seised of real estate in this country (*Ex parte Vauxhall Bridge Company*, 1 Glyn & J. 101), unless by the act incorporating the company they are deemed personal estate (*Ex parte Lancaster Canal Company*, Mont. 116; 1 Dea. & Ch. 411); but shares of a gas company possessed of a copyhold estate are within it (*Ex parte Vallance*, 2 Deac. 354; 3 M. & Ayr. 224; shares in a joint-stock company pass to the holder's assignees, notwithstanding an assignment or mortgage of them, if they continue in his name, or no notice be given to the company; *Nelson v. London Assurance Company*, 2 Sim. & St. 292; *Cumming v. Prescott*, 2 Y. & C. 488); so are shares in a railway company (*Ex parte Harrison*, 4 ib. 507; 3 Deac. 185), and so *seem* are shares in a commercial company holding lands in a foreign country (*Ex parte Richardson*, 3 Deac. 496; 1 Mont. & Ch. 43); and in a newspaper (*Longman v. Tripp*, 2 N. R. 67); so is stock (*Ex parte Richardson*, Buck, 480); so are bills of exchange (*Hornblower v. Proud*, 2 B. & Al. 327); policies of insurance (*Faulkner's case*, 1 Brown. C. C. 125). So are ships (*Hay v. Fairbairn*, 2 B. & A. 193; *Robinson v. McDonnell*, 2 ib. 134; 5 M. & S. 228; *Monkhouse v. Hay*, [*409] 2 B. & B. *114; 4 Moo. 549; *Hall v. Gurney*, Cooke, B. L. 353; *Kirkley v. Hodgson*, 2 B. & C. 588; 2 D. & R. 848), and their freight (*Leslie v. Guthrie*, 1 Bing. N. C. 697; see *Douglas v. Russell*, 4 Sim. 524); notwithstanding the registry, for this is evidence of property against those trusts only which might otherwise arise from the acts of the parties, and not against those arising from operation of law (*Curtis v. Perry*, 6 Ves. 739; *Ex parte Yallop*, 15 Ves. 60; *Ex parte Howson*, 17 ib. 251; 1 Rose, 177; *Ex parte Burn*, 1 J. & W. 378); unless where, under the recent act of 3 & 4 Will. IV. c. 55, the transfer had been made by way of mortgage or assignment, as a security for a debt, and has been duly registered pursuant to that statute, when they do not pass to the assignees. Before this statute, and so still in cases not coming within it, where a ship at sea is sold

or mortgaged, the transfer will be invalid if the transferee do not, after notice of the ship's arrival, take possession or notify the transfer to the captain (Mair v. Glennie, 4 M. & S. 240; Richardson v. Campbell, 5 B. & A. 196; and see *post*, "SHIPS"; see 5 Geo. IV. c. 94). The sale operates from the registration of the bill of sale, and not from the execution, so that registration after bankruptcy does not prevent a ship passing to the vendor's assignees, though the sale was before bankruptcy (Bayson v. Gibson, 4 C. B. 121). Wines, which have been sold but are left in the vendor's possession by the purchaser, he having merely marked them with his initials, are in the vendor's "possession" (Knowles v. Horsfall, 5 B. & A. 134). So where machinery belonging to a debtor is purchased by a creditor by bill of sale from the sheriff, and the purchaser having marked it with his initials devotes it to the debtor.

Possession, Order, or Disposition.] The following cases are not in general within the statute: the possession of goods for a specific purpose (Tooke v. Hollingworth, 5 T. R. 215; 2 H. Bl. 501; Moore v. Barthrop, 1 B. & C. 5; Toovey v. Mylne, 2 B. & A. 683; Giles v. Perkins, 9 East, 12; Ex parte Sergeant, 1 Rose, 153; West v. Ship, 1 Ves. 243; 3 T. R. 323; Ex parte Benson, Mont. & Bligh, 120; Carsairs v. Bates, 3 Camp. 301; Thompson v. Giles, 2 B. & C. 432; Bent v. Pullen, 5 T. R. 494; Hornblower v. Proud, 2 B. & A. 327; Parke v. Eliason, 1 East, 554); even, of money, if kept separate (R. v. Egerton, 1 T. R. 370; 9 East, 14); or capable of being specifically distinguished (per Mansfield, Lord, Howard v. Jemmett, 3 Burr. 369; Scott v. Surman, Willes, 400); or if in possession of a banker (Thompson v. Giles, 2 B. & C. 422; Ex parte Benson, Mont. & Bligh, 120; and see Ex parte Thompson, M. & M'Ar. 108, n.; Smith v. Pickering, Pea. 50; Taylor v. Plumer, 3 M. & S. 576); or, trustee (Winch v. Keeley, 1 T. R. 619; Ex parte Watkins, 1 Mont. & Ayr. 689); or executor or administrator (Ex parte Ellis, 1 Atk. 101; Farr v. Newman, 4 T. R. 629); and the rule extends to the husband of an executrix (Viner v. Cadell, 3 Esp. 88; see Howard v. Jemmett, *supra*; Taylor v. Plumer, 3 M. & S. 578); but the mere title to administer will not protect the goods (Fox v. Fisher, 3 B. & A. 135); or if in possession of a broker or factor (B. N. P. 42; Taylor v. Plumer, 3 M. & S. 562; Whitecombe v. Jacob, 1 Salk. 160; Scott v. Surmon, Willes, 400; per Mansfield, Lord, Mace v. Cadell, Cowp. 232). But books deposited with a bookseller for sale on commission, and separated from his general stock, do not pass to his assignees (Whitfield v. Brand, 16 M. & W. 283). The possession by a carrier, to whom the bankrupt delivered *money* in order to convey to a creditor is, till delivery to the creditor, the possession of the bankrupt (Hervey v. Liddiard, 1 Stark. 123). But, where the bankrupt had sold goods in the East India Company's warehouses, *and the purchaser left the warrants in his hands, and he afterwards pledged the warrants with another party to secure advances, [*410] the possession of the warrants by the pawnee was held not to be a constructive "possession" by him, within this clause; and his assignees were not enabled to hold the goods against the purchaser (Greening v. Clarke, 4 B. & C. 316). So, goods in the London Docks, which pass by indorsement of the warrants, are not in his possession, unless he has the warrants in his possession (Ex parte Davenport, Mont. & Bligh, 165). So, by the transfer of the warrants for goods in the West India Dock Company's warehouses, and the assent of the Company, there is a transfer of the possession (Lucas v. Dorien, 1 Moo. 29). A warrant was directed to a trader's servant and another, as special bailiffs, who took possession of the goods in the shop, but the business without the trader's interference was

carried on apparently as usual: held, within the statute, the servant's possession being that of the master (*Jackson v. Irvin*, 2 Camp. 48; *Toussaint v. Hartop*, Holt, N. P. 335; see *Doker v. Haslet*, 2 Bing. 479). Where, by agreement, the vendor retained possession of casks of wine, but the purchaser marked them with his initials, they were held to pass to the vendor's assignees, although the sale was notorious at the place (*Knowles v. Horsfall*, 5 B. & A. 134; *Lingard v. Messiter*, 1 B. & C. 308). But where the purchaser had it bottled and deposited in the bankrupt's cellar, in a particular bin, marked with the purchaser's seal, and entered in bankrupt's books as the purchaser: held, that it did not pass (*Ex parte Marrable*, 1 Glyn & J. 402; *Carruthers v. Payne*, 5 Bing. 270). If a symbolical delivery only can be made it is sufficient to take the case out of the statute (*Manton v. Moore*, 7 T. R. 67; *Mair v. Glennie*, *ante*, p. 409; *Brown v. Heathcote*, 1 Atk. 160). A., a dyer, purchased a plant of B. and re-sold it to him; he never took possession, but devised it to A.: held, to pass to A.'s assignees (*Bryson v. Wylie*, 1 B. & P. 83, *a*). A testator directed, in case his son should carry on his trade, that his lease and furniture should not be sold, but that the trustees should permit the widow and children to reside there, and have the use of the furniture: held, that the latter did not pass to the assignees of the mother and son (*Ex parte Martin*, 2 Rose, 331; see *Shaftsbury (Earl) v. Russell*, 1 B. & C. 636). Where, pursuant to an agreement for the sale of a dwelling-house and the furniture and stock therein, the latter were, after the sale, left in the dwelling-house, in the possession of the seller, for three months after the sale; held, that they did not pass to the seller on his becoming bankrupt within three months, the sale being notorious (*Muller v. Moss*, 1 M. & S. 335). But where a house was let, with a covenant to determine the lease on the lessor committing an act of bankruptcy, and by another deed the furniture of the house was demised subject to a similar covenant; held, that it passed to the assignees of the lessee, the jury having found that he was the reputed owner of the furniture (*Hickenbottom v. Groves*, 2 C. & P. 492). Where London sub-mortgagees of shipments at Ceylon and Hong-Kong send thither, directed to the parties in possession, notices of their security by the next direct mail, there being another and earlier mail by a different route, by which the notices might possibly have sooner reached their destination; before, however, this could have taken place by either mode of transmission, the sub-mortgagors became bankrupts: held, that the notice was sufficient to take the goods out of their reputed ownership. A man may give a valid security on merchandise out at sea belonging to him, although at the time he is ignorant of the particulars of which it consists (*Ex parte Kelsall*, 1 De G. 352).

*Shares in a water-works company are subject to the law of reputed ownership, the company's act of parliament declaring them to be personal property (*Ex parte Lawrence*, 1 De G. 269). A. authorized the sale of his share in a brewery to B., his surviving partner, whom he appointed one of his executors. B., conceiving he had duly become the purchaser, carried on the business until his death, and it was subsequently carried on by C., his executor. Afterwards, upon a bill filed, the sale was set aside, and the estate of A. became entitled to share in the profits made subsequently to A.'s death. C. afterwards became bankrupt, having the whole trade-property in his possession. Held, first, that the trade-creditors, during the time the business was carried on by C., had no lien for their debts on A.'s share: and, secondly, that the property was not within the order and disposition of the bankrupt (*Stocken v. Dawson*, 9 Beav. 239).

A trustee for sale of a testator's estates sold part of them and paid the

proceeds into court. A party entitled to a share of the testator's property assigned his interest to S., by way of mortgage, and S. gave notice of the assignment to the trustee, but did not obtain a stop-order. The remainder of the estates was afterwards sold, and the proceeds paid into court, under the decree in the suit. Subsequently the assignor took the benefit of the Insolvent Debtors' Act. Held, that the notice given to the trustee was sufficient to take the assigned share out of the order and disposition of the assignor (*Matthews v. Gabb*, 15 Sim. 51).

T. and C., being indebted to their bankers, gave them a written order upon a third party for the delivery to them of certain goods, belonging to T. and C., in his hands. At the same time T. and C. gave a written memorandum to their bankers, authorizing them to sell the goods and place the produce to their credit. On presentation of the order, it was found that the goods had been, under another written order given by T. and C., and ante-dated four days, already delivered to one of their servants, and removed by him to their premises, and mixed with other similar goods, so as to be rendered undistinguishable. Soon afterwards, and whilst the goods remained in their possession, T. and C. became bankrupts. Held, that the goods were not in the order or disposition of the bankrupts, within 6 Geo. IV. c. 16, s. 72, but that the bankers had a valid lien upon them (*Ex parte Bell, re Tunstall*, 11 Jur. 986, Ch.).

Partners.] The share of a dormant partner would seem to be within the statute (*Ex parte Enderby*, 2 B. & C. 389, 406; *Ex parte Barrow*, 2 Rose, 252).

Feme Covert.] Goods belonging to a woman living with, and passing as wife of a trader, will pass to his assignees (*Mace v. Cadell*, Cowp. 232), unless, on her marriage, they are vested in trustees for the wife's separate use, for the purpose of carrying on a separate trade, and the husband lives with her; if he did not meddle with them, and there be no fraud, the goods will not pass to the assignees of the husband, and whether the trade be carried on solely by the wife, or jointly with the husband, is a question of fact for the jury, and if they determine the latter the goods will pass (*Jarman v. Woolloton*, 3 T. R. 618; see also *Dean v. Brown*, 5 B. & C. 336; *Miller v. Demetz*, 1 Moo. & R. 479).

Sale or Return.] Goods sent upon sale or return to a trader are within the statute (*Levesay v. Hood*, 2 Camp. 83). But where they were to be returned if not approved of, and they arrived only *the day before the bankruptcy, they were held not to pass, for he should be [*412] allowed a reasonable time to approve (*Gibson v. Bray*, 8 Taunt. 76). If there be a custom for the purchaser to leave the goods in the vendor's warehouse for the purpose of sale, undistinguished from his other stock, they will pass to his assignees (*Thackthwaite v. Cock*, 3 Taunt. 487).

The True Owner.] The true owner is said to mean the legal owner, and therefore the consent of a trustee is sufficient (*Ex parte Dale*, Buck, 365). By the 6 Geo. IV. c. 94, s. 2, the person intrusted with, and in possession of, any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant, or order for delivery of goods, is the true owner of the goods, wares, and merchandises in such documents, described for the purpose of giving validity to any contract respecting them, by way of sale or pledge.

Possession, &c., at Time of Bankruptcy.] They must be in his possession, &c., &c., "at the time he becomes bankrupt." Therefore, if they do not come into his possession till *after* the bankruptcy (*Lyon v. Weldon*, 2 Bing. 34; *Fawcett v. Fearn*, 6 Q. B. 20); or are removed out of it before the bankruptcy (*Jones v. Dwyer*, 15 East, 21); even the day before (*Arbouin v. Williams*, R. & M. 72); unless, of course, under circumstances of fraud (as in *Darby v. Smith*, 8 T. R. 82); they will not pass to his assignees. Removal on the day of the bankruptcy, but before the act of bankruptcy, is not sufficient (per Gifford, Lord, *Arbouin v. Williams*, R. & M. 72). A demand by the owner of the goods before the act of bankruptcy, is sufficient to take them out of the order and disposition of the bankrupt (*Smith v. Topping*, 5 B. & Ad. 674).

Consent and Permission of True Owner.] The consent must move directly from the true owner to the bankrupt, and therefore the consent of a person who was permitted by the true owner to deal with them as his own is not sufficient (*Frazer v. Swansea Canal Company*, 1 Ad. & E. 354; 3 Nev. & M. 391). So, if the true owner demand them back before the bankruptcy (*Smith v. Topping*, 2 Nev. & M. 421; 5 B. & Ad. 674); or, having sold them, give notice to a carrier to stop them *in transitu*, and the carrier, by mistake, deliver them to the vendee (*Lett v. Cowley*, 7 Taunt. 169; *Holt*, 338; 2 Marsh. 457); or if they, being stock, are transferred without his privity into the bankrupt's name by the Accountant-General of the Court of Chancery (*Ex parte Richardson*, Buck, 480); they do not pass to the bankrupt's assignees. So, if the true owner is a person who cannot consent, as an infant (*Viner v. Cadell*, 3 Esp. 88); or who is presumed not to consent, as where a woman is married to a man, she not knowing that he has a former wife living (*Miller v. Demetz*, 1 Moo. & R. 479); but if she knows that the former wife is alive, then she must be presumed to have consented (*Ib.*). If a woman live with him as his wife, and assert herself to be his wife, her goods pass to his assignees (*Mace v. Cadell*, Cowp. 232). But where, on marriage, stock in trade and furniture are vested in trustees for the separate use of the wife, in order to enable her to carry on a separate trade, and the husband lives with her, if he do not intermeddle with them, and there be no fraud, they will not pass to his assignees; but whether the trade be carried on solely or jointly with him is a question for the jury; and if they determine the latter, the stock in trade will pass to his assignees, but not the furniture (*Jarman v. Woolloton*, 3 T. R. 618). When a simple-contract *debt has been assigned, the assignor is considered as having [*413] the order and disposition of the debt, with the consent of the true owner, until the debtor has notice of the assignment (*Buck v. Lee*, 1 Ad. & E. 804; *Gibson v. Overbury*, 7 M. & W. 561; *Belcher v. Campbell*, 8 Q. B. 1). A. bought goods from B., with the fraudulent intention of never paying for them, and kept them until his bankruptcy. Held, that they did not pass to A.'s assignees under the fiat, as having been in his possession, order, and disposition as the reputed owner thereof, with the consent of the true owner (*Load v. Green*, 15 M. & W. 216).

Evidence in Action to recover Property delivered by Bankrupt in Contemplation of Bankruptcy.] If a trader, knowing himself to be on the eve, and in contemplation of bankruptcy, voluntarily give or assign goods, money, or other property, to one of his creditors, with a view of giving him a preference over others, or to defeat the claims of his creditors generally, such assignment or transfer is void as against the other creditors; and, upon the bankruptcy of the trader, his assignees may recover the property from the

creditor thus preferred (*Crosby v. Crouch*, 2 Camp. 166; 11 East, 256; 2 Camp. 579; *Cowp.* 629). It is not necessary that the trader should intend to benefit the creditor, or that the latter should in fact be benefited (*Marshall v. Lamb*, 5 Q. B. 115; 1 D. & M. 315).

This preference, however, must be proved to have been made in contemplation of bankruptcy, at the time of such preference; and, if it appear that the bankruptcy was not contemplated at the time, although it actually did take place afterwards, the property assigned to the creditor will not be recoverable by the assignees (*Wheelwright v. Jackson*, 5 Taunt. 109; 1 Marsh. 196; 1 Ves. 280). But, if the assignment or transfer took place under circumstances which might reasonably lead the debtor to believe his bankruptcy probable, though not inevitable, it will be sufficient to invalidate the transaction (*Poland v. Glynn*, 2 D. & R. 310; *ante*, p. 391). So, a contemplation of insolvency, and a discharge by the Insolvent Debtor's Court, is sufficient (*Aldred v. Constable*, 4 Q. B. 674); and the jury may infer it from circumstances, without proof that a dishonest act of bankruptcy was contemplated (*Ib.*). But it does not necessarily follow, from a person being in embarrassed circumstances, that he contemplated bankruptcy, as he may hope for an improvement in his affairs (*Green v. Bradfield*, 1 C. & K., per Tindal, C. J.).

The transfer must be proved to have been voluntary; if made under compulsion, pressure, or any apprehension of annoyance from, or even from the importunity of the creditor, it will not be within the act (see *ante*, p. 393). In order to constitute pressure, it is not necessary that legal proceedings should be instituted, if the conduct of the creditor be such as to outweigh the bankrupt's own inclination, and induce him to pay against his will, it is enough (*Green v. Bradfield*, 1 C. & K. 449, per Tindal, C. J.).

Where the transfer or delivery of property upon the importunity of a creditor does not redeem a trader from any present difficulty, which is the ordinary motive for such an act, when really done under the pressure of a threat, this will be evidence that the transfer was not made under such pressure, but voluntarily and with a view to prefer a particular creditor, in contemplation of bankruptcy (*Thornton v. Hargreaves*, 7 East, 544). The transfer must be proved to have been made with a view of giving the creditor a preference over others; a voluntary transfer is good, if made *bona fide*, and not from a motive of undue preference (*Dixon v. Baldwin*, 5 East, 175). A payment in the fair course of *business, or in pursuance of a previous agreement, would not be a fraudulent preference (see [*414] *Rust v. Cooper*, *Cowp.* 629; *ib.* 117; *Mavor v. Croome*, 1 Bing. 261; *Guthrie v. Crossley*, 2 C. & P. 301). A delivery of goods under a pretended sale, or an absolute sale, with an intention to prefer, will be fraudulent (*Harris v. Limell*, 1 B. & B. 390; *Alderson v. Temple*, 4 Burr. 2235). In all questions on this subject, the relative situation in which the bankrupt and the creditor stand with each other at the time of the transfer, should be considered. And see further, as to this right of the assignee, *ante*, p. 388, as to how far a fraudulent preference constitutes an act of bankruptcy.

Evidence in Action to recover Property delivered by Bankrupt voluntarily, without Consideration.] Property voluntarily conveyed by a trader, without valuable consideration, and which conveyance would be void as against his creditors, by stat. 13 Eliz. c. 5, will pass to the assignees under the assignment, and may be recovered by them (see *Glaister v. Hewer*, 8 Ves. 195; 9 Ves. 12; 11 Ves. 377; 9 East, 59; *Arch.* 238). Money is not within the act (*Kensington v. Chantler*, 2 M. & S. 36). A settlement made after marriage will not prevent the property settled from vesting in the assignees of the husband, on his bankruptcy (*Ex parte Bell*, 1 G. & Y. 282; 1 Atk. 93);

unless, indeed, it be made in consideration of a portion, or a new additional sum received with, or in right of the wife, or of an agreement to pay the money, if it be afterwards paid (Cooke, 293; Arch. 240); or, unless it be made in pursuance of articles entered into before marriage (Arch. 240); or, unless it were made without fraud, before the husband entered into trade, and at a time when he was not indebted (*Battersbee v. Farrington*, 1 Swanst. 106). A settlement made by a trader, before marriage, on his intended wife and issue, will be valid, as against the assignees; and this, though he received no portion from his wife, marriage being a valuable consideration (*Ex parte Cottrell*, Cowp. 742). And, if a man, upon his marriage, settle personal property for the separate use of his wife, to enable her to carry on a separate trade, his living with the wife will not give him such a possession, order, or disposition of the property, as to vest them in his assignees on his bankruptcy (3 T. R. 620). If, however, the husband himself take any interest by the settlement, as an estate for life, or the like, it of course passes to the assignees (2 Atk. 558; Arch. 240).

By the 12 & 13 Vict. c. 106, s. 126, if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children, or to any other person, any hereditaments, offices, fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person, or in any other person's name, the court shall have power to order the same to be sold and disposed of for the benefit of his creditors under the bankruptcy; and every such sale shall be valid against the bankrupt, and such children and persons, and against all persons claiming under him (see 3 Mer. 702; Cro. Car. 548).

Evidence in Action to recover Property of Bankrupt seized under an Execution.] By the 81st sect. of the 6 Geo. IV. c. 16, executions and attachments levied *bona fide* on a trader's property two months before a commission issued against him were valid. The execution-creditor, however, must not have had notice of a prior act of bankruptcy (*lb.*); and, by the 108th sect., execution-creditors were put on the *same footing as others, [*415] and must receive only a rateable part of their debts, unless the levy were made before the act of bankruptcy; and, by the same section, creditors levying an execution on a judgment by default or confession, were not to be preferred (see *post*, p. 422). An execution merely tested or delivered to the sheriff before the bankruptcy, was insufficient; the property should be actually seized under the execution, before the act (*Stead v. Gascoigne*, 8 Taunt. 527; *Cole v. Davis*, 1 Ld. Raym. 724; 5 Moo. 313; *Phillips v. Thompson*, 3 Lev. 69, 192). Such executions and attachments were protected, if "*bona fide* executed or levied before the date and issuing of the fiat" (2 & 3 Vict. c. 29); that is, before it is delivered at the bankrupt's office, and not merely before it is bespoken (*Pewtress v. Acraman*, 9 Dowl. P. C. 828). The *bona fides* referred to the creditor and sheriff (*Belcher v. Magnay*, 12 M. & W. 102; 1 D. & L. 441). Under the 6 Geo. IV. c. 16, s. 81, a seizure at 11 o'clock, on the 13th August, was protected against a commission at 12 o'clock, on the 13th October (*Godson v. Sanctuary*, 4 B. & Ad. 255). There must have been an actual seizure made before the fiat, therefore a lodging of a writ with the sheriff, and a delivery of a warrant by him to an officer, did not oust the assignees (*Johnson v. Evans*, 1 D. & L. 935; 13 Law J., N. S., C. P. 117). If the execution be fraudulent or collusive, the assignees may recover the property seized, or its proceeds (see

2 Camp. 48; 1 Holt, 335; 1 H. Bl. 665; *ante*, 387; but see now 12 & 13 Vict. c. 106, s. 133; *post*, p. 422).

Damages.] Where, in trover against a sheriff in the usual form, he delivers up the goods, and the plts. proceed to trial to recover their costs, "according to the practice of a century, the jury may, under such circumstances, give them nominal damages;" but not more, if no special damage is laid in the declaration, and the damage complained of is not necessarily incidental to the wrongful taking: therefore, on such a declaration, the plts. cannot recover, as damages, the rent of the house where the goods were kept whilst in the possession of the sheriff, or the cost of keeping their messenger there during the same period (*Moon v. Raphael*, 2 Bing. N. C. 310; 2 Sco. 489; 7 C. & P. 115). Goods were seized under a *fi. fa.* issued upon a judgment on a warrant of attorney, after an act of bankruptcy committed by the debtor, against whom a fiat issued before the goods were sold. The assignees gave the sheriff notice not to sell, and he brought the parties before a judge by an interpleader order. The judge directed that the goods should be sold, and the money brought into court to abide the event of an issue to be tried between the execution-creditor and the assignees. The latter made no objection, and did not suggest any other mode of disposing of the goods, which were accordingly sold by the sheriff's auctioneer. The execution-creditor subsequently abandoned all claim to the goods, and the proceeds of the sale were paid out of court to the assignees. Held, that the assignees were not entitled, as matter of law, to recover in an action of trover against the execution-creditor, the difference between the produce of the sale and the value of the goods at the time of the seizure, and that it was no misdirection in the judge to state to the jury, that, if they thought the sale was *bona fide*, they might consider the produce of it as the measure of damages (*Whitmore v. Black*, 13 M. & W. 507). B., being indebted to the deft. in the sum of 500*l.* for the price of goods sold to him, and being pressed for part payment of the debt, handed to the deft. a bill of exchange drawn by himself for 600*l.* and the deft. agreed to pay discount, on the terms of retaining to his own use the sum of *100*l.*, or net the discount, and pay over [*416] the difference to B.; he, however, retained the bill, and paid no part of the proceeds over to B. B. shortly afterwards became bankrupt. Held, that his assignees were entitled to recover from the deft. the full amount of the bill *minus* the 100*l.* and such discount as the jury should find to be receivable by the deft. (*Alder v. Keighley*, 15 & W. 17; 15 Law J. 100, Ex.).

Evidence for Defendant.

This will of course depend on the pleadings.

By R. G. H. T. 4 Will. IV. in all actions by and against assignees of a bankrupt the character in which the party is stated on the record to sue or be sued shall not be in evidence, unless specially denied. A plea denying that plts. are assignees, *modo et formâ*, puts them upon strict proof of trading &c. (*Batten v. Hobson*, 4 N. C. 290; *Buckton v. Frost*, 8 Ad. & E. 844): strict proof may be dispensed with, by admissions expressed or implied (see *ante*, p. 350); but the plea will not dispense with the notice under the bankrupt act (*ante*, p. 349). With reference to the nonjoinder of a joint assignee, see *ante*, p. 335.

General Issue.] The 40th section of the bankrupt act (5 & 6 Vict. c. 122) rendered void all securities given in violation of its provisions, even though

in the hands of *bona fide* holders (see 12 & 13 Vict. c. 106). The general issue which that section allowed to be pleaded is *non assumpsit*, when the form of action is *assumpsit* (Weeks v. Argent, 11 Jur. 525; 16 Law J. 209, Ex.; 2 N. P. C. 235).

Plea of Non assumpsit to Action for Money received to the Use of the Assignees.] If it appear that the money was received by the deft. *before* the bankruptcy, it is a defence; but not if the payment were made by way of fraudulent preference, or there be a count for money received to the use of the assignees (Pennell v. Aston, 14 M. & W. 415). Where a landlord distrained the bankrupt's goods for rent, and a third person who claimed the goods agreed to redeem them by satisfying the landlord; it was held, that the sum so paid to the landlord could not be recovered by the assignees (Lackington v. Elliott, 7 Man. & G. 538).

Disputing Title.] We have already seen in what cases the plt. must adduce evidence of his *title* to sue as assignee, and what steps must be taken by deft.—as giving notice, &c.—to render it incumbent on plt. to adduce *strict* evidence of such title (*supra*); and when deft. is estopped from disputing the title (*ante*, 350). We have also seen the *mode* in which plt. must prove his title, where deft. has given no notice to dispute it (*ante*, p. 348, 349); where the commission has not been disputed by the bankrupt within a limited period (*ante*, p. 351); and where strict proof of title is necessary (*ante*, p. 348, 416). Under these observations will be also found, how far deft. will be able to contest and controvert the plt.'s title, and his evidence must be framed accordingly: If a notice have been given by deft. to dispute the bankruptcy, &c., he should adduce evidence of such notice in the usual way (*post*, "SECONDARY EVIDENCE"). The notice to dispute must specify which of the matters is intended to be disputed, for a notice to dispute "the bankruptcy" is too general (Trimley v. Unwin, 6 B. & C. 537). Where

[*417] the bankrupt has given no notice to dispute the commission under the statute, the *effect of the clause is, that in cases where the bankrupt, if solvent, could have sued, and the deft. gave notice of his intention to dispute the bankruptcy, &c., the fact so disputed must be proved, but the depositions under the commission are conclusive evidence of the matters contained in them (Earth v. Schroder, M. & M. 26). The notice in fact is no part of the deft.'s evidence, but may be proved at the commencement of the plt.'s case, and will immediately put him upon proof (Decharne v. Lane, 2 Camp. 324; *ante*, p. 348). A notice served upon the clerk at deft.'s counting-house, before issue joined, without showing that it has come to the deft.'s hands, was held sufficient (Widger v. Browning, M. & W. 27). Where a plea, which was delivered without a notice, was got back under a false pretence and re-delivered with a notice, it was held insufficient (Lawrence v. Crowder, 1 M. & P. 511; 3 C. & P. 229). If served on the attorney, it is sufficient (Howard v. Ramsbottom, 3 Taunt. 526). If the form of action, or the form of pleadings, be improper, plt. will be nonsuited; as to which, see *ante*, p. 324. If the plt. has omitted to join one of the assignees under the commission, the nonjoinder may be taken advantage of, as ground of nonsuit (Snelgrove v. Hunt, 1 Ch. R. 71; 2 Stark. 424; but see *ante*, p. 335).

Disputing Cause of Action.] We have seen what evidence the plt. must adduce in support of the *cause of action*, and what may be shown by deft. to impeach it (*ante*, 403). The question, whether or not a particular interest vests in the assignees, is a question of law, depending on the facts brought

forward in evidence from the plt.'s or deft.'s proof (see 2 Stark. Ev. 195). If plt. sues in an improper form of remedy (*ante*, p. 324), or there be a variance in the declaration (*ante*, p. 343), he will be nonsuited (see "VARIANCE").

Plea of Not Guilty in Trover.] If the declaration allege a possession by the plts. as assignees, and a conversion *after* the bankruptcy, and the deft. plead not guilty, a sale of the bankrupt's goods by the deft. under an execution *before* the bankruptcy will not support the issue, though there had been a demand and refusal by the deft. afterwards, for the sale was the real conversion (*Edwards v. Hooper*, 11 M. & W. 363; *post*, "TROVER").

Plea of Not Possessed.] Under this plea the deft. may show that he took the goods in execution *bona fide*, without notice of bankruptcy (*Unwin v. St. Quinton*, 11 M. & W. 277). Where the plts. were assignees of A. at the time of the conversion, and afterwards became assignees of A. and B., and alleged the property in themselves as the assignees of A. and B., they cannot recover even a moiety, for they were not, at the time of the conversion, possessed as assignees of *both* bankrupts (*Edwards v. Hooper*, 11 M. & W. 363). The deft. may under this plea show that the plts., as assignees, allowed the goods to remain in the bankrupt's "order and disposition," and that the property subsequently passed to the provisional assignee by assignment under the Insolvent Debtors Act, of which bankrupt had afterwards prayed the benefit (*Butler v. Hobson*, 2 N. C. 290). So it is a good defence under this plea that the equitable interest passed to the deft. before the bankruptcy, for the bankruptcy only vests in the assignees what the bankrupt is legally as well as equitably entitled to, so that an equitable assignment prevents the property from vesting in the assignees (*Carvalho v. Burn*, 4 B. & Ad. 382; *Tibbits v. George*, 5 Ad. & E. 107). If A. agree to assign to B. certain *specific goods* as a security for money advanced to B. for the purchase of them, and afterwards, in pursuance of such agreement, *actually assigns them, although the assignment itself be under such circumstances [*418] as would, under the Insolvent Act, have rendered it void, and A. subsequently takes the benefit of the act, yet his assignees cannot recover the goods. *Aliter* if the agreement related to such goods as A. might have at the time of the execution of the assignment, their *corpus* not being ascertained at the time of the agreement (*Mogg v. Baker*, 3 M. & W. 195).

Where the defence is in substance a denial that the property in the goods for which the plts. sue in trover as assignees passed to them, a simple traverse of such property is sufficient (*Carr v. Burdiss*, 1 C. M. & R. 787; see *Parke, B., Turquand v. Hawtrey*, 9 M. & W. 727).

Release.] A discharge by one assignee, on receiving moneys due to the estate, will bind the rest (*Smith v. Jameson*, 1 Esp. Ca. 114; 2 Stark. Ev. 199; *sed vide Carr v. Head*, 3 Atk. 695); but a discharge by one assignee will not be effectual, where the others have expressly dissented (*Bristow v. Eastman*, 1 Esp. Ca. 172). So, a release executed by one assignee, in the presence of another, will bind both (*Williams v. Walsby*, 4 Esp. Ca. 220); but, if the co-assignee be absent, an express authority by him, under seal, must be proved (4 T. R. 313; 2 Stark. Ev. 200).

Defence that the Conveyance, Contract, Execution, &c., through which the Property sought to be recovered against Defendant was conveyed to him, was
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without Notice, &c.] By the general operation of the bankrupt laws, as we have before seen, all the property of the bankrupt, from his act of bankruptcy, becomes vested in the assignees, so that the bankrupt has no power whatever to dispose of the same against their consent. The 6 Geo. IV. c. 16, s. 81, enacted, that all conveyances by, and all contracts, and other dealings and transactions, by and with any bankrupt; *bona fide* made, and entered into, *more than two calendar months* before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements, or goods and chattels, of such bankrupt, *bona fide* executed or levied *more than two calendar months* before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not, at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed.

The 2 & 3 Vict. c. 11, s. 12, protected on the same conditions of *bona fides*, and want of notice, and in the same terms, "all conveyances" made and executed; and, c. 29, s. 1, "all contracts, dealings, and transactions" made and entered into; and "all executions and attachments," executed or levied "before the date and issuing of the fiat." But see now *post*, p. 422, 12 & 13 Vict. c. 106, s. 133.

The effect of the 2 & 3 Vict. c. 29, was to destroy the title by relation, of the assignees to the act of bankruptcy, as to all *bona fide* transactions prior to the fiat. But where the act of bankruptcy was the procuring the bankrupt's goods to be taken in execution, the execution though levied *bona fide* by the creditor, was not protected (*Hall v. Wallace*, 7 M. & W. 353). The statute did not render valid an execution by *fi. fa.* on a warrant of attorney; the *fi. fa.* having been executed by seizure after a secret act of bankruptcy,

but not complete by sale before the issuing of the fiat, though the [*419] *warrant of attorney was not a fraudulent preference (*Whitmore v. Robertson*, 8 M. & W. 463); *semble*, an execution by mere seizure would have been protected if the judgment had been on a verdict (*Whitmore v. Robertson*, *supra*). The proviso in the act that nothing therein contained shall be deemed or taken to give validity to any execution founded on a judgment, on a warrant of attorney, or cognovit, given by any bankrupt, by way of fraudulent preference, did not imply that all executions, not being by way of fraudulent preference are necessarily made valid (*Whitmore v. Robertson*, *supra*; see also *Randen v. Wentworth*, 10 M. & W. 36; *Skey v. Carter*, *in error*, 11 M. & W. 571; *Cheston v. Gibbs*, 12 M. & W. 111). *Quære*, whether a *payment* by a bankrupt was within this section (*Turquand v. Vanderplank*, 10 M. & W. 180; see 12 & 13 Vict. c. 106, s. 83). *Quære*, whether a distress by a landlord was an "attachment" or transaction within this section (*Lackington v. Elliott*, 7 M. & G. 538). It seems a right of lien arising before fiat may be protected by the act 2 & 3 Vict. 29 (*Bordman v. Malcolm*, 11 M. & W. 833). Where a fiat was bespoken at two o'clock, and a seizure under an execution was at two o'clock, the fiat was delivered at the bankrupt's office after two o'clock: held, that the execution was protected, for the delivery of the fiat was the date and issuing within the statute (*Pewtress v. Acraman*, 9 Dowl. P. C. 828).

The protection of the statute was available under a plea denying the plt.'s property in trover. But see *Byers v. Southwell*, 9 C. & P. 320.

We have already seen what will be evidence of a notice of an act of bankruptcy, *ante*, p. 402, and *infra*.

Evidence in Action, to recover Goods which have been stopped in Transitu.] If a bankrupt has purchased goods, but the same are not delivered to him, and they still remain in the hands of the vendor, inasmuch as he has a lien on them for the purchase-money, the assignees, until they satisfy the vendor in that respect, cannot get possession of them, so as to dispose of them for the benefit of creditors; if the vendor have sent them, but they have not as yet been delivered to the bankrupt, the vendor may stop them *in transitu*; but, when the goods have been delivered to the bankrupt, then, of course, they pass to the assignees (Arch. 233). See, as to when a party has a right to stop goods *in transitu*, *post*, "TROVER, DEFENCES IN". The point generally in dispute, is, as to whether or not there has been an actual delivery to the bankrupt.

Evidence in Action to recover Property in hands of Party who Claims a Lien over it.] The assignees do not take a better title in the property of bankrupt, than he himself had at the time of his bankruptcy; and if, therefore, the holders of it have a claim of lien therein, as against the bankrupt, they have it also against the assignees. The requisites to support a legal lien on property, with the evidence to support or disprove it, will be found *post*, "TROVER, DEFENCES IN."

Proof of Defendant's Notice of Bankruptcy.] If the plt. seeks to recover money or property which he could not by virtue of sects. 133 *et seq.* of 12 & 13 Vict. c. 106 (*post*, 423), without debt. had notice of an act of bankruptcy committed, he must adduce evidence of such notice, which may be either actual or implied from circumstances. By 12 & 13 Vict. c. 106, s. 87, notice to an accredited agent of any body corporate, or public company, is notice to such body corporate or company (*ante*, p. 402).

The policy of the bankrupt code is to prevent the relation to a *secret act of bankruptcy, more than two months old from the com- [*420] mission, so as to avoid all intermediate *bona fide* dealings. Where, therefore, prior to the act of bankruptcy, B., a trader, had executed a mortgage of a house and furniture to A., with liberty to A. to enter and take possession of the house and furniture in case of default in payment of the interest by B. at a certain time after it became due; B. made default in payment of the interest at the time specified, and subsequently thereto committed an act of bankruptcy, of which A. had no notice: held, that this was a conveyance, contract, dealing, and transaction by and with the bankrupt, and having been entered into more than two months before the issuing of the commission, was protected by the 95th section of the Bankrupt Act (O'Connor v. Harris, 9 Ir. Law. R. 217). "The date and issuing of the fiat" mean the delivery of it out of the bankrupt office (Pewtress v. Acraman, 9 Dowl. P. C. 828). Under the 6 Geo. IV. c. 16, s. 81, a dealing on the 14th March was protected against a commission on the 14th May (Cowie v. Harris, Moo. & M. 141). A mere seizure is a levying within these statutes (Godson v. Sanctuary, 3 B. & Ad. 255; 1 Nev. & M. 52); but there must be an actual seizure (Johnson v. Evans, 1 D. & L. 935). Since the 5 & 6 Vict. c. 122, s. 22, the filing of a declaration of insolvency is a complete act of bankruptcy, without the same being advertised in the London Gazette, as required by the 6 Geo. IV. c. 16, s. 6. Therefore, a notice to the effect, "I have this day filed in the office of the secretary of bankrupts in Quality Court; Chancery Lane, in the county of Middlesex, a declaration of insolvency, a true copy of which is hereto annexed, and I, being a trader, have thereby committed an act of bankruptcy," is a sufficient notice of a prior act of bankruptcy to deprive an execution-creditor of the protection of 2 & 3

Vict. c. 29. Where A., a trader, being arrested under a *ca. sa.*, after notice to the execution-creditor, and to the sheriff's officer, of an act of bankruptcy committed by him, paid to the officer out of his assets the amount of the execution-debt, in order to procure his discharge, and which money was afterwards paid over to the execution-creditor: held, that the assignees of A. were entitled to recover this from the execution-creditor in an action for money had and received (*Follett v. Hoppe*, 11 Jur. 974, C. P.; 10 Law T. 205). Notice to the sheriff's officer of an act of bankruptcy is not notice to the execution-creditor (*Ramsay v. Eaton*, 10 M. & W. 22). But a general notice to a creditor is enough, without stating the particulars (*Ramsay v. Eaton*, *supra*). A distinct notice that A. had committed several acts of bankruptcy is sufficient (*Udall v. Walton*, 14 M. & W. 252; but see *Conway v. Hall*, 1 C. B. 643). Notice of an incomplete act of bankruptcy, as of a declaration of insolvency not yet filed and advertised, will not be sufficient (*Conway v. Hall*, *supra*). A notice to an attorney of the creditor before he sues out execution is sufficient, though the fiat issued after the writ was lodged with the sheriff (*Rothwell v. Timbrell*, 1 Dowl. N. S. 778). Notice means knowledge: a letter, therefore, is no notice until read; but, if the party wilfully abstain from reading it, the jury may infer notice (*Bird v. Bass*, 6 Man. & G. 143).

A notice given by a trader, that he has filed a declaration of insolvency, pursuant to 5 & 6 Vict. c. 122, s. 22, where a fiat in bankruptcy issues within two months from the filing of such declaration, is a sufficient notice to deprive the execution-creditor of the benefit of 2 & 3 Vict. c. 29, s. 1, so that he is not entitled to the proceeds of goods levied after the notice, but before the fiat issued (*Green v. Laurie*, 1 Exch. 335; 17 Law J. 61, Exch.; 2 N. P. C. 472).

*Where a bill of exchange was delivered by a bankrupt, with [*421] intent to transfer the property, more than two months before a commission issued, though not actually indorsed till within the two months, it was holden to vest in the indorsee, and not in the assignees (1 Camp. 432; and see *Esp. N. P. 40*; 2 J. & W. 237; 1 J. & W. 428). So, where A., a trader, on the 2d of October, gave a creditor an order for money drawn by a board of guardians on their treasurer payable to A., but not to bearer or order, and on the 4th committed an act of bankruptcy, and the creditor, with notice of the act, received the money from the treasurer of the union on the 9th; it was held that the transaction was complete, so far as the bankrupt was concerned; on the 2nd October, and was protected by the 2 & 3 Vict. c. 29, s. 1 (per Tindal, C. J., in *Green v. Bradfield*, 1 C. & K. 449). A release executed by the bankrupt, after an act of bankruptcy, to a releasee, knowing of the bankrupt's insolvency, is invalid, although executed more than two months before the suing out of the commission (*Mavor v. Pyne*, 3 Bing. 285).

Though notice of a docket may not of itself be considered notice of an act of bankruptcy, yet such a notice, together with the circumstance of the deft.'s requiring security before he made the payment, will justify a jury in finding the fact of notice (*Spratt v. Hobhouse*, 4 Bing. 181). Notice to the Bank of England is a notice to its branch banks after time for transmission has elapsed (*Willis v. England (Bank of)*, 4 Ad. & E. 21). A trader committed a secret act of bankruptcy by leaving his house and shop, and desiring his foreman to carry on business for him in his absence, who accordingly sold goods and received money, and made *bona fide* payments without notice of an act of bankruptcy. In debt for money had, &c., to the use of the assignees, plea never indebted and set-off, it was held that the plts. were entitled to recover

the whole, but that the debt. might probably have pleaded 2 & 3 Vict. c. 29, with effect (*Kynaston v. Crouch*, 14 M. & W. 266).

As to extents, see Arch. B. L. 179, 259; 6 Geo. IV. c. 16, s. 71. As to executions upon judgments entered upon warrants of attorney or cognovits, see 3 Geo. IV. c. 39; 6 Geo. IV. c. 16, s. 108; Arch. B. L. 99; 5 B. & C. 392; 6 B. & C. 479; *Green v. Wood*, 14 Law J., N. S., Q. B. 217; *post*, 423. An execution complete by sale prior to the fiat was protected by the 2 & 3 Vict. c. 29, s. 1; though the creditor had notice, before the sale, of an act of bankruptcy (*Whitmore v. Green*, 2 D. & L. 174; 8 Jur. 697). This defence need not be specially pleaded (*Ib.*; 12 & 13 Vict. c. 166, ss. 125, 136, 137, *post*, p. 423). By sect. 86, 6 Geo. IV. c. 16, no purchase from any bankrupt *bona fide*, and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy, by such bankrupt committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy. This section is re-enacted by 12 & 13 Vict. c. 106, s. 134, *post*, p. 423.

Defence in Action to recover Money paid by the Bankrupt to Defendant, or by Defendant to Bankrupt, that it was paid without Notice.] By the 82nd sect. of the 6 Geo. IV. c. 16, all payments really and *bona fide* made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt *committed, and all payments really and *bona fide* made, or which shall hereafter be made to any bankrupt, before the date [*422] and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed. See this section re-enacted, *post*, p. 422.

Under this section, a delivery of goods in part payment of a previous debt after a secret act of bankruptcy was protected (*Cannan v. Wood*, 2 M. & W. 465). So was a payment for goods bought after such an act (*Hill v. Farnell*, 9 B. & C. 45; and see also *Churchill v. Crease*, 5 Bing. 177; *Bishop v. Crawshay*, 3 B. & C. 415). So was giving cash for a bank post-bill of a partnership debt due before, to a creditor who has notice of the act (*Craven v. Edmondson*, 6 Bing. 734). But a deposit by way of pledge, of chattels, though *bona fide* and without notice of the act of bankruptcy was not (*Wright v. Fearnley*, 5 Bing. N. C. 89). (It would seem, however, that it would be protected now by the 2 & 3 Vict. c. 29, s. 1, as a "contract," "dealing," or "transaction.") Nor is a bill (*Willes v. Bank of England*, 4 Ad. & E. 21). So a payment for goods purchased before the act of bankruptcy is not, if the purchaser know, or have the means of knowing, the bankrupt's circumstances (*Devas v. Venables*, 3 Bing. N. C. 400; and see *Green v. White*, *ib.* 59). Nor is a payment by a partner, who has committed an act of bankruptcy, by assignment of chattels to a creditor, as a security for money lent in trust to permit the trader to use them till a certain period, and then to sell in case of default (*Cannan v. Denew*, 10 Bing. 292). (See 2 & 3 Vict. c. 29, s. 1; and now 12 & 13 Vict. c. 106). Although the execution would be protected under this section, or by 2 & 3 Vict. c. 29, if levied by a *bona fide* creditor, in ignorance of bankruptcy; yet, if a person claiming the goods

under an assignment, which was itself an act of bankruptcy, pays off the execution-creditor, and takes an assignment of them from the sheriff, the statute does not protect them. But an assignment by the sheriff to such claimant is valid as to goods seized before the act of bankruptcy, although the assignment by the sheriff was subsequent to it, for the claimant then stands in the same position as the execution-creditor (*Fawcett v. Fearn*, 6 Q. B. 20).

By the 12 & 13 Vict. c. 106, s. 133, it is enacted, "that all payments really and *bona fide* made by any bankrupt, or by any person on his behalf, before date of the fiat or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt, and all payments really and *bona fide* made to any bankrupt before the date of the fiat or the filing of such petition, and all conveyances by any bankrupt *bona fide* made and executed before the date of the fiat or the filing of such petition, and all contracts, dealings, and transactions by and with any bankrupt really and *bona fide* made and entered into before the date of the fiat or the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt *bona fide* executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt *bona fide* executed and levied by seizure and sale before the date of the fiat or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with or paying to or being paid

by such bankrupt, or at whose suit *or on whose account such [*423] execution or attachment shall have issued, had not at the time of such payment, conveyance, contract, dealing, or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed: provided also, that nothing herein contained shall be deemed or taken to give validity to any payment or to any delivery or transfer of any goods or chattels made by any bankrupt, being a fraudulent preference of any creditor of such bankrupt, or to any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or *cognovit actionem* or judge's order obtained by consent given by any bankrupt by way of fraudulent preference."

Sect. 134. "That no purchase from any bankrupt *bona fide* and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless a fiat or petition for adjudication of bankruptcy shall have been sued out or filed within twelve months after such act of bankruptcy."

Sect. 135. "That every warrant of attorney to confess judgment in any personal action, given by any bankrupt after the commencement of this act, and within two months of the filing of a petition for adjudication of bankruptcy by or against such bankrupt, and being for or in respect of (wholly or in part) an antecedent debt or money demand, and every *cognovit actionem* or consent to a judge's order for judgment given by any bankrupt, at any time after the commencement of this act, and within two months of the filing of any such petition in any action commenced by collusion with the bankrupt, and not adversely, or purporting to have been given in an action, but having been in fact given before the commencement of any action against the bankrupt, such bankrupt being unable to meet his engagements at the time of giving such warrant of attorney, *cognovit actionem*, or consent (as the case may be), shall be deemed and taken to be null and void, whether

the same shall have been given by such bankrupt in contemplation of bankruptcy or not."

Sect. 136. "And be it enacted, that if after the commencement of this act any warrant of attorney to confess judgment in any personal action, or any *cognovit actionem* in any personal action, shall have been given by any such trader, and such warrant of attorney or *cognovit actionem*, or a true copy thereof, shall not have been filed with the officer acting as clerk of the doquets and judgments in the Court of Queen's Bench within twenty-one days next after the execution thereof, in manner and form provided by an act passed in the third year of the reign of his late Majesty King George the Fourth, intituled 'An Act for preventing Frauds upon Creditors by secret Warrants of Attorney to confess Judgment' (c. 39), every such warrant of attorney and *cognovit actionem* shall be deemed fraudulent, null, and void, to all intents and purposes whatever; and if any such warrant of attorney or *cognovit actionem* which shall be so filed as aforesaid shall have been given subject to any defeazance or condition, such defeazance or condition shall be written on the same paper or parchment on which such warrant of attorney or *cognovit actionem* shall be written, before the time when the same or a copy thereof respectively shall be filed, otherwise such warrant of attorney or *cognovit actionem* shall be null and void to all intents and purposes whatever."

Sect. 137. "And be it enacted, that every judge's order made *by consent given after the commencement of this act by any such [*424] trader defendant in any personal action, and whereby the plaintiff in such action shall be authorized forthwith after the making of such order, or at any future time, to sign or enter up judgment, or to issue or take out execution in such action, and whether such order shall be made subject to any defeazance or condition or not, in case the action in which such order shall be made shall be in the Court of Queen's Bench, or in case the action wherein the same is made shall be in any other court, a true copy of such order shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the doquets and judgments in the said Court of Queen's Bench within twenty-one days after the making of such order, in like manner as a warrant of attorney in any personal action and a *cognovit actionem* given by any deft. in any personal action, or copies thereof and affidavits of the execution thereof respectively, may be filed with the said clerk within the space of twenty-one days after such warrant of attorney or *cognovit actionem* shall have been executed, otherwise such judge's order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be null and void to all intents and purposes whatever; and the provisions respectively contained in the said act passed in the third year of the reign of his late Majesty King George the Fourth (c. 39), intituled 'An Act for preventing Frauds upon Creditors by secret Warrants of Attorney to confess Judgment,' and in an act passed in the parliament holden in the sixth and seventh years of the reign of her Majesty (c. 66), intituled 'An Act to enlarge the Provisions of an act for preventing Frauds by secret Warrants of Attorney to confess Judgment,' for liberty to file warrants of attorney and *cognovits actionem*, or copies thereof, with the clerk of the doquets and judgments, and for the said clerk to make certain entries and search in relation thereto, and for entering satisfaction thereon, and for fees for search and filing and taking office copies, shall extend and be applicable to every such judge's order, in like manner as to warrants of attorney and *cognovits actionem* mentioned in the said acts."

Defence in Action to recover Property delivered by Defendant to Bankrupt after his Bankruptcy, that it was delivered without Notice.] By sect. 84 of the 6 Geo. IV. c. 16, it was enacted that no person, or body corporate, or public company, having in his or their possession or custody any money, goods, wares, merchandises, or effects, belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt, or his order, provided such person or company had not, at the time of such delivery or payment, notice that such bankrupt had committed an act of bankruptcy.

Want of Notice.] Wherever the deft. relies on having had no notice of the act of bankruptcy, it lies on him to prove it (*Pearson v. Graham*, 2 Nev. & P. 636; 6 Ad. & E. 899).

Set-off.] See plea of set-off, *ante*. Where the set-off arises on the indorsement of a bill to the deft. he must give in evidence that the indorsement was made before the bankruptcy (*Lucas v. Marsh*, Barn. 453); but, where the set-off was founded on certain notes of the bankrupt, proof that notes of the bankrupt, to the amount of the set-off, came to the deft.'s [*425] hands three or four weeks before *the bankruptcy, was held sufficient evidence from which the jury might infer that he was in possession of them at the time of the bankruptcy, without identifying them with the notes produced (*Moore v. Wright*, 2 Marsh. 209; S. C. 6 Taunt. 517). It is not sufficient, for the purpose of establishing a set-off, to prove that the deft.'s demand had been allowed by the commissioners as a debt (*Pirie v. Kemnet*, 3 Camp. 279).

Plea of Final Order under 5 & 6 Vict. c. 116, s. 10—Evidence.] An order for protection of the person of an insolvent debtor from process, made under 8 & 9 Vict. c. 96, s. 28, does not support a plea of final order for protection and distribution under the 5 & 6 Vict. c. 116 (*Miles v. Pope*, 10 Law T. 227, C. P.).

By 12 & 13 Vict. c. 106, s. 158, it is enacted, "that if the assignees commence any action or suit for any money due to the bankrupt's estate before the time allowed for the bankrupt to dispute the bankruptcy shall have elapsed (see sect. 233), any deft. in any such action or suit shall be entitled, after notice given to the assignees, to pay the same or any part thereof into the court in which such action or suit is brought, and all proceedings with respect to the money so paid into court shall thereupon be stayed until such time shall have elapsed; and if within that time the bankrupt shall not have commenced such action, suit, or other proceeding as allowed by this act, and prosecuted the same with due diligence, the money shall be paid out of court to the official assignee, but otherwise shall abide the event of such action, suit, or other proceeding, and upon such event shall be paid out of court, either to the official assignee or the person adjudged bankrupt, as the court shall direct; and after such payment of money so made into court, it shall not be lawful for the person so adjudged bankrupt to proceed against the defendant for recovery of the same money."

Competency of Witnesses.

Bankrupt.] As it is not settled that the 6 & 7 Vict. c. 85, makes the bankrupt a competent witness for all purposes (see *Udall v. Walton*, 14 M. & W. 254), it may be useful to state shortly the decisions before that act.

See "WITNESS." But see now 12 & 13 Vict. c. 106, s. 241, which enacts, "that the provisions of an act passed in the parliament holden in the sixth and seventh years of the reign of her present Majesty, intituled 'An Act for improving the Law of Evidence,' shall be applicable to any matter or proceeding in prosecution under the provisions of this act, and to any matter, question, or inquiry arising in any court of law or equity out of or consequent upon any such matter or proceeding."

The bankrupt was not a competent witness in an action by his assignees, either for the purpose of proving property in himself, or a debt due to himself, or in any other manner to increase the fund (*Ewens v. Gold*, B. N. P. 43; *Butler v. Cooke*, Cowp. 70; *Ex parte Bent*, 1 Madd. 46). His competency might be restored by his releasing to his assignees his claim to the surplus, and to his allowance, provided he had obtained his certificate (*Nares v. Saxby*, cited 2 T. R. 497). And, though he had not obtained it, he might be a witness against his assignees, in questions respecting his property (*Butler v. Cooke*, Cowp. 70; B. N. P. 73). But he was not a competent witness to support the commission, and no release would make him so (*Field v. Curtis*, 8 Stra. 820), and therefore he could not prove his own act of bankruptcy, or even explain an equivocal act, or prove *the petitioning creditor's debt (*Chapman v. Gardner*, 2 H. Bl. 279; (*Cross v. Fox*, [*426] *ib.*; *Flower v. Herbert*, *ib.*; *Hoffman v. Pitt*, 5 Esp. 22; *Rabitt v. Gurney*, Mont. 482, n.; and the cases of *Oxlade v. Perchard*, *Russell v. Russell*, are overruled). Nor could he be examined to any act of bankruptcy committed by him prior to that on which the commission was founded (*Wyatt v. Wilkinson*, 5 Esp. 187); nor be cross-examined to defeat the commission, or any other similar evidence (*Binns v. Tetby*, *McCle. & Yo.* 397; *Elsom v. Brailey*, 1 Selw. N. P. 239). The incompetency of a witness to support the commission is restricted to evidence, either affirming or disaffirming the bankruptcy (per Lord Ellenborough, 1 Stark. 134); for, after obtaining his certificate, and executing a release, he is a competent witness to prove the signature of the commissioners, in order to identify the proceedings under the commission, as its validity does not depend on their signature, but on the facts contained in the depositions (*Morgan v. Prior*, 2 B. & C. 14; 3 Star. 58. See also *Brind v. Bacon*, 4 Taunt. 183; *Reed v. James*, 1 Stark. 134).

He might be a witness in an action *qui tam* brought by his assignees against the person who had won money from him at play, after the act of bankruptcy committed: three releases, however, were necessary: 1, his own release of the allowance and surplus under his commission; 2, a release from all his creditors to him of their respective debts; 3, a release from the assignees to him (*Carter v. Abbott*, 1 B. & C. 444; 2 D. & R. 575). But, in an action against his sureties, a release of him and his property generally was not sufficient: it should have been a release of his interest in the surplus specifically (*Perryman v. Steygall*, 1 Moo. & S. 540). Where he stated, on the *voire dire*, that he had obtained his certificate and released his assignees, *Park, J.*, held him competent without the production of the release (*Carlisle v. Eady*, 1 C. & P. 234).

He is competent to prove a collateral fact, as notice to the debt. of an act of bankruptcy (*Udal v. Wallow*, 14 M. & W. 254); or to prove the act of bankruptcy (per *Alderson, B.*, *ib.*).

Where he had become a bankrupt a second time, his certificate under the second commission, and a release to the assignees, would not make him a competent witness to increase the fund, unless he had paid 15s. in the pound under the second commission (*Kennet v. Greenwallers*, *Pea.* 3). In a suit against the crown, a release from the bankrupt to his assignees would not

render him a competent witness, the crown not being bound by the bankrupt law (*Crawford v. Attorney-General*, 7 Pri. 2).

The *wife* of the bankrupt was equally incompetent to support the commission, as the bankrupt himself. And the power given to the commissioners, by the 37th section of the 6 Geo. IV. c. 16, now 12 & 13 Vict. c. 106, s. 118, to examine the wife as to the discovery of the bankrupt's property, is limited to that express purpose, and to the commissioners alone, and does not extend to render her a competent witness for any other purposes, or before any other tribunal. And see 2 Ph. Ev. 284. Where the wife was called to prove that a promissory note had been paid to the debts in contemplation of bankruptcy, *Kenyon, Lord*, held her to be a competent witness, inasmuch as, if the plt. recovered, the debts would be creditors against the estate to the amount of the note; and so the witness stood indifferent (*Jourdaine v. Lefevre*, 1 Esp. 66); but she was not competent, in an action by the assignees, to prove a payment made by the bankrupts to the debts, after the bankruptcy (*Williams v. Williams*, 8 Dowl. 220; 6 M. & W. 170).

*The bankrupt's son, who had been held out as a partner with [*427] him, though he was not so in fact, was held in one case not a competent witness for the assignees (*Holland v. Reeves*, 7 C. & P. 36).

Creditor.] A creditor was not, in any case, a competent witness to sustain a commission; for, by so doing, he increased the fund out of which he was to receive a dividend (*Shuttleworth v. Bravo*, Str. 507); unless he released the assignees (*Ambrose v. Clendon*, Ca. Hard. 267; *Koopes v. Chapman*, Pea. 19); or one of them (*Sinclair v. Stevenson*, 1 C. & P. 532); or sold, or agreed to sell, his debt (*Granger v. Furlong*, Bl. R. 1273; *Heath v. Hall*, 4 Taunt. 326); though, at one time, it was held, that if he had not proved under the commission, he was competent to support it, though not to increase the fund (*Williams v. Stevens*, 2 Camp. 301); but this distinction was overruled by the cases of *Adams v. Malkin*, 3 Camp. 543; and *Crooke v. Edwards*, 2 Stark. 302. A creditor was, however, a competent witness to disprove the petitioning creditor's debt. (*In re Codd*, 2 Sch. & Lef. 116.) He is now competent for all purposes.

Petitioning Creditor.] A petitioning creditor, even by a release or sale of debt, would not be rendered a competent witness to support the commission (per *Ellenborough, Lord*, *Green v. Jones*, 2 Camp. 412); though, to overthrow it, his evidence would be allowed (*Ib.*; *Lloyd v. Stretton*, 1 Stark. 40). He is now competent for all purposes.

Commissioner and Assignees.] A commissioner might be examined as a witness to support the commission (*Crooke v. Edwards*, 2 Stark. 302). An assignee, who has released his individual claims on the bankrupt's estate, is an admissible witness to prove the petitioning creditor's debt; for he is then a mere trustee, whose trust is coupled with no personal interest (*Tomlinson v. Wilkes*, 2 B. & B. 397; 5 Moo. 175).

Evidence by Assignee.] Under stat. 6 Geo. IV. c. 16, s. 90, a deft. who is assignee of a bankrupt may prove the act of bankruptcy at *nisi prius* by merely putting in the proceedings, if the opposite party has given no notice to prove the petitioning creditor's debt; and if it be clear that such opposite party must have known that the bankruptcy would be relied on by deft., though deft. is not named assignee on the record (*Fawcett v. Fearn*, 6 Q. B. 25).

Admissibility in Evidence of Bankrupt's Admissions.] These, when made *before his bankruptcy*, as to the existence of the petitioning creditor's debt, are receivable in evidence as an admission of the debt, as the bankrupt then had no interest to make such admission; therefore, the same objections do not apply to this evidence as to that given after his bankruptcy, in support of the commission. The bankrupt may, therefore, allow his attorney (employed by him before his bankruptcy) to give in evidence privileged communications then made, though offered in proof of the act of bankruptcy (*Merle v. More*, 1 Ry. & M. 390). As to the admission of the declarations of a bankrupt relative to past transactions, the general rule is, that they ought not to be received to explain any past transaction, which at the time of making the declaration was completely finished (*Robson v. Kemp*, 4 Esp. 233); for to admit such declarations would be, in effect, to receive an admission by the bankrupt, that he had committed an act of bankruptcy (2 Ph. Ev. 287); but *a letter of the bankrupt, written previous to his [*428] bankruptcy, and nearly contemporaneous with the act done by him, is admissible in evidence, to explain the motives of the act. And, in a case at *nisi prius* (which was an action brought by the assignees to recover back money paid to a deft., on the ground of a fraudulent preference), Best, Lord C. J., acted up to the full extent of this principle, by admitting a letter of the bankrupt in evidence (though written five months before the commission issued, explaining the embarrassed state of his affairs), in order to show that, when the bankrupt made the particular payment in question to the deft., he had his bankruptcy then in contemplation (*Bacon v. Maine*, cited Deac. 798; and see *ante*, p. 75).

So, an entry in the bankrupt's books, or an account signed by him, charging himself, if made before the bankruptcy, are evidence of the debt (*Watts v. Thorpe*, 1 Camp. 376; *Howie v. Coryton*, 4 Taunt. 560). An acknowledgment by the bankrupt that, before the act of bankruptcy, he owed the petitioning creditor above 100*l.*, made before the issuing of the commission, is evidence to prove the petitioning creditor's debt (*Dowton v. Cross*, 1 Esp. 168). But an admission of the debt made after the bankruptcy, but before the issuing of the commission, is not evidence (*Smallcomb v. Bruges*, M'Cle. 48; 13 Pri. 136). Where, however, the debt was founded on a bill of exchange, of which the bankrupt was drawer, a declaration of the bankrupt made after the bankruptcy and before the commission, that the bill would not be paid, was held admissible to supply proof of notice (*Breet v. Levett*, 13 East, 213). In *Abbott v. Plumbe*, 1 Doug. 217, where the debt arose on a bond, an acknowledgment of the debt by the bankrupt obligor was held not to dispense with the ordinary proof of the bond; *sed quære*, for admissions will now dispense with proof of a written instrument. An I O U bearing date before the bankruptcy of a trader, constitutes no evidence of a petitioning creditor's debt without some proof that it was in existence before the bankruptcy (*Wright v. Lainson*, 2 M. & W. 739). In an action by a bankrupt to try the validity of the commission, proof that the bankrupt and petitioning creditor attended the second meeting of the commissioners, and discussed before them the debt due to the petitioning creditor, and produced their accounts and that the bankrupt objected to part of the petitioning creditor's account, and that the commissioners ticked off such items in it as they allowed, and struck a balance of 169*l.*, was held evidence for the jury of an implied admission by the bankrupt, from his conduct and demeanor before the commissioners, that such a balance was due, but not of an adjudication by them by their own authority, or of an award made by them with the consent of parties, and therefore, where it had been so left to the jury, the court granted a new trial (*Jarrett v. Leonard*, 2 M. & S. 265).

Declarations made by a bankrupt, before and after the issuing of a commission against him, are admissible in evidence to show that it was founded on fraud (*Lloyd v. Heatcote*, 2 B. & B. 388). A declaration made by a bankrupt previous to his bankruptcy, "that he did not owe 10*l.* to any one," and inquired whether a friendly commission could not be sued out against him, is admissible in evidence to show a collusion between the bankrupt and petitioning creditor to create a debt, although the latter was not an assignee under the commission (*Thompson v. Bridges*, 2 Moo. 376).

Admissibility in Evidence of Depositions, and the Proceedings under the Commission.] See *ante*, pp. 349, 353. The examination of the bankrupt taken before the commissioners, is admissible as evidence *against himself, [*429] even though the questions were improperly put to him, with a view to the action (*Stockfleth v. De Tastet*, 4 Camp. 10; see *Robson v. Alexander*, 1 M. & P. 448; *R. v. Wheaton*, 2 Moo. C. C. 203; *Tucker v. Barrow*, 7 B. & C. 322; see *ante*, "ADMISSIONS," p. 82); or though they exposed him to penalties (*Smith v. Beadnell*, 1 Camp. 40). And the examination of any party is evidence against himself, if he has signed it after he has read it (*Hammond v. Myers*, 3 Atk. 415); and it is admissible, though not taken down word for word, but only the substance of what appeared to be relevant (*Milward v. Forbes*, 4 Esp. 172). If the party refer in his examination to written documents, they may be read as part of his examination (*Falconer v. Hanson*, 1 Camp. 171); but parol evidence is admissible to explain it (*Wilson v. Poulter*, 2 Stra. 794). The examination of a third person, however, has been held to be inadmissible against a party to the suit (3 Atk. 415). And, where a creditor has taken the bankrupt's goods in execution, after an act of bankruptcy, and assigned them to B., the creditor's examination, taken under the commission, was holden not admissible, in an action by the assignees against B. (*Deady v. Harrison*, 1 Stark. 60). The examination of a bankrupt under another commission, is not (in event of his death) evidence upon a petition in his bankruptcy to expunge the debt of a creditor (*Ex parte Campbell*, 2 Rose, 51). Where deft. pleaded a set-off in an action brought against him by assignees, his own deposition in proof of a debt before the commissioners was held inadmissible (*Pirie v. Mennett*, 3 Camp. 279). Those depositions only which are read in support of the party's case upon the trial, are to be considered as given in evidence, and the opposite party has no right to inspect any other deposition for the purpose of cross-examining a witness; but he may afterwards call for the deposition of the witness, and read it in evidence, for the purpose of contradicting him (*Black v. Thorne*, 4 Camp. 191; *Stafford v. Clarke*, 1 Carr. 26; see *ante*, "ADMISSIONS"). If the plts. put in evidence an examination of deft. before the commissioners of bankrupts, his admissions against himself are evidence against him, but his statements in his own favour are not evidence for him (*Groom v. Richardson*, 5 Jur. 1061, B. C.).

It was formerly established, that the solicitor to the commission was bound to produce the proceedings, when served with a *subpoena duces tecum* (*Cohen v. Templar*, 2 Stark. 260; *Corsen v. Dubois*, Holt, 239; 5 Esp. 91); though it was previously doubted (*Bateson v. Hartsink*, 4 Esp. 43). But, though the solicitor was bound to produce the proceedings and books of the bankrupt, the evidence must be confined to entries relative to the matters in issue (*R. & M.*, 64). It was held that the solicitor was not bound to produce them in a collateral action, to which neither the assignees nor the bankrupt were parties, and where the production might tend to the detriment of the assignees (*Laing v. Barclay*, 3 Stark. 38). But now, by the 1 & 2 Will. IV. c. 56; 2 & 3 Will. IV. c. 114; and 12 & 13 Vict. c. 106, the pro-

ceedings are all kept in the Court of Bankruptcy, and are produced by the Registrar.

II. ACTIONS AGAINST ASSIGNEES.

Form of Remedy and Pleadings.

Actions against assignees are brought in general by the bankrupt to try the validity of the fiat, or by others who claim a right to property taken under the fiat by the assignees.

*The form of remedy and pleadings will be the same as in ordinary cases, the assignees of a bankrupt never being liable *as assignees*. [*430] The rule of H. T. 4 Will. IV. does not apply to assignees when debts.

By sect. 190 of 12 & 13 Vict. c. 106, it is enacted, "that no action for any dividend shall be brought against any assignee by any creditor who shall have proved under the bankruptcy; but if the official assignee shall refuse to pay any such dividend, the court may order payment thereof, with interest for the time that it shall have been withheld, and may also order the costs of the application."

Sect. 145. "That if the assignees of the estate and effects of any bankrupt having or being entitled to any land, either under a conveyance to him in fee or under an agreement for any such conveyance, subject to any perpetual yearly rent reserved by such conveyance or agreement, or having or being entitled to any lease or agreement for a lease, shall elect to take such land or the benefit of such conveyance or agreement, or such lease or agreement for a lease, as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the fiat or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements in any such conveyance or agreement, or lease or agreement for a lease." The assignees therefore, where they make election, will be the proper parties to be sued (see *Bourailon v. Dalton*, Pea. 238; *Turner v. Richardson*, 7 East, 335; *Copeland v. Stephens*, 1 B. & A. 593). The assignees may however discharge themselves from future liability by assigning their interest in the premises, even to a pauper (*Taylor v. Slum*, 1 B. & P. 21). So, where they elect to abide by and execute any agreement entered into by the bankrupt, for the purchase of any estate or interest in land, they will be liable for the breach of such agreement (see sect. 146, 12 & 13 Vict. c. 106). The provisional assignee of a bankrupt was not liable, under 6 Geo. IV. c. 16, for the fraud of an agent appointed with due care (*Raw v. Cutton*, 9 Bing. 96). The assignees are not liable to be sued by the messenger under the fiat, for fees due to him before the choice of assignees, the petitioning creditor being the party answerable for these expenses (*Burwood v. Felton*, 3 B. & C. 43; *Hartop v. Jukes*; see 6 Geo. IV. c. 16, s. 14). But when assignees personally contract or receive money to the use of another, they are personally liable (*Ridout v. Brough*, Cowp. 134; *Randoll v. Bell*, 1 M. & S. 714; *Lord Ellenborough, C. J. diss.* An assignee who has been removed, and assigned his interest to his co-assignees, may be sued by them (*Smith v. Jameson*, Pea. 213). Trover lies by a bankrupt against his assignees, if the plt. was not subject to the bankrupt laws (*Summersett v. Jarvis*, 3 B. & B. 216; *Moo*. 56).

By sect. 41 of 12 & 13 Vict. c. 106, it is enacted, "that no official assignee

shall be personally responsible or liable for any act done by him, or by his order or authority, in the execution of his duty as such official assignee, by reason of the petitioning creditor's debt, trading, or act of bankruptcy upon which any adjudication of bankruptcy shall have been grounded, or of any or either of such matters, being insufficient to support such adjudication; and no official assignee shall be deemed personally answerable for or by reason of his having received any money, bills, notes, or other negotiable instruments under any bankruptcy in his character of official assignee, provided he shall have paid and deposited such money, bills, notes, and other negotiable instruments during the prosecution of the bankruptcy to and in the

Bank of England to the credit of the *accountant in bankruptcy for [*431] the particular estate for which such money, bills, notes, or other negotiable instruments shall have been received, and shall have given notice of such payment or deposit (as the case may be) to any person claiming such money, bills, notes, or other negotiable instruments of the official assignee, and provided also, that the official assignee, after such payment or deposit, shall not have dealt with such money, bills, notes, or other negotiable instruments otherwise than in the execution of his duty as official assignee, and under the order of the court; and if any action shall be brought against the official assignee, either solely or jointly with the creditor's assignee, in respect of such money, bills, notes, or other negotiable instruments, it shall be lawful for a judge of the court in which the same shall be brought upon application of the official assignee, and upon an affidavit of facts, to set aside the proceedings in such action so far as the official assignee is concerned, with such costs, or without costs, as to the judge shall seem meet."

Evidence for Plaintiff.

This will be the same as in ordinary cases; the assignees are not personally liable to be sued by any creditor, even in respect of effects in their hands, as he must prove his debt, and accept the dividend payable to him.

By the 12 & 13 Vict. c. 106, s. 234, it is enacted, "that in any action, other than an action brought by the assignees for any debt or demand for which the bankrupt might have sustained an action had he not been adjudged bankrupt, and whether at the suit of or against the assignees, or against any person acting under the warrant of the court, for anything done under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt, or of the trading or act of bankruptcy respectively, unless the other party in such action shall, if deft. at or before pleading, and if plt. before issue joined, give notice in writing to such assignees or other person that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignees or other person shall prove the matter so disputed, or the other party admit the same, the judge before whom the cause shall be tried may (if he think fit) grant a certificate of such proof or admission; and such assignees or other person shall be entitled to the costs occasioned by such notice; and such costs shall, if such assignees or other person shall obtain a verdict, be added to the costs, and if the other party shall obtain a verdict, shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignees or other person."

Where the plt. in trover claimed goods which the deft. took as being in the order and disposition of the bankrupt, but gave no notice to prove the petitioning creditor's debt, it was held enough for the deft. to put in the proceedings (*Fawcett v. Fearn*, 6 Q. B. 25, n. b; see *Simmonds v. Knight*, 3 Camp. 251; *Gilman v. Cousins*, 2 Stark. 182). If the assignees are

strangers to the record, as where the debts set up their title in ejectment, that title must be regularly and strictly proved (*Doe v. Liston*, 4 Taunt. 741). The bankrupt may be estopped by his own acts or admissions from disputing his bankruptcy (*ante*, p. 427).

The assignees cannot be sued for the dividend (*supra*). They cannot be sued, *as such*, for goods sold to them (*Ridout v. Brough*, Cowp. 134-5); nor can they be sued for fees due to the messenger before the choice of assignees (*Burwood v. Felton*, 3 B. & C. 43; *ante*, p. 430.) As to their liability for attorney's costs, *ante*, p. 253. *By the recent act, 12 & 13 Vict. c. 106, with reference to costs, it is enacted, by sect. [*432] 249, "that the court may in all matters before it award such costs as to such court shall seem fit and just; and in all cases in which costs shall be so awarded against any person, it shall and may be lawful for such court to cause such costs to be recovered from such person in the same manner as costs awarded by a rule of any of the superior courts at Westminster may be recovered, and that the like remedies may be had upon an order of such court for costs as upon a rule of any of the said superior courts for costs."

And if the assignees do not take possession of the bankrupt's estate, they will not be liable to the performance of covenants (*Turner v. Richardson*, 7 East, 335; see *ante*, p. 430); as to what amounts to such taking possession, see *post*, "COVENANT," "LANDLORD AND TENANT." When an assignee is removed, and he has assigned his interest to his co-assignees, he may be sued by them (*Pea. C.* 213); and assignees who personally contract (4 Taunt. 754), or receive money for the use of another (1 M. & S. 714), may be sued on their own personal responsibility, though not in the character of assignees. Where the bankrupt, as the agent of the assignees, is permitted to carry on the business for the benefit of the creditors, and not on his own account, the assignees are liable for goods supplied for the purposes of the business, even although the credit were given in the bankrupt's own name (*Kinder v. Howarth*, 2 Stark. 354; and see 1 Atk. 86, 90; *Ambl.* 218; 1 Ken. 38). The assignees were liable to the commissioners upon their covenant for indemnity contained in the assignment; and, if the commissioners were damnified contrary to the terms and meaning of the covenant, the court would not restrain them from bringing an action on it (16 Ves. 234). It need hardly be noticed, that if the assignees seize or retain property which does not pass to them under the assignment, they will be personally liable, and the owner of it may maintain an action against them in respect of it. As to the proof of commencement of action, *ante*, p. 216.

Evidence for Defendant.

On the part of the defendants, if they justify as assignees, the petitioning creditor's debt, the trading, the act of bankruptcy, the fiat, and assignment, must be proved, as well as the special matter of defence. We have, however, already seen when strict proof of the above first three requisites of a commission may be dispensed with, from the want of a notice disputing them, &c. (*ante*, p. 349); also, the nature and mode of such proof (*ante*, p. 348 *et seq.*). Those observations will be here applicable as to proof of the fiat and assignment (*ante*, p. 349). As to proof of commencement of action, *ante*, p. 216.

Where the plt. sues in trespass for breaking his house and taking his furniture the assignee may show on a plea, denying the property of the plt., that they were fraudulently assigned to him by the bankrupt before the bankruptcy (*Smith v. Groom*, 2 Moo. & R. 388); and under the same plea in

trover, they may show that the goods passed to them as being in the order and disposition of the bankrupt (*Isaac v. Belcher*, 5 M. & W. 139).

Statute of Limitations.] By sect. 159 of 12 & 13 Vict. c. 106, it is enacted, "that every action brought against any person for anything done in pursuance of this act shall be commenced within three months [*433] next after the fact committed; and the defendant in any *such action may plead the general issue, and give this act and the special matter in evidence at the trial, and that the same was done by authority of this act; and if it shall appear so to have been done, or that such action was commenced after the time limited as aforesaid for bringing the same, the jury shall find for the deft.; and if there be a verdict for the deft., or if the plt. shall be nonsuited, or discontinue his action or suit after appearance thereto, or if upon demurrer judgment shall be given against the plt., the deft. shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any such action as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer."

Under a similar provision in 6 Geo. IV. c. 16, s. 44, it was held that the limitation did not apply to the seizure by assignees of property of third persons (*Edge v. Parker*, 8 B. & C. 701), for they act by virtue of the property in the goods vesting or claimed to vest in them, and not by virtue of any special powers given by the statute (*Knight v. Turquand*, 2 M. & W. 105). The right construction of the section is that if the assignee does an act directed by the statute but does it erroneously, he is protected, but if he does the act as the result of his ownership of that which was the bankrupt's property, and not by the direction of the statute, it is not done in pursuance of the statute, and he is responsible for it (*Edge v. Parker*, *supra*; see *Carruthers v. Payne*, 5 Bing. 270).

III. ACTIONS BY BANKRUPT.

Form of Remedy and Pleadings.

We have under the preceding head noticed the cases of actions by bankrupts against assignees to try the validity of the fiat; the forms of remedy and pleadings in actions by bankrupts will be the same as in ordinary cases. The plt.'s bankruptcy might formerly be given in evidence under the general issue (*Webb v. Fox*, 7 T. R. 396; *B. N. P.* 153; *Norton v. Shakespeare*, 15 East, 622; 3 Camp. 236). But it now must be pleaded specially in assumpsit and debt (see *Pitt v. Chappellow*, 8 M. & W. 616). But in trover such a plea would amount to a traverse of the property, under which it might be given in evidence (see *Fyson v. Chambers*, 9 M. & W. 460, 463, 464). In trespass for breaking and entering plt.'s dwelling-house, making a noise therein, and damaging the doors, &c., and trees of gardens, &c., and seizing goods and exposing them for sale on the premises, without plt.'s leave; plea in bar of the further maintenance of the action, that plt. became bankrupt after action brought, and that an assignee had been appointed, who accepted the appointment, whereby and by virtue of the statutes, &c., the causes of action became vested in the assignees; demurrer and judgment for plt.: held, on error affirming the judgment, that the plea was bad, and that the primary personal injury to the bankrupt being the principal and essential cause of action, it still remained in the bankrupt, and did not pass to his assignees (*Rogers v. Spence*, 13 M. & W. 751).

When the plea is pleaded to an action *ex contractu*, it is not good unless

it shows that the assignees have interfered (Herbert v. Sayer, 5 Q. B. 965; 2 D. & L. 49). The bankruptcy of a sole plt. is an issuable plea (Willes v. Hallett, 5 Bing. N. C. 565); but the bankruptcy of one of two plts. is not (Staples v. Holdsworth, 6 Dowl. 196; 4 Bing. N. C. 144). If the bankruptcy arose after the writ was issued, *and before plea [*434] pleaded, the plea should be in bar of the further maintenance of the action. If after plea pleaded it must be *puis darrein continuance*, and this plea must be pleaded within eight days after the matter of such defence arises (Arch. Pr. 823; see Lovell v. Eastaff, 3 T. R. 554; Duff v. Campbell, 3 B. & A. 577; Biggs v. Cox, 7 B. & C. 409; Bretherton v. Osborne, 1 Dowl. 457; see *post*, p. 435). See a plea that the plt. has been twice a bankrupt, and that he did not pay 15s. in the pound on the second fiat (Young v. Rickworth, 8 Ad. & E. 470). But it must be averred that the assignees have interfered (Herbert v. Sayer, 2 D. & L. 109; 5 Q. B. 965). It is an issuable plea (Mackay v. Wood, 7 M. & W. 420). *Quære*, whether the section 127, 6 Geo. IV. c. 16, and 1 & 2 Will. IV. c. 56, under which this plea was pleaded, are not now repealed by 12 & 13 Vict. c. 106; *post*, p. 441.

Evidence for Plaintiff.

The proof of the cause of action will be the same as in ordinary cases. Plt. should be prepared with evidence to rebut the deft.'s evidence against plt.'s title to sue; upon which head it should be observed, that if he have not obtained his certificate, his after-acquired property may, no doubt, be claimed by his assignees (*ante*, 403); but, although uncertificated, he may maintain an action for his personal labour performed since the issuing of the fiat (Chippendale v. Tomlinson, Cook, 428); 1 Esp. 140; or with relation to his after-acquired property (Webb v. Fox, 7 T. R. 391; Fowler v. Down, 1 B. & P. 44; 1 Esp. 170; Pea. 140); or sue upon any contract made with him (Cuming v. Roebuck, Holt, C. 172; Drayton v. Dale, 2 B. & C. 293; 3 D. & R. 534); if the assignees do not interfere (Kitchen v. Bartsch, 7 Ea. 53; Herbert v. Sayers, 5 Q. B. 965). They have vested in them a right to interfere and claim the property; and, if they do make any claim, it is effectual against the bankrupt and all the world: but if they do not interfere, then as between the bankrupt (or one claiming under him) and his debtor the latter cannot set up their title, but the bankrupt has a right, in a court of law, to enforce payment of his debt (per Abbott, C. J., Drayton v. Dale, 2 B. & C. 293). Even where the assignees of a bankrupt employed him in carrying on the manufacture for the benefit of the creditors, and paid him money from time to time, this was holden evidence of such a contract between him and his assignees, as would enable him to recover from them a reasonable compensation for his work and labour (Coles v. Barrow, 4 Taunt. 774). The bankrupt may bring an action against any person who has seized his goods or taken possession of his house, &c., under the fiat, or against them by whose direction it has been done, in order to try the validity of the commission (Bryant v. Withers, 2 M. & S. 123, 131; 9 East, 21); as to when he is precluded contesting his fiat, *ante*, p. 349, 350, 352; and as to what steps he must take to contest it, *ante*, 349, 350; as to other actions in which he may sue, see *ante*, p. 342.

Evidence for Defendant.

This will consist in disproving plt.'s title to sue, by showing the assignees have interfered, &c. (*supra*); or the cause of action.

By 12 & 13 Vict. c. 106, s. 155, it is enacted, "that all persons from
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whom the assignees shall have recovered any real or personal estate, either by judgment or decree, are hereby discharged, in case that fiat be afterwards superseded, or the adjudication of bankruptcy, or petition for adjudication, be afterwards annulled or dismissed, *from all demands [*435] which may thereafter be made in respect of the same by the person against whom the adjudication was made, and all persons claiming under him; and all persons who shall, without action or suit, *bona fide* deliver up possession of any real or personal estate to the assignees, or pay any debt claimed by them, are hereby discharged from all claim of any such person as aforesaid in respect of the same, or any person claiming under him, provided the persons so delivering up any real or personal estate, or paying any debt, shall not have had notice of an action, suit, or other proceeding to dispute or annul the fiat or adjudication or petition for adjudication, and such action, suit, or other proceeding shall not have been commenced and prosecuted within the time and in manner allowed by this act."

As to where money which has been paid into court under sect. 158 12 & 13 Vict. c. 106, is paid out to the assignees, see *ante*, p. 425.

IV. ACTIONS AGAINST BANKRUPT.

Form of Remedy and Pleadings.

These will be the same as in ordinary cases, with the exception of the plea, that the defendant is discharged from liability by his certificate, and with respect to which, by the 12 & 13 Vict. c. 106, s. 205, it is enacted, "that any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him, for any debt, claim, or demand proveable under his bankruptcy, shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and such bankrupt's certificate shall be sufficient evidence of the trading, bankruptcy, fiat, or petition for adjudication, and other proceedings precedent to the obtaining such certificate. As to the evidence, and what causes are barred by the certificate, see *post*, p. 439; Arch. B. L. 10th ed. 348, 119, 182. The certificate cannot be given in evidence under the general issue (*Gowland v. Warren*, Eden, 348, 119—182; 1 Camp. 363; *Stedman v. Martremant*, 12 East, 664); but the deft. may plead the general issue as well as any other plea. This general plea of bankruptcy allowed by the above act, can be pleaded only in cases where the act of bankruptcy took place before the suit was commenced (6 East, 413; 4 T. R. 516; 5 Esp. 90), and the certificate was obtained before plea pleaded (*Harris v. James*, 9 East, 82). So it is sufficient, where an action is brought for the recovery of a debt or demand contracted before, though not payable until after, the act of bankruptcy or fiat, or of a debt *bona fide* contracted and payable after the act of bankruptcy, and before the fiat, and which is recoverable by virtue of this act (*Charlton v. King*, 4 T. R. 156; *Stedman v. Martremant*, 12 East, 664; *Attwood v. Partridge*, 4 Bing. 209; *Westcott v. Hodges*, 5 B. & A. 12); but it is not applicable where the claim is for *damages*, and not for a debt (*Green v. Bicknell*, 8 Ad. & E. 701). A public officer of a company cannot plead his own bankruptcy, in bar of an action against him in his character of public officer (*Stewart v. Dunn*, 11 M. & W. 63). The general plea of bankruptcy is only given to a bankrupt when sued; in other cases all the proceedings must be set forth (*Pitt v. Chappe-*

low, 8 M. & W. 616). Where both the bankruptcy and certificate are after action brought, the plea must be special; so, where a surety brings an action for money paid by him after the issuing of the *commission, the plea must be special (*Stedman v. Martremant*, 12 East, 664); so, [*436] if the cause of action be barred by the certificate, but the certificate be not obtained until after plea pleaded, it must be pleaded specially *puis darrein continuance*, stating the proceedings (6 T. R. 605-7; *Todd v. Maxfield*, 6 B. & C. 105; see form, *Dunn v. Hill*, 2 Dowl. N. S. 1062). The plea must be pleaded within eight days after the defence arose, unless a judge give further time (see Arch. Pr. 8th ed.; *ante*, p. 433). A judge must receive the plea (*Ludlow v. Tyler*, 7 C. & P. 537). The deft., by pleading this plea, abandons all former pleas (Arch. Pr. *supra*); plt. may discontinue after it without paying costs (*Woollen v. Smith*, 9 Ad. & E. 505); and, if deft. neglects to plead it, and judgment is obtained against him, he cannot plead his certificate to an action on such judgment (6 B. & C. 105).

As to the form of the general plea, it is not necessary to aver that the deft. became a bankrupt before the commencement of the action (*Tower v. Cameron*, 6 East, 413, *supra*). It is necessary to show, that the causes of action accrued before the deft. became a bankrupt, and this even though the cause of action was not actually completed before the act of bankruptcy (4 T. R. 156; 5 B. & A. 17). As to the form of the plea, see *Charlton v. King*, 4 T. R. 155; *Sheen v. Garrett*, 6 Bing. 688; *Wheatly v. Williams*, 1 M. & W. 537, per Parke, B., *post*, p. 437. This plea should conclude to the country (*Sheen v. Garrett*, 6 Bing. 686; see *Miles v. Williams*, 1 P. Wms. 258; 10 Mod. 160, 247; *Wheatley v. Williams*, 1 M. & W. 537; but see *Lobb v. Stanley*, 5 Q. B. 573). It requires no signature. In the special plea of bankruptcy, all the proceedings should be set forth (1 B. & P. 448). In a special plea of bankruptcy, &c., after action brought, the prayer against the plt.'s right further to maintain his action is necessary (6 T. R. 597). As to plea of deft.'s petition and final discharge, under 12 & 13 Vict. c. 106, s. 211, see Ch. jun. Pl. 257.

A plea by a bankrupt that the plt. had elected to prove under the commission (see 6 Geo. IV. c. 16, s. 59) is bad (*Harly v. Greenwood*, 5 B. & A. 95).

By 12 & 13 Vict. c. 106, s. 202, it is enacted, "that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to forbear opposing, or to consent to the allowance of the bankrupt's certificate, or to forbear to petition for the recall of the same, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable, and the party sued on such contract or security may plead the general issue, and give this act and the special matter in evidence."

Sect. 204. "That no bankrupt, after his certificate shall have been allowed, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement made after the issuing of the fiat or filing of the petition for adjudication of bankruptcy, and if any bankrupt be sued upon any such contract, promise, or agreement, he may plead the general issue, and give this act and the special matter in evidence."

Sect. 221. "That so soon as the said resolution or agreement shall have been carried into effect, and the creditors of such petitioning trader shall have been satisfied, according to the tenor thereof, the court shall give to

such petitioner a certificate under the hand and seal of the commissioner in the form contained in the Schedule (A c) *to this act annexed, set-
 [*437] ting forth the filing of the petition, the resolution or agreement of the creditors, and that the said resolution or agreement has been fully carried into effect; and such certificate shall thenceforth operate to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy, except only that any debt which shall have been contracted wholly or in part by reason of any manner of fraud or breach of trust, or without reasonable probability at the time of contract of being able to pay the same, or by reason of any judgment in any prosecution for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication of bankruptcy, shall not be barred by such certificate."

With respect to the *replication*, the usual *similiter* is proper to the general plea of bankruptcy; a special replication would be bad, on special demurrer (*Wilson v. Kemp*, 2 M. & S. 549; S. C. 3 Campb. 499, n. (a); *Hughes v. Morley*, 1 B. & A. 22). Under this *similiter*, any acts rendering the certificate void or inoperative may be given in evidence, either in respect of the grounds mentioned in the act, or on account of fraud, &c. (Ib.); see 12 & 13 Vict. c. 106; *Horn v. Ion*, 4 B. & Ad. 78). In the case of the bankruptcy and certificate of one of several debtors, he need not be made a deft. but if joined and he plead his certificate, plt. may reply, or enter a *nolle prosequi* as to him, and proceed against the other debtors (*Noke v. Ingham*, 1 Wils. 89; *Moravia v. Hunter*, 2 M. & S. 444; *Grant v. Jackson*, Pea. 203). To the special plea of bankruptcy, the replication must be special; and as to how to reply, see 3 Taunt. 287.

By 12 & 13 Vict. c. 106, s. 224, it is enacted, "that every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six-sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy: provided always, that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him."

Sect. 225. "That no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the court an order or certificate of the said court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the court within the district of which the

trader shall have resided or carried on business for six months next immediately preceding his suspension of payment to make such *orde
 [*438]

or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate as aforesaid shall be bound thereby."

Sect. 226. "That when the trustee or inspector under any such deed or memorandum of arrangement, or, if there shall be no such trustee or inspector, when any two of the creditors, shall be satisfied that six-sevenths in number and value of the creditors whose debts amount to 10% and upwards have signed such deed or memorandum, it shall be lawful for such trustee or inspector, or for such two creditors, as the case may be, to certify the same to the court in writing, and such certificate shall be filed with the registrar of the court, and shall thereupon be *prima facie* evidence in all courts of law and equity that such deed or memorandum of arrangement has been so signed."

Sect. 227. "That every such certificate as last aforesaid shall have appended thereto a full account of the debts of such trader, together with the names, residences, and occupations of his creditors, and shall be accompanied by an affidavit by such trader verifying the same; and any omission in such account or the insertion therein of any debt not really existing, or of any larger amount of debt than that really existing, and which shall appear to the court to have been made through the culpable negligence or fraud of such trader, with intent to defraud any of his creditors, shall deprive him of the benefit of the provisions of this act with respect to arrangements by deed, and of the discharge proposed in any such deed or memorandum of arrangement: provided always, that any omission, insertion, or incorrectness in such account, which shall not have been made through such culpable negligence or fraud as aforesaid, shall not defeat or otherwise affect such deed or memorandum of arrangement."

Sect. 228. "That the creditors of every such trader shall have the same rights respectively as to set-off, mutual credit, lien, and priority, and joint and separate assets shall be distributed, in like manner as in bankruptcy; and no creditor shall be prejudiced or affected by being a party to any such deed or memorandum of arrangement aforesaid, or by the same being obligatory upon him as to his right or remedy against any person other than such trader; and every person who would be entitled to prove in bankruptcy shall be deemed a creditor within the meaning of the provisions of this act with respect to arrangements by deed."

Sect. 230. "That any bankrupt, at any time after he shall have passed his last examination, may call a meeting of his creditors (whereof, and of the purport whereof, twenty-one days' notice shall be given in the *London Gazette*), and if the bankrupt or his friends shall make an offer of composition, and nine-tenths in number and value of the creditors assembled at such meeting shall agree to accept the same, another meeting for the purpose of deciding upon such offer shall be appointed to be holden, whereof such notice shall be given as aforesaid, and if at such second meeting nine-tenths in number and value of the creditors then present shall also agree to accept such offer, the court shall and may, upon such acceptance being testified by them in writing, and upon payment of such sum as the court shall direct, annul the adjudication of bankruptcy, and supersede or dismiss the fiat or petition for adjudication, and every creditor of such bankrupt shall be bound to accept of such composition so agreed to."

Sect. 231. "That in deciding upon the offer of composition no

*creditor whose debt is below 20% shall be reckoned in number, [*439] but the debt due to such creditor shall be computed in value; and every creditor to the amount of 50% and upwards residing out of England

shall be personally served with a copy of the notice of the meeting to decide upon such offer as aforesaid, and of the purpose for which the same is called, so long before such meeting as that he may have time to vote thereat, and such creditor shall be entitled to vote by letter of attorney, executed and attested in manner required for a creditor's voting in the choice of assignees; and if any creditor shall agree to accept any gratuity or higher composition for assenting to such offer, he shall forfeit the debt due to him, together with such gratuity or composition; and the bankrupt shall (if thereto required) make oath before the court that there has been no such transaction between him, or any person with his privity, and any of the creditors, and that he has not used any undue means or influence with any of them to attain such assent."

Precedents.

In the Q. B. (C. P., or Ex. of Pleas). On the day of A. D. 1850.

Plea of bankruptcy of deft. to action of assumpsit.

And the deft., by his attorney, saith, that heretofore and before the commencement of this suit, to wit, on, &c. [*date of certificate*,] he, the deft., became a bankrupt, within the true intent and meaning of the statute in force concerning bankrupts; and that the supposed causes of action in the said declaration mentioned, and each of them, did accrue to the plt. before the deft. so became a bankrupt; and of this he, the said deft., puts himself upon the country, &c.

Plea of bankruptcy of deft. after the commencement of the suit.

And the deft., by his attorney, says, that the plt. ought not further to maintain this action; because he says, that the deft., before and at the time of his becoming bankrupt, and of the petition and adjudication hereinafter mentioned, was a trader, to wit, [*the trade carried on by him*] within and subject to the statutes then in force concerning bankrupts, and as such trader heretofore, to wit, *some day about the date, &c., of the petition*,] became and was indebted to one C. D. [*petitioning creditor*,] in the sum of [*sum sworn to*,] for a true and just debt; and thereupon the deft., so being such trader, and being and continuing so indebted as aforesaid, afterwards, and after the commencement of this suit, to wit, on *the day and year aforesaid* became and was a bankrupt, within the true intent and meaning of the statute in that case made and provided; and thereupon the said last-mentioned debt continuing due, the deft. afterwards, and within twelve months after the deft. so became bankrupt, and after the 11th day of October, A. D. 1849 [IN WORDS AT LENGTH], to wit, on [*the day and year aforesaid*,] the Court of Bankruptcy acting in London [or in and for the district], did, upon the petition of the said C. D., and affidavit of the truth of the allegation therein, duly filed according to the statute in that behalf, and upon due proof of the petitioning creditor's debt, and of the trading and act of bankruptcy of the deft. in due form of law, find and adjudge that the deft. had become and was a bankrupt according to the true intent and meaning of the statute in that behalf, which adjudication still remains in full force, as by the said adjudication duly filed and now remaining of record, in the said Court of Bankruptcy, reference being thereunto had will fully appear; and the deft. further saith, that forthwith, after the said adjudication, one A. B. then and still being one of the official assignees of the said Court of Bankruptcy duly appointed in that behalf, was by the said court appointed to be the official assignee of the estate and effects of the said deft. under the said adjudication, to act with the assignee or assignees to be thereafter chosen by the creditors of the said *bankrupt, as by the memo-
[*440] randum of said appointment now remaining of record in the said Court of Bankruptcy, reference being thereunto had, will more fully appear. And that afterwards, and after the expiration of seven days from the service of a duplicate of such adjudication upon the deft., to wit, on, &c. [*day of notice in Gazette*,] the said [or district] Court of Bankruptcy caused due notice of such adjudication to be given and published in the London Gazette, and thereby, according to the said statute, duly appointed two public sittings of the said [or district] court, to be holden at the Court of Bankruptcy in Basinghall Street, in the city of London [*or as the case may be*,] for the deft. to surrender and conform, the last of which sittings was thereby appointed for and on a day not less than 30 days and not exceeding 60 days from such advertisement, to wit, on, &c. [*day of last meet-*

ing,] such said last-mentioned day being the day limited for such surrender of the deft. And the deft. further saith, that such two several sittings were had pursuant to such notice, and that before three of the clock upon the said last-mentioned day, the deft., at the place so appointed in that behalf, duly surrendered himself to the said court, and signed and subscribed such surrender, and then and there submitted to be from time to time examined upon oath, and finished his examination upon oath before the said court; and, upon such his examination, made a full disclosure and discovery of his estate and effects. And the deft. further saith, that, having so duly surrendered and passed his last examination, and in all things duly conformed himself to the law in force concerning bankrupts, afterwards, to wit, on, &c.

the said Court [*or district court*] of Bankruptcy, appointed a public sitting of the said court for the allowance of the certificate of conformity to the said deft. as such bankrupt, as aforesaid, to be holden at [*state the place,*] on the day of

A. D. , pursuant to the statute in that case made and provided, of which said last-mentioned meeting and of the purport thereof, 21 days' notice was given in the London Gazette and to the solicitor to the assignees, according to the said statute; and on the last-mentioned day, at a public sitting pursuant to such notice, the said Court [*or district court*] of Bankruptcy having regard to the conformity of the deft. as such bankrupt, as aforesaid, and as to his conduct as a trader before as well as after his bankruptcy, found the deft. as such bankrupt, as aforesaid, entitled to the said certificate of conformity, and then allowed and awarded him the same; and then, by writing, under the seal of the said Court and hand of E. F. Esq., then being one of the commissioners of, and then constituting the said Court, and then duly acting as such in the prosecution of the said petition for adjudication, certified in manner and form as by the said statute is directed, that the deft. as such bankrupt, had made a full disclosure and discovery of his estate and effects, and in all things conformed, and so far as the court could judge, there did not appear any reason to question the truth or fulness of such discovery. And the deft. further saith, that the said several causes of action in the declaration mentioned, and each and every of them accrued, to the plt. before the deft. so became bankrupt as aforesaid; and this the deft. is ready to verify. Wherefore he prays judgment if the plt. ought further to maintain his aforesaid action thereof against him, &c.—*Signature.*

Other precedents.

See other precedents of plea of bankruptcy in Ireland (Ch. Pl. by Pearson, 260). To an action for money paid, the bankruptcy of deft., and that the money was paid by plt. as a security for the debt of the deft. before his bankruptcy, *Jackson v. Magee*, 3 Q. B. 48.

Evidence for Defendant.

Under 12 & 13 Vict. c. 106, sect. 205, the deft. may, under the general plea, give the act and the special matter in evidence, and the certificate shall be evidence of the trading, bankruptcy, fiat, or petition for adjudication, and other proceedings subsequent to the obtaining the certificate. A certificate of conformity, under a fiat, *must appear to have been entered of record in the Court of Bankruptcy, under 2 & 3 Will. IV. c. 114, s. [*441] 8. But, if obtained after the above statute, on a commission issued before it, it is proved by production of the certificate (*Taylor v. Wilsford*, Moo. & M. 503). By sect. 199 of 12 & 13 Vict. c. 106, it is enacted, "that the certificate of conformity under this act shall be in writing under the seal of the court and the hand of the commissioner, and shall certify that the bankrupt has made a full discovery of his estate and effects, and in all things conformed, and that, so far as the court can judge, there does not appear any reason to question the truth or fulness of such discovery." By sect. 236, any certificate appearing to be sealed with the seal of the court shall be receivable in evidence; and, by sect. 237, all courts, &c., shall take judicial notice of the signature of any commissioner or registrar of the court, and of the seal of the court.

Certificate—its Effect against Action brought against Bankrupt.] By the 6 Geo. IV. c. 16, s. 121, "every bankrupt who shall have duly surrendered, and, in all things, conformed himself to the laws in force con-

cerning bankrupts, at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter directed (Ib., sect. 122, 123); but no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound, or had made any joint contract, with such bankrupt." By 12 & 13 Vict. c. 106, sect. 199, it is enacted, "that every certificate of conformity allowed by any commissioner before the time appointed for the commencement of this act, though not confirmed according to the laws in force before that time, shall discharge the bankrupts from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the fiat." And, by sect. 200, "that the certificate of conformity allowed under this act, subject to the provisions herein contained, shall discharge the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the bankruptcy: provided always, that no such certificate shall release or discharge any person who was a partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound or had made any joint contract with such bankrupt."

As to when the certificate will be void, and what is an answer to it, see *post*, 442.

Under the provisions of the old act, the effect of the certificate was to bar all demands which were due at the time of the act of bankruptcy, and which could have been proved under the commission (*Bamford v. Burrell*, 2 B. & P. 11); and, as to what may be proved, see *Arch. B. L. and Deac. B. L. Indices*. A debt was not discharged which occurred after the bankruptcy, but before the commission (2 B. & P. 11). Where a bankrupt acceptor pleaded his certificate, and it appeared that the commission was sued out after the day of the date of the bill, but before it became due, it was held to be incumbent on the plaintiff, an indorsee, to show that an act of bankruptcy was committed before the date of the bill (*Pearson v. Fletcher*, 5 Esp. C. 90); but an antecedent act of bankruptcy might, in such case, be proved by the proceedings under the commission, stating a previous act of bankruptcy (Ib.). Where a verdict was obtained against the bankrupt, in an

[*442] action for damages, before an act of bankruptcy, *but judgment was not signed till after, the debt will not be barred by the certificate (*Bass v. Gilbert*, 2 M. & S. 70). If an action be commenced against a bankrupt after the bankruptcy, for a debt due before, and, after a verdict for the plt., the bankrupt obtain his certificate, the costs of the action, as well as the debt, are proveable under the commission (*Willet v. Pringle*, 2 N. R. 190; *Scott v. Ambrose*, 3 M. & S. 328); for the costs bear relation to the original debt (Ib.; 2 Stark. Ev. 203).

What is a discharge of a debt in the country where it was contracted, is a discharge of it everywhere (per *Ellenborough*, Lord, *Potter v. Brown*, 5 East, 129, recognising *Ballantine v. Golding*, Cooke, 487; see also *Hunter v. Potts*, 4 T. R. 182). So, the certificate is a bar to an action for debts contracted in England as well as for those contracted in Scotland (*Royal Bank of Scotland v. Cuthbert*, 1 Rose, 462); or those contracted in Ireland, or any foreign country (*Odwin v. Forbes*, Buck, 57); and a certificate obtained under a commission of bankruptcy issued in Ireland, or any foreign country, will be a good defence to an action brought here for a debt contracted in Ireland, or any foreign country (*Potter v. Brown*, 5 East, 124); but it will not bar an action for a debt contracted here (*Smith v. Buchanan*,

1 East, 6; *Quin v. Keefe*, 2 H. Bl. 553); nor will a certificate under an English commission defeat an action for a debt contracted in the West Indies (*Beawes*, 543; Co. B. 465); or in Scotland (*Watson v. Renton*, 2 Bell, Com. 693). And, where a bill of Exchange was drawn in Ireland, but accepted and paid here, it was considered an English debt, and, as such, not barred, by the certificate under an Irish commission (*Lewis v. Owen*, 4 B. & A. 654).

The certificate is no bar where the action is for unliquidated damages; as, an action of trover, even in cases where the plt. has his option to bring trover or assumpsit (*Parker v. Norton*, 6 T. R. 695; 3 Madd. 51); or an action of trespass for mesne profits (*Goodtitle v. North*, 2 Doug. 584). Bankruptcy is not a discharge of a promise to allow a weekly sum for the support of an illegitimate child; for, though the certificate would discharge any arrears accrued before the bankruptcy, yet, no proof in respect of the subsequent arrears could have been admitted under the commission for them (*Millen v. Whittenbury*, 1 Camp. 429). A certificate under a joint commission will be evidence in bar of a separate debt (*Horsey's case*, 3 P. Wms. 23; *Howard v. Poole*, Stra. 995); and, *vice versa*, a certificate under a separate commission in bar of a joint debt (*Ex parte Yale*, 3 P. Wms. 24). Signing the certificate of a surviving partner does not release the estate of a deceased partner (1 Mer. 570).

The certificate must be entered of record, as directed *ante*, p. 439, before it can be given in evidence (see 3 Bing. 493). If B. plead his bankruptcy and certificate, and prove a commission against A., and a certificate under it, he may prove that he was formerly known by the name of A., and that the commission was issued against him, although at the time of the trial he was known by the name of B. only (*Stevens v. Eliseè*, 3 Camp. 256). It must appear at the trial, that the bankruptcy was subsequent to the commencement of the action (see *ante*, p. 436); and, as to when the bankruptcy and certificate must be pleaded specially, see *ante*, pp. 435, 436.

Evidence for Plaintiff.

Proof to defeat Certificate.] The plt. cannot, it seems, in answer to the general plea of bankruptcy, at the trial, show matter which
 *impeaches the validity of the *fiat* only without affecting the certi- [*443]
 ficate (see *Bateson v. Hartsink*, 4 Esp. 43; *Eden*, 426; and see 12
 & 13 Vict. c. 106, s. 205). The plea merely puts the certificate in issue. By the 6 Geo. IV. c. 16, s. 127, it is enacted, "that if any person, who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by an insolvent act, shall be or become bankrupt, and have obtained, or shall hereafter obtain, such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission 15s. in the pound, such certificate shall only protect his person from arrest and imprisonment; but his future estate and effects (except his tools of trade, and necessary household furniture, and the wearing apparel of himself, his wife, and children) shall vest in the assignees under the said commission, who shall be entitled to seize the same, in like manner as they might have seized the property of which such a bankrupt was possessed at the issuing of the commission." This sect. would seem to be repealed by 12 & 13 Vict. c. 106, but as there may yet arise cases where it may be pleaded, it is considered advisable to allow it to keep its place, and to refer shortly to some of those that have been decided upon it. Under this provision the certificate is avoided, though the former commission has been superseded (1 Doug. 46).

It has been held, that a deed of composition, embracing all the creditors, under which many of them came in, though some of them did not, is, in case of a subsequent commission of bankruptcy, such a compounding with his creditors as will, within 5 Geo. II. c. 30, s. 9, &c., deprive the bankrupt of the benefit of his certificate to protect his future effects from being liable to be taken in execution (*Slaughter v. Chenye*, 1 M. & S. 182); or though the former commission have been superseded (*Ex parte Hodgkinson*, 19 Ves. 291; *Philpot v. Corden*, 5 T. R. 287). But a composition with a certain class of creditors, as, for instance, with joint creditors only (*Norton v. Shakespeare*, 15 East, 619); or a composition with all his creditors generally, if he have afterwards paid them 20s. in the pound, before his bankruptcy (*Read v. Sowerby*, 1 M. & S. 78), will not deprive a bankrupt of his certificate. For the purpose of proving a former commission, it is only necessary to produce the commission and proceedings, and prove that the debt submitted to it, without proving the leading act of bankruptcy, &c. (*Heviland v. Cook*, 5 T. R. 655; *Gregory v. Merton*, 3 Esp. 195); and the certificate under such former commission must be proved, either by producing it, or by secondary evidence of it after notice to the bankrupt to produce it, and an affidavit of conformity was held to be good secondary evidence (*Graham v. Grill*, 4 Camp. 282; *Henry v. Leigh*, 3 Camp. 499). It is incumbent on the bankrupt to prove that he has paid 15s. under his second commission (*Gregory v. Merton*, 3 Esp. 195); and proof that it will, probably, produce so much, is insufficient (*Coverley v. Morley*, 16 East, 225; *Jelfs v. Bolland*, 1 B. & P. 467).

By the 231st sect. of the 12 & 13 Vict. c. 106, it is enacted, "that no bankrupt shall be entitled to a certificate of conformity under this act, and any such certificate, if allowed, shall be void, if such bankrupt shall have lost, by any sort of gaming or wagering, in one day, 20*l.*, or within one year next preceding the issuing of the fiat, or filing of the petition for adjudication of bankruptcy, 200*l.*; or if he shall, within one year next preceding the issuing of the fiat, or the filing of such petition, have lost 200*l.* by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract,

[*444] or *where the stock bought or sold was not actually transferred or delivered, in pursuance of such contract, or if such bankrupt shall, after an act of bankruptcy, or in contemplation of bankruptcy, or with intent to defeat the object of this or any other statute relating to bankrupts, have parted with, concealed, destroyed, mutilated, altered, or falsified, or caused to be concealed, destroyed, mutilated, altered, or falsified, any of his books, papers, writings, or securities, or made, or been privy to the making, of any false or fraudulent entry in any book of account, or other document, with intent to defraud his creditors, or shall have concealed any part of his property, or if any person, having proved a false debt under the bankruptcy, such bankrupt being privy thereto, or afterwards knowing the same, shall not have disclosed the same to his assignees, within one month after such knowledge."

With respect to the effect of a *subsequent promise* by bankrupt, the 6 Geo. IV. c. 16, s. 131, and 5 & 6 Vict. c. 122, s. 43, enacted that no bankrupt, after his certificate shall have been confirmed, shall be liable to pay or satisfy any debt, claim, or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement, made or to be made after the suing out of the commission, unless such promise, contract, or agreement, be made in writing, signed by the bankrupt, or by some person thereto lawfully authorized in writing, by such bankrupt. (See *ante*, p. 436; 12 & 13 Vict. c. 106,

s. 204.) If the bankrupt's surname occur in his handwriting in a letter commencing thus: "Mr. Stanley begs to inform," it is a sufficient signing by him (*Lobb v. Stanley*, 5 Q. B. 574; *Harris v. Wall*, 1 Exch. 122); and parol evidence of the amount due is admissible (*Lobb v. Stanley*, *supra*). So, also that parol evidence might be given of the time at which it was written; held also a sufficient promise, notice having been given to the deft. to produce plt.'s letter referred to, which had not been done (*Lobb v. Stanley*, *supra*). But the initial of the deft.'s surname is not a sufficient signature (*Hubert v. Moreau*, 2 C. & P. 528); a promise given before the certificate granted is sufficient, if it be a personal one, and not merely a promise to pay out of the estate, or a mere account stated which would be barred by the certificate (*Kirkpatrick v. Tattersall*, 13 M. & W. 766).

Besides the above legislative enactments, the plt. may, in answer to the certificate, show that it was obtained unfairly and by fraud, or that it is in other respects void; as, if the bankrupt, or any person for him, give money or security for money to a creditor for signing the certificate, such certificate will be void (*Holland v. Palmer*, 1 B. & P. 95; 1 Doug. 228; *ante*, p. 436). Where the fourth, among several other signatures to a certificate, was obtained by a promise of the bankrupt to pay the creditor his whole debt, it was held this avoided the certificate, although the creditors who signed before and after the fourth were sufficient in number and value, without reckoning that one for his example, might have induced others to sign it (*Phillips v. Dicus*, 15 East, 248). So, if a creditor be induced for money to withdraw a petition against the allowance of the certificate, or if he sell his debt, and agree at the same time to withdraw his petition, this will avoid the certificate (*Ex parte Gibson*, 6 Ves. 5; when otherwise, see 1 Doug. 230; *Arch. B. L.* 205; see now 12 & 13 Vict. c. 106, s. 201; *ante*, p. 436).

*BILLS OF EXCHANGE, (a)

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**Form of Remedy.*

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Assumpsit is the most usual remedy on bills of exchange, whether foreign or inland, promissory notes and checks, and is the only remedy where there

is no privity of contract between the parties. It is the only remedy at the suit of the payee or indorsee of a bill of exchange against the acceptor, or of the indorsee of a promissory note against the maker (*Bishop v. Young*, 2 B. & P. 78; *Barry v. Robinson*, 1 N. R. 293; 1 Ch. Pl. 103). It lies against a corporation (*Murray v. East India Company*, 5 B. & A. 204).

Debt also lies where there is a privity of contract between the parties. It lies at the suit of a drawer against acceptor (*Priddy v. Henbrey*, 1 B. & C. 674); even where he is also payee (*Watson v. Knightly*, 11 Ad. & E. 702). Of the payee against drawer of a bill, or maker of a note (*Bishop v. Young*, *supra*; *Hodges v. Steward*, Skin. 346; *Hatch v. Trayes*, 11 Ad. & E. 702; *Sison v. Kidman*, 3 Man. & G. 810). Of the indorsee against his immediate indorser (*Watkins v. Wake*, 7 M. & W. 488). Of the first indorsee against drawer of a bill payable to his own order (*Stratten v. Hill*, 3 Pri. 253; 2 Chit. Rep. 126). But debt does not lie at the suit of indorsee against acceptor (*Cloves v. Williams*, 3 Bing. N. C. 868; 3 *Hodges*, 176; *Bishop v. Young*, *supra*; *Powell v. Ancel*, 3 Man. & G. 171). Nor in any case where there are intermediate parties between the plt. and deft. (*Lewis v. Edwards*, 9 M. & W. 720; 6 Jur. 401). Therefore, where the drawer of a bill indorses it in blank, and delivers it to A. who passes it without a fresh indorsement to B., B. cannot maintain debt against the drawer (*Lewin v. Edwards*, *supra*.) An indorser cannot maintain debt against the acceptor (*Powell v. Ancel*, 3 Man. & G. 171). Debt is maintainable against a party who joins in making a note as surety (*Sison v. Kidman*, 3 Man. & G. 810; 4 Sco. N. R. 429).

Debt will not lie on a promissory note payable by instalments, until the last day of payment be past (*Rudder v. Price*, 1 H. Bl. 547; 1 Ch. Pl. 113; see *Bayley v. Hughes*, Cro. Car. 137; *Pemberton v. Shelton*, Cro. Jac. 498; *Hunt v. Braines*, 4 Mod. 402; *Hulme v. Sanders*, 2 Lev. 4). If it be so payable on the face of it assumpsit will lie for such instalment; if not, only one action of assumpsit lies (*Bayl. B. 361*, n. g).

It has been supposed that debt will not lie on a bill or note unless the instrument be represented to be "for value received" or some consideration be expressed upon the face of it (*Bishop v. Young*, *supra*; *Priddy v. Henbrey*, *supra*; *Creswell v. Crisp*, 2 Dowl. 635; *Lyons v. Cohen*, 3 Dowl. 244); but this idea is now exploded (*Hatch v. Trayes*, 3 P. & D. 408; *Watson v. Knightly*, *ib.*; 11 Ad. & E. 702, *post*). Wager of law has been abolished by 3 & 4 Will. IV. c. 42, s. 13, and debt on simple contract now lies against an executor or administrator, s. 14.

Where the bill has been refused acceptance, the action may be [**448*] *commenced immediately; it is not necessary to wait until the bill comes to maturity (*Ballingalls v. Gloster*, 3 East, 481; *Whitehead v. Walker*, 9 M. & W. 506).

Form of Pleadings.

Declaration.] The plt. is not, where there is a privity of contract between him and deft. independent of the bill, bound to declare on the bill itself, but may declare on such contract, if he has not parted with the bill; but it would be a defence to such action that the bill was in the hands of third parties (*Kearslake v. Morgan*, 5 T. R. 513; *Burdon v. Hatton*, 4 Bing. 455). It is always advisable, however, to declare on the bill itself, as the plt. will, otherwise, instead of the expeditious and least expensive mode of getting the damages assessed by having the same referred to the master, be bound to execute a writ of inquiry (*Osborne v. Noad*, 8 T. R. 648); and he

cannot in general obtain interest; besides which, if the bill be negotiable, he would on evidence by the deft. of its existence be bound to show it was in his possession (*post*).

The declaration stated that on, &c., the deft. made his bill, &c., and directed the same to A. and Co., payable to B. or his order, three months after date, which period had elapsed, &c.; that B. then indorsed to the plt., that it was presented for acceptance, and protested for non-acceptance, of which the deft. had notice; that the bill, being wholly unaccepted and unpaid afterwards, &c., when it became due on, &c., was presented for payment to A. and Co., who refused to pay the same; whereupon it was protested for non-payment, of all which the deft. had notice; and whereas, also, the said deft. before, &c., to wit, &c., was indebted to the plt., &c., on an account stated, and the deft. in consideration of the premises respectively, then, to wit, on the day and year last aforesaid, promised the plt. to pay him the said several sums respectively on request. Demurrer for duplicity and uncertainty: held, that whether the first part of the declaration was considered as two counts or only one, it was not demurable on either of those grounds (*Galway v. Rose*, 6 M. & W. 291; 8 Dowl. 239; 4 Jur. 320).

The plt. in the first count, declared on a bill of exchange, drawn and indorsed to him by the deft.; and, in the second, for money alleged to be due from the deft. upon an account stated—concluding, that, “in consideration of the premises respectively, the deft. promised to pay the said several last-mentioned moneys respectively to the plt. on request.” The deft. demurred to the second count, on the ground that it contained an incorrect statement of the consideration for the promise; or, if “the last-mentioned moneys” included the money in the first count, then the second count was bad for duplicity. The court set aside the demurrer as frivolous (*Lomax v. Wilson*, 2 C. B. 763).

Where, in a declaration on a bill of exchange, with a count for goods sold and delivered, there is the usual allegation that the deft. promised to pay the said bill, &c., according to the tenor and effect thereof; and in the count for goods sold, the promise is not confined to such count, but that, “in consideration of the several premises respectively, he, the deft., promised the plt. to pay him the several moneys respectively on request,”—this does not make the declaration double (*Shaw v. Glascott*, 9 Law T. 228, Ex.). A declaration, containing counts on bills of exchange by the indorsee against the indorser in the form prescribed by the R. G. T. T. 1 Will. IV., stated that the deft. promised to pay the bills, and commenced and concluded in the form of a declaration in debt. It also contained the *indebitatus* counts in debt. Held, that there was no misjoinder (*Esdaile, &c. v. Maclean*, 16 Law J. 71, Ex.).

*One count stated that deft. accepted a bill and promised to pay the amount, whereby an action accrued to the plt. to demand [*449] the amount. Deft. pleaded over, and plt. demurred, deft.’s counsel abandoned the demurrer, but contended that the above count was in debt: held, that it was so, and that debt did not lie by an indorsee against acceptor (*Cloves v. Williams*, 3 Bing. N. C.).

Declaration on a promissory note whereby the deft. promised to pay the plt. 30*l.* 13*s.* 6*d.*, as follows: 2*l.* on the 12th of April, then next, and the further sum of 2*l.* on the 12th of May then next, and the like sum of 2*l.* on the twelfth day of each and every succeeding month afterwards, until the whole should be paid, and that, in default in payment of any one of the said instalments, then the deft. promised to pay to the plt. or order, on demand, the sum of 30*l.* 13*s.* 6*d.*, or so much thereof as should remain unpaid; averment that default was made in payment of the first two instalments,

whereby according to the tenor and effect of the note the deft. became liable to pay to the plt. the said sum of 30*l.* 13*s.* 6*d.* General demurrer, for that by default in payment of the instalments, the note did not become payable without demand of the amount of it: held, that the demurrer was too large, there being clearly a debt as to the first two instalments (*Teague v. Morse*, 5 M. & W. 599).

Title.] The R. G. M. T. 3 Will. IV. r. 15, prescribes the form of title, and orders that every declaration (i. e. in personal actions when commenced in one of the superior courts) shall be entitled in the proper court, and of the day of the month and year in which it is filed or delivered (see form, p. 485).

Venue.] The plt. may lay the venue in any county (*Pinkney v. Collins*, 1 T. R. 571); and the court will not change it at the instance of the deft. unless on very special ground (*Tidd*, P. 605; see Ch. Pr. 956; see *Blendell v. Steele*, 8 M. & W. 640). The R. G. H. T. 4 Will. IV. r. 8, orders that "the name of the county shall in all cases be stated in the margin of the declaration, and shall be taken to be the venue intended by the plt., and that no venue shall be stated in the body of the declaration or in any subsequent pleading:" should it be so, it is not ground of demurrer; the proper course is to apply to a judge at chambers, who will order it to be struck out (*Harper v. Champress*, 1 C. M. & R. 369; *Fisher v. Snow*, 3 Dowl. 27; *Townsend v. Gurney*, 1 C. M. & R. 596).

Commencement.] Before the Uniformity of Process Act (2 Will. IV. c. 39), there were numerous and perplexing modes of commencing personal actions: that act having abolished the use of an original writ, and mesne process in personal actions, and substituted several other prescribed forms of writs in personal actions printed in the schedule to the act, it became desirable that the judges should, for the sake of uniformity, prescribe new forms of commencing a declaration according to the particular writ that had been issued, and accordingly we find such forms prescribed by R. G. M. T. 3 Will. IV. r. 15 (see form, 485). Where the action is in debt care should be taken to use the form applicable to that action (*post*, p. 487).

Statement of the Bill itself.] In general, the bill must be stated in the declaration like other contracts (*ante*, 448); either in its precise terms—except in cases where that would mislead, as when a bill is drawn payable in foreign currency of the English denomination, but of different value (*Reany v. Ring*, 2 B. & A. 301; *Sprowle v. Legge*, 1 B. & C. 16; see *Taylor v. Booth*, 1 C. & P. 286; *Harington v. McMorris*, 5 Taunt. 228; [**450*] *Simmons v. Parmenter*, 1 Wils. 185; **4 Bro. P. C. 604*; *Stevenson v. Oliver*, 8 M. & W. 239)—or according to its legal effect; and a variance on any material point will be fatal. In general, it is advisable to state no more of the bill declared on than is necessary to enable the plt. to recover (*Bristow v. Wright*, Doug. 667; *Waugh v. Russell*, 1 Marsh. 217; *Siffkin v. Walker*, 2 Camp. 309). Whenever the bill is in a particular form, care must be taken to describe it, so as to avoid a variance; one of the forms prescribed by the New Rules, r. 8, *ante*, p. 485 (with the exception of venue, which must now be confined to the margin) should be adhered to as closely as practicable.

If it be doubtful whether the instrument be a bill or note, it may be declared on as either (*Edis v. Bury*, 2 C. & P. 559; 6 B. & C. 433); the judge at nisi prius will amend the declaration by allowing it to be treated

as a note, if necessary (*Mallet v. Powell*, 6 C. & P. 233; *Worley v. Harrison*, 3 Ad. & E. 669; *Hay v. Fisher*, 2 M. & W. 722). As to what is a note, see *Shelton v. James*, 5 Q. B. 199, *post*. An instrument in the form of a bill of exchange drawn upon a joint-stock bank by the manager of one of its branches, by order of the directors, may be declared on as a promissory note (*Miller v. Thompson*, 3 Man & G. 576). A note, "I promise to pay, or cause to be paid," may be declared on as a note in the common form (*Lovell v. Hill*, 6 C. & P. 238). If a bill or note be informal it may be stated in its terms with an innuendo of its meaning, which seems a safer course.

If a bill be in a foreign language, it may nevertheless be stated in English, without noticing the foreign language (*Att.-Gen. v. Valabrique*, *Wight*. 9).

Names of Parties.] The names of the parties to the bill must be accurately described; a variance in the name of one who is not a party to the suit is a ground of nonsuit (*Whitwell v. Bennett*, 3 B. & P. 559). If a bill drawn by the name of Cruch be declared on in an action against a third party as drawn by Crouch, it is a fatal variance (*Whitwell v. Bennett*, *supra*; *Hutchinson v. Piper*, 4 Taunt. 810). But where a bill was stated to have been indorsed by Phillip Phillip, when his name was Phillip Phillips, and he had so indorsed it, Lord Ellenborough refused to nonsuit, observing, that whether the name on the bill be the party's true or false name is immaterial, if it be his name of trade, and that the only question was as to the identity of the person (*Forman v. Jacob*, 1 Stark. 47). Where a bill is drawn with the payee's name in blank, and the declaration states that A. B. (a *bona fide* holder who has inserted his own name) was payee, it is no variance (*Attwood v. Griffin*, Ry. & M. 425). But when, in an action against three makers of a note, the declaration states it to have been made by William Austin, Robert Strobell, and William Shutcliffe, of whom the latter two were outlawed, whereas the names were William Austin, Samuel Strobell, and William Shirliffe, the variance was held fatal. The parties' identity was not proved in *Gordon v. Austin*, 4 T. R. 611. It has been held, in *Esdale v. McClean*, 15 M. & W. 277, that a special demurrer will hold if there be no allegation in the declaration that the party described by initials was so designated in the bill declared on (see *Applemans v. Blanch*, 14 M. & W. 154). A count on a bill of exchange, by indorsee against acceptor, alleged that "one J. B. Doe," on, &c., made his bill of exchange, &c. The court refused to set aside as frivolous a demurrer, assigning for cause that the drawer was described in the count by the initials of his christian name only, without alleging any excuse for the omission of his christian name, or showing that he was so designated in the bill. *Semble*, that the omission is fatal on special demurrer (*Turner v. Fitt*, 3 C. B. 701; see further, *post*, p. 456; *Levy v. Webb*, 9 Q. B. 427; *Gatty v. Field*, 9 *Q. B. [*451] 431; *Nash v. Collier*, 17 Law J. 91, C. P.). A mistake as to the payee's name is amendable at the trial.

If a bill be drawn by a firm consisting of several persons, it may be so described in the declaration in an action against the acceptor, though in fact the firm consisted of one individual only (*Bass v. Clive*, 4 Camp. 78; 4 M. & S. 13). Declaration by indorsee against acceptor stated that the bill was drawn by certain persons using the name, style, and firm of M. & Co., and that the said M. & Co. indorsed it. This is not a sufficient description, as it did not show that M. and Co. drew or indorsed the bill in that name (*Ball v. Gordon*, 9 M. & W. 345; *Tigar v. Gordon*, *ib.* 347; *sed quare*, see *Bass*

v. Clive, 4 Camp. 78; Schultz v. Astley, 7 C. & P. 99; 2 Bing. N. C. 544; 2 Sco. 815; see *post*).

A variance in the names of the parties to the suit is no ground of nonsuit, if the mis-described party's identity be proved (*Boughton v. Frere*, 3 Camp. 29; *Jowett v. Charnock*, 6 M. & S. 45; *Dickinson v. Bowes*, 16 East, 110; *Willis v. Barrett*, 2 Stark. 29): formerly it was a ground of plea in abatement, but that plea for misnomer is taken away (3 & 4 Will. IV. c. 42, s. 11). A variance in the christian name of the defendant is not material, if it appear that he has been served with process (*Dickenson v. Bowes*, 16 East, 110). Proof that other parties joined the deft. in drawing or accepting the bill is immaterial, it being matter of plea in abatement (*Mountstephen v. Brooke*, 1 B. & A. 244; see "ABATEMENT"). The plt. was described as Henry H. Lindsey; the court refused to set aside the declaration for irregularity, the defect being cured by 3 & 4 Will. IV. c. 42, s. 12 (*Lindsey v. Wells*, 5 Dowl. 618; *Braithwaite v. Harrison*, 3 Dowl. N. S. 210; 7 Jur. 898).

A declaration stating that A. B. drew a bill requiring the deft. to pay to the drawer's order, without again naming him, is good (*Knill v. Stockdale*, 6 M. & W. 478); or to his order, the word his referring to the drawer (*Spyer v. Thelwall*, 2 C. M. & R. 693; 4 Dowl. 509).

The indorsement of one partner must be in the name of the firm, in order to bind the others (*Kirk v. Blanton*, 9 M. & W. 284). Where a declaration stated that a bill was indorsed by certain persons trading under the firm of H. and F., by procuration of J. D., it was held that this allegation was supported by evidence of J. D.'s handwriting, and that he, being the managing partner in a firm which carried on its business of buying and selling under the denomination of H. and Co., was in the habit of indorsing bills in the manner above stated, though there was no such person as F. in the firm of H. and Co., and no direct proof that J. D.'s partners were privy to these transactions (*Williamson v. Johnson*, 1 B. & C. 146; 2 D. & R. 281). Where Messrs. J. C., R. M., J. P., and J. S. carried on business as bankers, and the following promissory note was signed by R. M.: "I promise to pay the bearer on demand 5*l.*, value received, for J. C., R. M., J. P., and J. S.—R. M.": held, that there was no separate right of action against the party so signing, but that the firm were liable (*Ex parte Buckley*, in re Clarke; 14 M. & W. 469; overruling *Hall v. Smith*, 1 B. & C. 407).

If a bill be indorsed in blank any number of persons may join in suing upon it, without proof of partnership or joint interest (*Ord v. Portal*, 3 Camp. 239; *Rordusnz v. Leach*, 1 Stark. 446). Where indorsees sued the drawer in their own right, and it appeared that the bill had been indorsed to them in blank before the death of one of their partners, it was held not necessary to describe themselves as surviving partners in the declaration, as they were not bound to prove the partnership, or that the bill was indorsed or delivered to them jointly with their deceased partner; otherwise if the bill has been specially indorsed (*Attwood v. Rattenbury*, 7 Moo. 579). The [*452] *delivery of a bill indorsed in blank by the direction of the payee to A. B. and Co., who were bankers, on the account of an insolvent's estate vested in trustees for the benefit of creditors, will not enable A. and B., jointly with a third trustee, to sue the indorser (*Mitchell v. Kinnear*, 1 Stark. 499). The drawer of a bill accepted generally, and protested by the payee for non-payment and afterwards by himself, may, in his own name and without any previous assignment or indorsement from the payee, sue the acceptor (*Parminter v. Symons*, in error, 2 Bro. P. C. 43; 1 Wils. 185). Where a bill was indorsed to three partners in respect of a debt due from the drawer and indorser, and was accepted by the deft. at the request of one of the partners, who engaged to provide for it when it became due: held, that

the assignees of both could not recover against the acceptor, although the one partner was not privy to the engagement of the other (*Johnson v. Peek*, 3 Stark. 66). If several persons, not partners in business, separately indorse for the accomodation of the drawer a bill which has been previously indorsed by another person, and on the bill being dishonoured pay the party who discounted it in equal proportions, they may strike out their own indorsements, and bring a joint action against such previous indorser, to recover the amount of the bill (*Low v. Copestake*, 3 C. & P. 300). Assumpsit by A., B., and C. against D., as one of the indorsers of a note drawn by E. in favour of C., D. and (himself) E., then in partnership, and by them indorsed to A., B., and C.: a plea in bar that C., one of the plts., was liable as indorsee together with D., was held good on special demurrer (*Mainwaring v. Newiman*, 2 B. & P. 120).

If one of two partners be an infant, the holder of a bill accepted by both partners may declare on it, as accepted by the adult only in the names of both, and if deft. plead in abatement the nonjoinder, the plt. may reply the infancy, and it is no departure (*Burgess v. Merrill*, 4 Taunt. 468). Evidence that other persons joined the deft. in the drawing or accepting the bill does not constitute a variance (*Mountstephen v. Brooke*, 1 B. & Ald. 224; 1 Saund. 291 c); but an allegation of a note having been made by A. and B. is not supported by evidence of a note given by A. alone to secure a partnership debt (*Siffkin v. Walker*, 2 Camp. 308; *Emly v. Lye*, 15 East, 7), though it would be otherwise, if A. prefixed to his signature, "For A. and B." (*Galway v. Matthews*, 1 Camp. 403; and see *Mason v. Ramsay*, 1 Camp. 284).

In a declaration by the public officer of a banking co-partnership, established under 7 Geo. IV. c. 46, it is sufficient to describe the plt. as a public officer duly appointed (*Spiller v. Johnson*, 6 M. & W. 570; *Christie v. Peat*, 7 M. & W. 491; see *Esdale v. Maclean*, 15 M. & W. 277).

The plt. may sue any of the indorsers previous to himself, whether mediate or immediate. But if the bill be reindorsed to the party, by whom it had previously been indorsed, such party cannot sue the person so reindorsing it (*Bishop v. Hayward*, 4 T. R. 470; and see *Britten v. Webb*, 2 B. & C. 483). But where the payees of a bill indorsed it specially to the plts., and immediately after the special indorsement the deft. indorsed it, it being in the plt.'s possession at the time: held, that the action was maintainable against the deft. (*Penny v. Innes*, 1 C. M. & R. 439; 5 Tyrw. 107).

A bill drawn by an agent may be stated to have been so by the principal, as that is its legal operation (12 Mod. 346; *Collis v. Emett*, 1 H. Bl. 313; *Heys v. Heseltine*, 2 Camp. 604). Where the deft. drew a bill in the name of A. and Co., held, that to make him liable, it was requisite to show a want of authority from A. and Co. (*Wilson v. Barthrup*, 2 M. & W. 863; and see *Thomas v. Hawes*, 2 C. & M. 530, n.).

If an agent for A. draw a bill upon B. *in favour of C., [*453] though he direct B. to place the amount to A.'s debit, he will be personally liable to C., though C. knew he was only agent for A., unless he uses words to prevent such liability (*Leadbitter v. Farrow*, 5 M. & S. 345; *Sowerby v. Butcher*, 4 Tyrw. 320; 2 C. & M. 368; *Goupy v. Hurden*, 7 Taunt. 160; 2 Marsh. 454; *Lefevre v. Lloyd*, 5 Taunt. 742; 1 Marsh. 318). An agent for an association, who draws bills in his own name for the purposes of the company, does not bind the partners as drawers, though authorized to draw bills (*Ducarry v. Gill*, Moo. & M. 450; 4 C. & P. 121). The declaration stated that the bill was drawn by one H. P., accepted by the deft., and endorsed to the plt.; the drawing was "Per pro. H. P., J. P." A clerk of the plt.'s proved that the drawing and indorsement were of the

handwriting of Mr. J. P., whom he understood to be a son of Mrs. P., whom he had never seen, but with whose house his employer had dealings, and that he had seen bills, drawn and indorsed in the same manner, paid. The plts. had a verdict, and a rule *nisi* for a new trial having been obtained, an affidavit was produced, stating the name of the party was H. P., and that the bill was drawn by her authority. The court refused to make the rule absolute (*Jones v. Turnover*, 4 C. & P. 204). The indorsee of a bill, accepted by procuration, is bound to use due caution, and should see the general power of the agent, and also inquire into the propriety of his accepting that particular bill; otherwise, when it is improperly accepted, it cannot be recovered against the acceptor (*Attwood v. Mannings*, 7 B. & C. 278). If A. permit B. to draw bills in his name, he is liable to ignorant indorsees, although he had neither knowledge of, nor interest in, the particular bills; but he is not liable to a payee, having knowledge of the transaction (*Smith v. Strange*, Peak. Ad. Ca. 116, 119). From the fact that the defts.' confidential clerk had been accustomed to draw checks for them; that in one instance they had authorized him to indorse, and in two others had received money obtained by indorsing in their name, a jury was held warranted in inferring that the clerk had a general authority to indorse (*Prescott v. Flynn*, 9 Bing. 19; 2 Moo. & S. 18).

The directors of a mining association cannot bind the members by accepting a bill, unless authorized to do so by the deed of copartnership, by the necessity of such a power to the carrying on of their business, by the usage of similar establishments, or the express assent of the parties sought to be charged; still less can the directors bind the members by a bill drawn upon the directors by their own servant, such a bill being in effect a promissory note (*Dickinson v. Valpy*, 10 B. & C. 128; see *post*, "PUBLIC COMPANIES"). In an action on a bill, alleged to have been drawn on the deft., and accepted for him by A. B., as his agent, the bill, on being produced, appeared to be drawn on the director of a mining company, of whom the deft. was one, and which company had given a general authority to A. B. to accept bills on their behalf: held, no variance (*Faith v. Buckingham*, 6 Jur. 956).

Where a bill or note is given to a single woman, and she marries, the property vests in her husband, and he alone can indorse it (*Connor v. Martin*, 3 Wils. 5; 1 Stra. 516), and the husband and wife must join in an action upon it (Com. Dig. Baron and Feme, n.). If not reduced into possession during their joint lives, it reverts to the woman as survivor, or goes to the husband as her administrator if he survive (Co. Lit. 351; *Coppin v. —*, 2 P. Wms. 497; *Day v. Pargave*, 2 M. & S. 396). The indorsement by a married woman, with her husband's assent, of a bill drawn by her, is binding upon him, and will pass the interest, so as to enable the indorsee to sue the acceptor (*Prestwick v. Marshall*, 7 Bing. 565; 5 Moo. & P. 513).

[*454] Where a bill was payable to a feme sole, who intermarried before the *same was due: held, that the husband might sue, although the wife had not indorsed the bill (*McNeilage v. Holloway*, 1 B. & A. 218; *Burrough v. Moss*, 10 B. & C. 558). A promissory note made payable to a woman, who is married at the time of the making, passes by the indorsement of the husband alone during the coverture (*Mason v. Morgan*, 2 Ad. & E. 30). The right to the note survives to the wife, if the husband do no act to reduce it into possession (*Gaten v. Madeley*, 6 M. & W. 423; 4 Jur. 724, *supra*; see "HUSBAND AND WIFE").

An infant may sue on a bill (Ch. Bills, 20; *Warwick v. Bruce*, 2 M. & Sel. 205; *Holliday v. Atkinson*, 5 B. & C. 501); and though it be said that payment should be made to his guardian, yet payment to the infant will be good (*Bayl. B.* 309; *Byles*, 44; see "INFANT").

On a joint and several note the holder may sue all or only one of the makers, but if it be joint, then all must be sued, otherwise the omission may be pleaded in abatement (*Evans v. Lewis*, 1 B. & A. 226). When a note commences, "I promise to pay," and is signed by two parties, it is joint and several (*Clark v. Blackstock*, Holt, 474; *March v. Wood*, Pea. 130). A note drawn by one partner, "I promise to pay," and signed for self and partners, with his own name, is either joint or several (*Hall v. Smith*, 1 B. & C. 407; *Galway (Lord) v. Matthew*, 10 East, 264; but see *Ex parte Buckley*, 15 Law J. 3, Bank., ante, p. 451). A note signed by A. only cannot be treated as the joint note of A. and B., though given for the joint debt of both (*Siffkin v. Walker*, 2 Camp. 308). If a person sign a note under the impression that others are to join, and one of the others afterwards refuses to sign it, an action will not lie against the party who has been thus induced to sign it, unless it appear that being aware of his rights he consented to waive the objection (*Leaf v. Gibbs*, 4 C. & P. 466).

The assignees of a bankrupt may maintain an action in their own names only for a chose in action belonging to the wife of a bankrupt before marriage, as a promissory note given to her *dum sola* (*Yates v. Sherrington*, 11 M. & W. 412; see *McNeil v. Holloway*, 1 B. & A. 218).

A feme sole payee of a promissory note payable with interest married, and her husband survived her: held, in an action on the note by her administrator—first, that the note did not become the property of the husband, but passed to her administrator, though the husband had received the interest during her life, for that he did not thereby reduce the chose in action into possession (*Hart v. Stephens*, 6 Q. B. 937).

A description of the plts. as executors and trustees of A. B. is mere surplusage, the bill being payable to them in the name of the firm which they had assumed (*Aguttar v. Moses*, 1 Stark. 499). H. indorsed a promissory note, but did not deliver it. After the death of H. his executor delivered the note to the plt.: held, that the plt. had no title to sue on the note (*Bromage v. Lloyd*, 1 Exch. 32; 5 D. & L. Exch. 123).

In an action on a note payable to the executors of the late Mr. W. B., the proof that the plts. are the executors of Mr. W. B., is the production of the probate of his will, and reading in evidence so much of it as shows that he appointed the plts. his executors (*Hamilton v. Aston*, 1 C. & K. 679; per Rolfe, B.).

The description in a declaration on a bill of the deft.'s Christian name by a consonant letter put as one initial letter of such name is bad on special demurrer, unless excuse is averred for not setting it forth in full, even though one of the deft.'s Christian names be fully stated (*Kinnersley v. Knott*, 13 Jur. 658; 18 Law J., C. P. 281; see *Lomax v. Landells*, 13 Jur. 38; 18 Law J. 88, C. P.; *Miller v. Hay*, 3 Ex. 14; 18 Law J. 487).

Where, in pleading, a single vowel immediately precedes a surname, the Court will understand such vowel to be the Christian name of the party (*Kinnersley v. Knott*, supra).

Debt against the maker of a promissory note. Plea, that it was made by the deft. as the treasurer of a certain society which consisted of divers persons, to wit, fifty persons, and was called "The Silurian Lodge of Odd Fellows," &c., and as a security for any balance due to the society from the deft. as such treasurer, &c.: held ill, on special demurrer, for not stating the names of the persons composing the society, nor any reason for not giving them (*Williams v. Miles*, 18 Law J. 295, Ex.).

The declaration described the defts. as "The City Steam-boat Company:" held, on special demurrer, to be a sufficient description (*Woolf v. City Steam-boat Company*, 13 Jur. 456; 18 Law J. 125, C. P.).

Day of Drawing Bill.] It is not necessary in the case of an inland bill to state the date when the bill was drawn (2 Ch. Pl. 100 n. g); a variance in this respect is immaterial (Coxon v. Lyon, 2 Camp. 307, [*455] n.); even since the New Rules (Smith v. Lord, *2 D. & L. 758.)

The statement in a declaration on a promissory note that the deft. on a certain day made his promissory note, does not require proof that the note bore date on that day (Smith v. Lord, 2 D. & L. 759). *Quære*, if it require proof that the note was actually made on the day named (Ib.) The judge at nisi prius, will amend the date stated (Behtzing v. Scott, 4 C. & P. 24). Where the second count ran thus, "that afterwards, to wit, on the day and year aforesaid," the deft. drew a certain other bill of exchange, payable two months after date, without mentioning any express date in either count, the last was held sufficient by reference to the first (Hague v. French, *infra*; Giles v. Bourne, *infra*).

Custom of Merchants.] The allegation that the bill was drawn or accepted, &c., according to the custom of merchants, &c., is now exploded in practice (see Soper v. Dible, Ld. Raym. 175).

Date of the Bill.] It is neither safe nor necessary to allege that the bill bore date on a certain day, for such an averment, if incorrect, being matter of description, would be a variance (Anon. 2 Camp. 308, n.; see Cole v. Hawkins, 1 Stra. 22; De la Courtier v. Bellamy, 2 Show. 422; Hague v. French, 3 B. & P. 173; Giles v. Bourne, 6 M. & S. 73; and see Smith v. Lord, *supra*). A misstatement of the day when the note was payable by instalments is fatal (Wells v. Girling, Gow, 21); as to the manner of stating bill, dated by mistake, or wrong date, see Ch. Bills, 9th ed. 563. The judge, at nisi prius, will now amend the date stated (*supra*).

Place of Drawing.] It is not now necessary in counts on inland bills to state the place where they are drawn (Howreit v. Morris, 3 Camp. 304; 2 Ch. Pl. 88, n. q). But, on foreign bills, it is necessary to allege that they were made "in parts beyond the seas," although a foreign town be mentioned (thus, Dublin), otherwise the bill will be taken for an inland one (Sprowle v. Legge, 1 B. & C. 16; Kearney v. Ring, 2 B. & A. 301); Deybel's case, 4 B. & A. 243; and deft. may in his plea deny that he indorsed the said *inland* bill (Armani v. Castrique, 2 D. & L. 440; 13 M. & W. 448). It has been held, that a foreign note may be stated to be made at any place in England (Houriet v. Morris, 3 Camp. 304); but it seems doubtful whether it might not be a cause of special demurrer (Bayl. 22, n.; ib. 385). The court will not take judicial notice that a bill is drawn abroad; therefore, if it be alleged that it was drawn, &c., at Dublin, the note will not be taken to have been made in Ireland, and to be payable there, without an express allegation to that effect (Kearney v. Ring, *supra*; Sprowle v. Legge, *supra*).

Drawing of the Bill.] For the purpose of showing the deft.'s contract, the plt. must show in what manner deft. became liable, whether by making, &c., the note. The allegation of the party himself having drawn the bill is sufficient, though the party did so by his agent, because that is its legal effect (Leslie v. Hastings, 1 Moo. & R. 119; 12 Mod. 344; Collins v. Emmett, 1 H. Bl. 313; Russell v. Langstaff, 2 Doug. 515; Smith v. Mingay, 1 M. & S. 87; Molloy v. Davis, 7 Bing. 428); and so it may be stated, if a man sign his name on a blank paper, and deliver it to another to draw what bill he pleases (Bayl. 307).

A memorandum indorsed on a note after it is signed, stating the note to have been given upon a condition mentioned in an agreement referred to in the memorandum, is a mere earmarking of a note, and does not incorporate the agreement into it (*Brill v. Crick*, 1 M. & W. 232).

*Where a bill is drawn in the name of a firm, it is usual to state that certain parties by and under the name, style, and firm of, &c., [*456] made, &c. (*Tigar v. Gordon*, 9 M. & W. 347); *using* the style, name, &c., is bad on demurrer, for they may use that style and yet not draw the bill by it (*Ball v. Gordon*, 9 M. & W. 343; see *ante*, p. 450). The addition of the christian names of the partners to the style of a partnership, consisting of the surnames of the partners only, does not prevent the signature to a promissory note by one partner from binding the firm (*Norton v. Seymour*, 16 Law J. 100, C. P.; 11 Jur. 312). If, in a declaration, it be stated that the drawer made his bill of exchange, that is tantamount to saying he signed it (*Erskine v. Murray*, 2 Ld. Raym. 1542).

His own proper Handwriting thereto subscribed.] *Quære*, when the declaration stated that the defts. made the bill, their own proper hands being thereunto subscribed, when the bill bore the subscription of A. and Co., whether the variance be fatal or not (*Jones v. Mars*, 2 Camp. 305; *Bayl. B.* 389; *Levy v. Wilson*, 5 Esp. 180). The allegation of deft.'s handwriting was rejected; when it appeared that the name was written by another under deft.'s authority, that being sufficient (*Booth v. Grove*, 1 M. & W. 182; *nom. Both v. Grove*, 3 C. & P. 335). These words are not introduced into the new forms, it would therefore be improper to insert them now.

Direction to Drawee.] It is not absolutely essential that the drawee's name should be mentioned on the bill by the drawer if there be a place of payment fixed, and the drawee accept the bill in such form by writing his name thereon, which will be an adoption of the bill by him (*Gray v. Milner*, 3 Moo. 90; 8 Taunt. 739; 2 Stark. 336; see *Davis v. Clark*, 6 Q. B. 199). A bill may be directed to the drawer, although that would make it rather a note than a bill (*Block v. Bell*, 1 Moo. & R. 149; *Starke v. Cheeseman*, Carth. 509; *Dehors v. Harrot*, Show. 16; *Robinson v. Bland*, 2 Burr. 1077; *Jocelyn v. Laserre*, Fort. 282). A bill directed to A., or in his absence to B., being accepted by A., may be declared on, without taking notice of B. (*Anon.* 12 Mod. 447). If the word *at* be inserted before the drawee's name, whether in ignorance or fraud, the instrument is still a bill of exchange (*Shuttleworth v. Stevens*, 1 Camp. 407; *R. v. Hunter*, R. & R. C. C. 511; *Allan v. Mawson*, 4 Camp. 115). John Hart drew a bill payable to himself, or order, addressed to John Hart; C. wrote across this, "Accepted, H. J. C." Held, that C. could not be sued as acceptor of a bill of exchange directed to him (*Davis v. Clark*, 5 Q. B. 16).

Time when Bill, &c., payable.] When a declaration on a bill of exchange omitted the time at which the bill was payable, and the judge at nisi prius refused an amendment and nonsuited the plt., the court set aside the nonsuit on terms (*Pullen v. Seymour*, 5 Dowl. 164); so a demurrer, for that the count on a note omitted to state the time at which the note became payable was set aside as frivolous, allowing deft. to plead on an affidavit of merits (*Gurney v. Hill*, 2 Dowl. N. S. 936; 7 Jur. 834).

In some places usances mean one calendar month from the date of the bill; in others, two calendar months: a double usance is double this time; and half an usance is half of it; and, when an usance is one calendar

month, half an usance is fifteen days, without reference to the number of days in the month (Bayl. B. 251): and when a declaration sets out a bill drawn at one or more usances, or at half an usance, it must aver how many months or days they or it amounts *to, otherwise it will be bad on [*457] special demurrer (Buckley v. Campbell, 1 Salk. 131; Ch. Bills, 9th ed. 371, 504); but it will be cured by pleading over (Smart v. Dean, 3 Keb. 645).

Pay to Order.] It is essential for the plt. to show in what manner he derives his title to sue (Bishop v. Hayward, 4 R. T. 471). Therefore, in an action by the assignee of a bill or note, it is necessary to show that the bill or note authorizes a transfer; but in an action by the payee, it is not (Bayl. B. 396). The payee of a bill payable *to his order* may state it to have been payable to himself, and there is no occasion to aver that he made no order (Frederick v. Cotton, 2 Show. 8; Fisher v. Pomfret, Carth. 403; Smith v. M'Clure, 5 East, 476). Where the bill was "pay to my order," and the allegation was "pay to A. or order;" held to be no variance (Bluet v. Middleton, 1 D. & L. 376). A bill or note payable to the order of a person is payable to himself (Sheldon v. Pearson, Bayl. B. 329; Smith v. M'Clure, *supra*). A note payable to A., without the words "or bearer, or order," is a valid note (Smith v. Kendall, 6 T. R. 123).

A demurrer to a declaration on a bill of exchange, by indorsee against acceptor, for that it did not state to whose order the bill was drawn will not be set aside as frivolous (Hart v. Broadfoot, 8 Dowl. 306; 4 Jur. 579).

Declaration stated that the deft. made his promissory note, and thereby promised to pay to his order 500*l.* two months after date, and indorsed it to plt.; demurrer on the ground that a note payable to the maker's order was not a legal instrument, and could not be negotiated. Held, that the count was bad, for the instrument declared on as indorsed to the plaintiff was not a promissory note within 3 & 4 Anne, c. 9, s. 1, it not being made payable by the maker to some other person, or his order, or unto bearer (Flight v. M'Clean, 16 M. & W. 53; but see Wood v. Mytton, 16 Law J. 446, Q. B.; 11 Jur. 967, where it was held that the statute 3 & 4 Anne, c. 9, s. 1, does extend to, and render assignable and indorsable over, promissory notes payable to the order of the maker). A note, whereby five persons promised to pay "to our and each of our order," is a promissory note within sect. 1 of stat. 3 & 4 Anne, c. 9; and having been indorsed by one, an action may be maintained against him (Absolom v. Marks, 11 Jur. 1016, Q. B.; 17 Law J. 7, Q. B.). The declaration alleged that the deft. made his note payable to bearer, two months after date, and delivered it to J. K., who became the bearer thereof, and who indorsed and delivered it to plt.; it appeared that the note was payable to the maker's own order, and was indorsed in blank by deft. and afterwards by J. K.: held, that the plt. was entitled to recover, and the note was properly described.

A bill or note payable to a fictitious person, and to be indorsed by him, may be stated to be payable to the person in whose favour the indorsement is made; or, if it import to be indorsed in blank, it may be stated to be payable to bearer (Bayl. B. 395).

Where a bill through mistake has been made payable to a wrong person, the mistake may be stated, with an innuendo as to the person meant (Bayl. B. 396; Willis v. Barrett, 2 Stra. 29; Bishop v. Howard, *supra*). If a bill be accepted payable to — or order, and a *bona fide* holder insert his name as the payee, the bill may be described as payable to him, without noticing the blank (Attwood v. Griffin, R. & M. 425; 2 C. & P. 368; Crutchley v. Clarence, 2 M. & S. 90; see *post*, p. 460). Where the note or bill has been

returned to the payee, he may declare in his own right, without noticing that fact (Ch. Bills, 342).

A note made by several persons payable to "our and each of our order," and indorsed by one of three persons, is a good promissory note, within 3 & 4 Ann. c. 9 (Absolom v. Marks, 17 Law J. 7, Q. B.; 11 Q. B. 19). A note payable to the maker's own order is not a promissory note, within 3 & 4 Ann. c. 9 (Brown v. De Winton, Gay v. Lander, 12 Jur. 678; 17 Law J. 281, C. P.; 6 C. B. 336). But such a maker may, by indorsing it, give a right of action to the indorsee; and where the indorsement is in blank, and the note is circulated, it is in effect a note payable to bearer (Ib.). The declaration stated, that the deft. made his promissory note, and thereby promised to pay his the deft.'s own order, and alleged that the deft. indorsed the same to the plt. The deft., by his pleas, traversed the making and the indorsing: held, after verdict, that the defect in the declaration was cured, and that the plt. was entitled to recover (Ib.). So, also, where the declaration stated that the deft. made a promissory note payable to his own order, and indorsed it to Smith & Co., who indorsed it to the plt.: held, that, as against the maker and indorser, this was a valid promissory note payable to Smith and Co. or order; that the note before indorsement was in the nature of a promise to pay to the person to whom the maker should afterwards indorse it; and that the declaration would have been bad, on special demurrer, for not setting out correctly the legal effect of the instrument (Ib.). The following document held not to be a promissory note:—"August 5, 1844. Borrowed of Mr. J. White the sum of 200*l.*, to account for, on behalf of the Alliance Club, at ——— months' notice if required" (White v. North, 18 Law J. 316, Exch.). So, also, where the blank was filled up by the word "two" (Ib.).

Payable at a Particular Place.*] If the holder consent to take a bill payable at a particular place, the plt. must aver performance [458*] of this like other conditions precedent, by showing a presentment to the acceptor at the place specified, whether the action be against the drawer or acceptor (Gammon v. Schmoll, 3 Taunt. 344; 1 Mar. 80; Rowe v. Campbell, 3 Camp. 247, 304; Price v. Mitchell, 4 Camp. 204; Sanderson v. Bowes, 14 East, 500; Bowes v. Howe, 5 Taunt. 34); and it must be proved (Rowe v. Young, in error, 2 B. & B. 165; 2 Bligh, 390). In a count against acceptor of a bill stated to be "accepted payable at S. & Co.'s," it is sufficient to allege generally a request by the plt. to the deft. to pay the bill without alleging that it was presented "at the particular place" (Fenton v. Goundry, 13 Ea. 459; 2 Camp. 656; Halstead v. Skelton, 13 Law, J., N. S. 17; 5 Q. B. 86; Blake v. Beaumont, 4 M. & Gr. 7, nom. Blake v. Bowman, 14 Law J. 222, C. P.; and see Exon v. Russell, 4 M. & S. 505). In the Common Pleas it was held, that if a declaration allege a bill to be accepted payable at the house of certain persons at a particular place, it must also aver that the bill was presented payable at that place, and not to those persons generally (Ambrose v. Hopwood, 2 Taunt. 61; Huffam v. Ellis, Bayl. B. 407; 3 Taunt. 415). But an allegation that it was presented to them "according to the tenor and effect of the bill, and the acceptance thereof" was held sufficient (Ib.). By R. G. H. T. 4 Will. IV. 2, r. 8, no venue is required to be stated in a declaration, except the one alleged in the margin; and therefore in an action by the indorser against the indorsee of a bill of exchange, drawn payable in London, where the venue stated in the margin of the declaration was "London," it was held that an averment of presentment, not stating where, sufficiently alleged a presentment in London (Boydell v. Harkness, 4 D. & L. 178, C. P.; 10 Jur. 379). A promissory note was in the

following form:—"Six months after date, I promise to pay to A. B. or order, the sum of 500*l.*, value received. (Signed) Charles Baldwin. Payable at 14, Stratford Place, London." Held, that the words after the signature were no part of the note (*Padwick v. Baldwin*, 10 Law T. 325, Q. B.).

Declaration, alleging that the deft. made his promissory note, and thereby promised to pay to the plt., by name and addition of Miss Jessie Hope, at 10, Duncan Street, Edinburgh, the sum of, &c. Averment, that the plt., when and since the said sum became due and payable, was always ready and willing to receive the said sum according to the tenor and effect of the said note, of which the deft. had notice, yet, &c. On general demurrer, held, that this was a note payable at a particular place, and that the declaration was bad for want of an averment of presentment for payment there (*Spindler v. Grellett*, 17 Law J. 6, Exch.).

Indorsee against drawer of a bill accepted payable at a particular place; allegation that a presentment was made to the acceptor, the proof being that the bill was presented at the particular place where it was made payable: held, no variance (*Wilmot v. Williams*, 8 Jur. 987; 8 Sco. N. R. 713); and that the averment was proved by showing a presentment at the particular place without showing that the acceptor was there (*Ib.*).

A count on a promissory note made payable at a place named in the note, held bad, after verdict, for want of an averment of presentment at that place (*Emblin v. Dartnell*, 1 D. & L. 1010; 13 Law J., N. S. 255).

Since the 1 & 2 Geo. IV. c. 78, if drawee of a bill drawn without special direction as to place of payment accept it payable at a particular place [*459] *place (without additional words) he undertakes thereby to pay the bill at maturity when presented there, or to himself; if he accepts payable at such place "and not otherwise or elsewhere," he undertakes to pay it at maturity if presented at that place, and not otherwise (*Halstead v. Skelton*, 5 Q. B. 86; *Blake v. Beaumont*, *supra*; and see *Selby v. Eden*, 3 Bing. 611; *Froyle v. Bird*, 6 B. & C. 531; *Gibb v. Mather*, 2 Crompt. & J. 254). The use of the word "only" is not essential to qualify the acceptance, if the words "and not elsewhere" are inserted (*Higgins v. Nichols*, 7 Dowl. 551); and if a declaration by indorsee against acceptor of such a bill state that he accepted it "payable at C. & Co., bankers," and that the deft. promised to pay it "according to the tenor and effect thereof," it will be understood that the bill is pleaded according to its legal effect, but that does not imply that the bill is made payable at the bankers' only, and therefore the declaration need not state a presentment there (*Halstead v. Skelton*, *supra*).

Where a bill is made payable at the plt.'s bank, and when it becomes due there are no assets of the company in the bank; held, in an action by indorsee against indorser, that it was not necessary to show a presentment of the bill to the acceptor (*Bayley v. Porter*, 14 M. & W. 44; 14 Law J., N. S. 244). In an action against acceptor of a bill accepted payable at Messrs. W. & Co.'s, bankers, London, the count alleged the acceptance in the precise words, and a presentment at the place mentioned; held, no variance, though such acceptance is by the 1 & 2 Geo. IV. c. 78, a general and not a qualified one (*Blake v. Bowman*, 4 Sco. N. R. 617, nom. *Blake v. Beaumont*, 4 Man. & G. 7). If the maker of a note, by a note at the foot, make it payable at a particular place, the allegation (after stating the promise to pay in the usual manner) that the deft. then and there made the note payable at a particular place, does not amount to a misdescription of the note (*Hardy v. Woodroffe*, 2 Stark. 156). If the place of payment be mentioned so as to constitute no part of the contract, but a mere memorandum, it is not necessary to allege it (*Price v. Mitchell*, *inf.* Bayl. B. 220). When a promissory

note is in the body of it made payable at a particular place, it is proper so to state it (*Roche v. Campbell*, 3 Camp. 247, 304; *Price v. Mitchell*, 4 Camp. 201; *Sanderson v. Bowes*, 14 East, 500; *Bowes v. How*, 5 Taunt. 34; *Williams v. Waring*, 10 B. & C. 2; and see S. C. M. & R. 9); otherwise not (*Ib.*). The 1 & 2 Geo. IV. c. 78, relates merely to the acceptance of bills, and does not apply to notes.

The declaration stated that deft. made his promissory note, and thereby promised to pay to plt. "by the name and addition of Miss Jessie Hope, at 10, Duncan Street, Edinburgh," &c.: held, that this was a note payable at a particular place, and that the declaration was bad for want of an averment of presentment at that place (*Spindler v. Grellett*, 1 Ex. 384; 17 Law J. 6).

A note in the following form, "three months after date, I promise to pay to my own order the sum of 65*l.*, J. A. B., payable at Messrs. W. and P.'s, indorsed J. A. B., is not a note payable at a particular place (*Masters v. Baretto*, 13 Jur. 1124, C. P.). *Quere*, if *Trecothick v. Edwin*, 1 Stark. 469, is law (*Ib.*).

Description of Payee.] One C. drew a bill on the deft. in London, payable to H. D. It got into the hands of a different person of the same name, and was accepted by the deft., and the wrong H. D. indorsed to plt.: held, that no title passed to the plt. (*Mead v. Young*, 4 T. R. 28). If the name be spelled wrong it may be shown by verbal testimony who was intended (*Willis v. Barrett*, 2 Stark. 29). Where father and son are of the same name, it is *prima facie* payable to the father (*Sweeting v. Fowler*, 1 Stark. 106).

A note payable to trustees under A.'s will is a good note, and evidence is admissible to show who they are (*Megginson v. Harper*, 2 Cr. & M. 322). The payee is sufficiently designated in the following notes: "Received of A. B. 100*l.*, which I promise to pay," &c. "15*l.* 15*s.* balance due to A. C. I am still indebted, and do promise to pay" (*Chadwick v. Allen*, 2 Stra. 706).

A note payable to the manager of the National Provincial Bank, to an order by the payee in his own name; plea, that deft. did not make, &c.: held, plt. was entitled to recover (*Robinson v. Sheward*, 1 Sco. N. R. 419).

*If a bill be not made payable either to any payee in particular, or to the drawer's order, or to the bearer in general, it would seem [*460] that it is payable to bearer (*Minet v. Gibson*, 1 H. Bl. 608; but see *Ib.* per Eyre, C. B.). A bill payable to —, or order, was held to be no bill of exchange, for there was no payee (*R. v. Rundall*, Russ. C. C. 195; *R. v. Richards*, *ib.* 193; see further, "DEFENCE").

If a blank be left for the payee's name, a *bona fide* holder may fill it up with his own, and may recover against the drawer (*Crutchley v. Clarence*, 2 M. & S. 90; *Atwood v. Griffin*, R. & M. 425); but he must show that he had this authority from the drawer, in order to charge the acceptor (*Crutchley v. Mann*, 5 Taunt. 529; 1 Marsh. 29).

Where the name of the payee is not that of a person, as when the note is payable to ship *Fortune*, or bearer, it is payable to bearer simply (*Grant v. Vaughan*, 3 Burr. 1516; see *R. v. Box*, 6 Taunt. 325). By the 17 Geo. III. c. 30, all negotiable instruments under 5*l.* must specify the name of the payee and place of his abode.

When a bill through mistake has been made payable to a wrong person, the mistake may be stated with an innuendo as to the person meant (*Bayl. B.* 314; *Willis v. Barrett*, *supra*; *Bishop v. Hayward*, 4 T. R. 470).

When a bill or note is returned to a payee, he may declare on it in his own name (*Ch. Bills*, 343). If drawn payable to a fictitious payee, and the drawer indorse the fictitious payee's name, the holder cannot, either as in-

dorsee or bearer, recover against the acceptor (*Bennett v. Farnell*, 1 Camp. 130). If the acceptor at the time of acceptance knew the payee to be a fictitious person, he shall not take advantage of his own fraud, but a *bona fide* holder may recover against him, and declare as payable to bearer, or may recover on the money counts (*Minet v. Gibson*, 3 T. R. 481; 1 H. Bl. 569; see *Vere v. Lewis*, 3 T. R. 182; *Collis v. Emmett*, 1 H. Bl. 313; *Tatlock v. Harris*, 3 H. Bl. 174; *Bennett v. Farnell*, 1 Camp. 130).

Sum payable.] If there be any difference between the sum mentioned in the body of the bill and the sum superscribed, that in the body is the one for which the bill is made payable (*Saunderson v. Piper*, 5 Bing. N. C. 425; 7 Sco. 408). Where the figures express a larger sum than the words, evidence to show that the difference arose from an accidental omission of words is admissible (*Ib.*). An inaccurate, but intelligible, statement of the sum payable will not vitiate (*R. v. Port*, Bayl. B. 8; *Phipps v. Tanner*, 5 C. & P. 488). Where the money in which the bill is payable is foreign, it is necessary to show in the declaration that it is foreign money, or else its value (*Simmons v. Parmenter*, 1 Wils. 185; 4 Bro. P. C. 604; Ch. R. 359; but see *Ring v. Kearney*, *supra*; *Sprowle v. Legge*, *supra*). The omission of the word sterling is immaterial (*Kearney v. Ring*, 2 B. & A. 301; *Glossop v. Jacob*, 2 Stark. 69).

It seems that an averment in a declaration on a bill drawn in Ireland, and made payable in England, treating the sum mentioned in the bill as Irish currency, and stating it to be of the value of 232*l.* 4*s.* of lawful money of Great Britain, is material, and will prevent the plt. from recovering more than that sum; although, without such an averment, he would have been entitled to have treated the bill as of English currency (*Taylor v. Booth*, 1 C. & P. 286; *Kearney v. Ring*, *supra*; *Sprowle v. Legge*, 1 B. & C. 16; *Smith v. Smyth*, 10 Bing. 406).

Value received.] It has been held that the words "value received" are an essential part of the bill (*Cramlington v. Evans*, 1 Show. 5). *But [*461] they seem to be not at all material, and might be omitted from the declaration (*Grant v. De Costa*, 3 M. & S. 352, per Lord Ellenborough; see *Coombs v. Ingram*, 5 D. & R. 211; Ch. Bills, 67).

It has been questioned whether an action of debt will lie on a bill, unless the consideration be expressed (*Bishop v. Young*, *ante*, p. 447; *Priddy v. Henbrey*, *ante*, p. 447); but it is now decided that the action will lie, although the consideration be not expressed (*Hatch v. Traves*, 11 Ad. & E. 702; *Watson v. Knightly*, *ib.*; see *ante*, p. 447). If however they are stated, and a wrong meaning be given to the words, it is a fatal variance (*Highmore v. Primrose*, 5 M. & S. 65). But it is no variance to state "value delivered in leather," to be "value received in leather" (*Jones v. Mars*, 2 Camp. 307). The following bill, "Pay to F. and Co., or order, 315*l.* value received," and signed by the drawer, may be declared on as a bill for value received by the drawer from the payee (*Grant v. De Costa*, *supra*; *Highmore v. Primrose*, *supra*). A note described to be "for value received," is not disproved by evidence of a note payable to the plt.'s order "for value received in Mrs. L.'s estate" (*Bond v. Stockdale*, 7 D. & R. 140). If, however, the bill be drawn payable to the drawer's own order, the words value received mean by the drawee, and the declaration alleges it as value received by the drawer, the variance is fatal (*Highmore v. Primrose*, *supra*). Value received in a note means value received by the maker, of the payee (*Clayton v. Gosling*, 5 B. & C. 361).

Though the nature or particulars of the consideration appear on the note

or bill, it need not be stated in the declaration, or it may be stated generally as "value received" (Coombs v. Ingram, 4 D. & R. 211; Bond v. Stockdale, *supra*). The deft. may prove that the note was given for a different consideration, or without any consideration at all (Abbot v. Hendrick, 2 Sco. N. R. 183). But the deft. will not be allowed to contradict his written admission on the note of the nature of the consideration (Ridout v. Bristow, 1 Cromp. & J. 231; and see Edwards v. Jones, 2 M. & W. 414; 5 Dowl. 575).

Directions to place to Account &c.] This is unnecessary (Laing v. Barclay, 1 B. & C. 398; 2 D. & R. 530).

Before the commencement of this Suit.] Drawer against acceptor; allegation that the bill was made on the 29th March, payable four months after date, "which period has now elapsed:" held, sufficient, and that it was not necessary to aver that the four months had elapsed "before the commencement of the suit" (Owen v. Waters, 2 M. & W. 91; 5 Dowl. 324; 2 Gale, 208). But in a previous case, a demurrer to a count on a bill (in the exact form given by the rules T. T. 1 Will. IV.), for that the words "now elapsed" did not show that the bill was due before the action was commenced, was held not to be frivolous (Abbott v. Arlett or Aslett, 4 Dowl. 759; 1 M. & W. 209; 1 Gale, 405). The statement that the time elapsed before the commencement of this suit is still inserted in the books of pleading, and it may be advisable to adhere to it.

Where a count on a note was demurred to, for not stating whether the note was payable before the commencement of the suit, the court set aside the demurrer as frivolous, but allowed the deft. to plead on making an affidavit of merits (Gurney v. Hill, 2 Dowl. N. S. 936; 7 Jur. 834).

Where the allegation in the declaration is, that on the 25th of March, 1844, the deft. made his promissory note in writing, and thereby promised to pay the plt. on the 25th of March, 1845 (not *being laid under a *vide licet*), the sum mentioned in the note, "which day had expired before the commencement of this suit," the court held this allegation quite unnecessary, because they could see by the writ that the suit was commenced after the note was due, therefore that allegation may be struck out; Maule, J., observing that in Abbott v. Aslett, *supra*, Parke, B., says, in speaking of the old mode of declaring on bills of exchange, "If the date of the bill were stated with certainty, it was sufficient to show that it was payable a certain time after date; but if the day was laid under a *vide licet*, it was necessary to allege that the time for payment had elapsed before the commencement of the suit or the exhibiting of the bill" (Shepherd v. Shepherd, 3 D. & L. 200).

In *assumpsit* by indorsee against the maker of a bill of exchange, the second count stated that the deft. thereby required the acceptor to pay at three months' date, which period had then elapsed: held, that the averment was sufficiently certain, and was not ground of special demurrer (Maxwell v. Chambers, 8 Ir. Law R. 267).

In an action by indorser against drawer of a bill of exchange, the declaration contained the words "which period is now elapsed," and in the conclusion of the money counts the word "promise" was used instead of "promises:" held good, on special demurrer (Burret v. Daly, 8 Ir. Law R. 518).

Delivery of the Bill.] It is not necessary to state that the drawer or indorser of a bill delivered it to the payee, as it is implied in the allegation

that he made or indorsed the bill, &c. (Churchill v. Gardner, 7 T. R. 596; Smith v. M'Clure, 5 East, 477; Sheldon v. Occason, Bayl. B. 349; Bind v. Hampshire, 1 M. & W. 371, per Ld. Abinger). A statement of the delivery to the acceptor is untechnical in an action against him, but not demurrable (Smith v. M'Clure, *supra*). In an action against the acceptor, it is not necessary to aver a re-delivery from him after acceptance; for, if a re-delivery, or something tantamount, to show the assent of the drawee to charge himself, be necessary to an acceptance, a demurrer by admitting the acceptance impliedly admits the re-delivery (Smith v. M'Clure, *supra*); although a statement of a delivery of a note or bill to a holder be not necessary, yet an allegation of delivery alone, without an indorsement, is not sufficient (Cunliffe v. Whitehead, 6 D. 63; Bing. N. C. 828; see Bromage v. Lloyd, 16 Law J. 257, Ex. *post*).

In an action by payee against maker of a note, it is not necessary to state a delivery of the note (Conway v. Lewis, 8 Ir. Law R. 4).

Acceptance.] The holder's right of action accrues immediately after refusal to accept (Whitehead v. Walker, 9 M. & W. 506). By the 1 & 2 Geo. IV. c. 78, s. 2, an inland bill must be accepted by writing the same on the face of the bill; but there is no necessity for stating in the declaration that it was so accepted (Charlie v. Belshaw, 6 Bing. 529; 4 Moo. & P. 275).

The word accepted written on the bill is sufficient, although there be no signature; but it is a question for the jury whether the acceptance be complete (Dufaur v. Oxenden, 2 Moo. & M. 90).

If the bill be payable after sight, the day when accepted should be expressed (Bayl. B. 173); but it seems a variance is not material (Forman v. Jacob, 1 Stark. 46; Young v. Wright, 1 Camp. 139). Where a declaration alleged that a bill was drawn on the 18th of August, payable 60 days after sight, and was afterwards, to wit, on the day and year aforesaid, accepted by the deft., and the bill appeared to have been accepted on the 19th September: held, no variance (Forman v. Jacob, *supra*). Though

*it has been considered that if the plt. allege in terms that the
[*463] acceptance was made before the time limited by the bill for its payment, the plt. will be precluded from giving in evidence an acceptance afterwards (Jackson v. Piggott, Raym. 364; 12 Mod. 212; but see Bayl. B. 400; Leaper v. Tatton, 16 East, 420); but the drawee's name alone, written on any part of the bill, is a sufficient acceptance; so, without any name, the word "accepted," "presented," "seen," the month, or a direction to a third person to pay it (Anon. Comb. 401; Powell v. Monnier, 1 Atk. 611; Moore v. Whitby, B. N. P. 240; Dufaur v. Oxenden, *supra*).

Where one banker who held a check drawn on another presented it after four o'clock, and it was not paid, but according to practice a mark was put on it, to show that the drawer had effects, and that it would be paid; this was held to be an acceptance, payable next day at the clearing-house (Robson v. Bennett, 2 Taunt. 388).

An acceptance in blank, the bill being afterwards drawn in pursuance of the acceptor's authority, is good (Leslie v. Hastings, 1 Moo. & R. 119). An acceptance written on the paper before the bill is filled up, will charge the acceptor to the extent warranted by the stamp, and it is not necessary that the bill should be drawn up by the person to whom the acceptor handed the blank stamp (Schultz v. Ashley, 2 Sco. 815; 2 Bing. N. C. 544).

Although the acceptance be written first, it will be no variance, if the

declaration state the drawing to have been first and the acceptance afterwards (*Molloy v. Delves*, 7 Bing. 428; 5 Moo. & P. 275).

A bill may be accepted after the period at which the bill was made payable has elapsed, and the acceptor will be liable on demand, and if it be stated that the acceptance was according "to the tenor and effect," these words are surplusage (*Jackson v. Pigot*, 1 Ld. Raym. 364; *Mutford v. Walcott*, ib. 573; *Stein v. Eglesias*, 5 Tyrw. 172; 1 C. M. & R. 565). It may also be accepted after a previous refusal to pay (*Wynne v. Raikes*, 5 East, 514; 2 Sm. 98).

The acceptance need not be stated, except in actions against the acceptor, or on bills payable within a limited time after sight (*Bayl. B.* 316; 4 Camp. 409). If unnecessarily stated, it need not be proved (*Tanner v. Bean*, 4 B. & C. 312; 6 D. & R. 338; overruling *James v. Morgan*, 2 Camp. 472).

A person is not liable as acceptor who accepts by procuration for the drawee, but without his authority, for no one can be liable as such but the person to whom the bill is addressed, unless he be an acceptor for honour (*Polhill v. Walter*, 3 B. & Ad. 122). John Hart drew an instrument payable to himself or order, addressed John Hart; Clarke wrote across it, "Accepted, H. J. Clarke:" held, that he could not be sued as acceptor of a bill of exchange directed to him (*Davis v. Clarke*, 6 Q. B. 16). An acceptance by an agent may be stated to be by principal (*Heys v. Haseltine*, 2 Camp. 604). A bill of exchange was drawn upon the plt., and accepted by his wife in her name, she having authority to accept for him: held, that the plt. was liable on the bill as acceptor. If a principal authorizes an agent to accept a bill, such principal is liable as acceptor, though wrongly described by his agent in the acceptance (*Lindus v. Bradwell*, 12 Jur. 230; 17 Law J. 121, C. P.). In an action by the indorsee against the drawer, it is not necessary to aver that the bill has been accepted (*Parkes v. Edge*, 1 C. & M. 429).

In an action against a party as acceptor of a bill of exchange, accepted in his name by another person, where evidence has been given of a general authority in that person to accept bills in the deft.'s name, an admission by the deft. of liability on another bill *so accepted is [*464] good evidence confirmatory of the former (*Llewellyn v. Winkworth*, 13 M. & W. 599).

In an action by indorsee against acceptor, allegation that one P. N. drew the bill, and required the deft. to pay to his order, &c., and that the deft. accepted, and N. P. indorsed it to the plt.; special demurrer, for that "his" was ambiguous, &c.: held, that his could not necessarily be referred to the last antecedent, and that it sufficiently appeared that it had reference to the drawee (*Spyer v. Thelwell*, 4 Dowl. 509; 2 C. M. & R. 692).

Where a bill of exchange is drawn upon five persons, not a trading partnership, but jointly contracting for this particular occasion, and the bill is accepted by one of them only, in his own name, this is a sufficient acceptance to bind the others (*Jenkins v. Morris*, 9 Law T. 151, Ex.).

The acceptor cannot, in an action against him by the indorser, dispute the handwriting of the drawer, and if he do so by plea, the plt. may reply the acceptance by way of estoppel (*Sanderson v. Collman*, 4 Sco. N. R. 638; 4 Man. & G. 209).

A partner has no implied authority by law to bind his co-partners by his acceptance of a bill of exchange, except by an acceptance in the true style of the partnership; therefore, where a firm consisted of J. B. & C. H., the partnership name being J. B. only, and C. H. accepted a bill in the name of J. B. & Co., it was held that J. B. was not bound thereby (*Kirk v. Blurton*, 9 M. & W. 284).

It is improper to aver that the acceptor's handwriting was subscribed, as it can never help, and if the bill be accepted by procuration, it would be a fatal variance (Bayl. B. 402; *Levy v. Wilson*, 5 Esp. 180); but it would not be so if signed by one of a firm (*Jones v. Marr*, 2 Camp. 305; *ante*, 456); and it would seem that it would be obviated by a subsequent promise (*Helmsley v. Loader*, *ib.* 150). Where the time of payment depends upon the presentment, and the action is against the drawer of a bill, or indorser of a bill or note, this should be the very day of presentment (Bayl. B. 405); in other cases, the exact day is not material.

Conditional Acceptance.] Where a bill has been accepted by the drawee, if another person accept it also, for the purpose of guaranteeing the first acceptor, the second acceptance is merely a collateral undertaking, and must be declared on as such (*Jackson v. Hudson*, 2 Camp. 447).

As to pleading specially that the acceptance was qualified, see *Lyon v. Wall*, 2 Moo. & S. 736. If the acceptance were in fact conditional, it will not support the allegation of an absolute one, though the condition be performed (*Langston v. Corney*, 4 Camp. 177; *Ralli v. Sarrell*, *post*, 165; *Swan v. Cox*, 1 Marsh. 176); if the condition have not been performed, a legal excuse must be averred and proved, if denied (*Ros. Ev.* 206).

Whether the acceptance be conditional or not is a question of law (*Sproat v. Mathews*, 1 T. R. 182). The following have been held to be conditional acceptances. When, on the presentment of bills for acceptance, the drawee said he would have accepted them if he had certain funds, which he had not been able to obtain from France, but that when he did he would pay the bill (*Mendizabel v. Machado*, 3 Moo. & S. 481). So, "to pay as remitted for" (*Banbury v. Lissett*, Stra 1212). So, that the bills would not be accepted until a money bill was paid (Bayl. B. 178; see *Julien v. Showbrooke*, 2 Wils. 9; *Smith v. Abbott*, 2 Stra. 1152).

When the acceptance is in writing, and absolute, it may be suspended *on a condition by another contemporaneous writing (*Bowerbank* [*465] *v. Monteiro*, 4 Taunt. 844; but see 1 & 2 Geo. IV. c. 78, s. 2; and see *Spiller v. Westlake*, 2 B. & Ad. 157; *Gibbon v. Scott*, 2 Stark. 286). But it cannot be available against an indorsee ignorant of such paper (*Bowerbank v. Monteiro*, *supra*); a mere verbal condition is inadmissible (*Hoare v. Graham*, 3 Camp. 57; *Adams v. Wordly*, 1 M. & W. 374; 2 Gale, 29).

Though, when a condition is performed, a conditional acceptance becomes absolute; yet in pleading it must be declared on as a conditional acceptance (*Langston v. Corney*, 4 Camp. 176; *Ralli v. Sarrell*, *supra*; *Swan v. Cox*, *supra*, where see a form). A bill having been accepted for the purpose of taking up other bills accepted by the same party, for the accommodation of the drawer, was held to be properly described as having been accepted for the accommodation of the drawer, (*Thomas v. Fenton*, 16 Law J., N S, Q. B. 362; 2 C. B. 58).

Foreign Bills.] In case of foreign bills, a parol acceptance by collateral writing is still sufficient, according to the law of England. The following cases may therefore be taken to be applicable to such bills. A letter stating that such bill "shall meet with due honour" (*Clarke v. Cock*, 4 East, 57); so, that the holder "may rest satisfied as to such payment" (*Wilkinson v. Lutwidge*, 1 Stra. 649; *Wynne v. Raikes*, 5 East, 514). "What! not accepted? We have had the money, and the bills ought to have been paid. But I do not interfere in this business; you should see my partner" (*Fairlee v. Herring*, 3 Bing. 625).

A. having ordered goods of B. and C., a commercial house at Genoa, directed them to draw a bill of exchange for the amount upon a banking company in England, of which A. was a customer; A. having given notice of the drawing of this bill to the banking company, they wrote a letter to A. promising to accept it, which was the next day countermanded, with information that they would not accept the bill, to which A. assented afterwards. A. showed the letter, promising to accept to C., A.'s partner in the house of B. & C., resident in England, but suppressed the fact of his having received the second communication. In an action by B. and C. on this bill, as drawers, against the banking company as acceptors; held, that the first letter to A. operated as an acceptance, and enured to the benefit of the drawers, and could not therefore be affected by what subsequently passed between the banking company and A. (Grant v. Hunt, 14 Law J., N. S. 106; 9 Jur. 228; 1 C. B. 45).

Quære, whether it is essential that a promise to accept or pay on the face of the bill should be communicated to some party to the bill, or to the holder, or to some agent for such party or holder, in order to bind the party making it (Grant v. Hunt, 9 Jur. 228).

A promise to accept a non-existing foreign bill of exchange does not amount to an acceptance, there must be a bill in existence (Ireland Bank v. Archer, 12 Law J., N. S. 353; 11 M. & W. 383; 7 Jur. 379).

A merchant abroad, on the 21st of August, 1840, drew upon the defts., his London correspondents, a bill for 225*l.*, payable to plt.; they refused to accept it, and, on the 11th of September, refused to pay it; on the 13th the drawer died insolvent; on the 15th the defts., in ignorance thereof, wrote a letter, in which they said, "Respecting the drafts on us, we have to advise that we have paid, and are prepared to pay the following," mentioning the one in question. In a postscript they add, "We have been informed that the holders *of the bill above for 225*l.* had returned [*466] it to you; this they had no right to do, as already explained to you; they were bound to keep it until the following post day. The said bill we are almost sure was presented again on Saturday last, therefore we cannot conceive how it can have been sent back before this day. You ought to require proof that this bill had been returned by Friday's mail, otherwise the charge made thereon cannot be demanded of you." Held, that this contained an absolute promise to pay, which amounted to a valid acceptance of the bill, and that the effect of the letter was not destroyed or altered by the postscript (Billing v. Devaux, 3 Man. & G. 565; 4 Sco. N. R. 175).

As between the holder of a bill of exchange and the drawer or the indorser the *lex loci contractus* of the drawer, and of the indorser and not of the acceptor governs the liabilities of the drawer and indorser respectively. Therefore where A. (resident in Demerara), drew a bill of exchange in favour of B. (also resident in Demerara), upon C. resident in Scotland, and C. accepted it, making it payable in London; B. indorsed the bill to D., who afterwards became bankrupt. When C.'s acceptance became due, he held a bill of exchange accepted by D., D.'s assignees brought an action in Demerara against A. and B. upon the bill of exchange: held, reversing the decision of the Court of Demerara, (the Roman-Dutch law), and not the law of England must govern this case, and that according to that law, A. & B., the drawer and indorser of the first bill were at liberty to plead D.'s bill as compensation *pro tanto* of the first bill (Allen v. Kemble, 13 Jur. 287, P. C.).

Indorsement.] Every indorsement essential to a transfer should be stated, and unnecessary ones omitted (Bayl. B. 403; Peacock v. Rhodes, Vol. I.

Doug. 611, 633; see *Waynam v. Bend*, 1 Campb. 175; *Critchlow v. Parry*, 2 ib. 182; *Mayer v. Jadis*, 1 Moo. & R. 247). For it is not essential to state all the indorsements (*Chaters v. Bell*, 4 Esp. 210); but all that can be proved should be stated, and the plt. should not declare as immediate indorsee of the first indorser, when it may be material to make title through or from an intermediate indorsee (see Ch. Bills, 8th ed. 588; *Stein v. Yglesias*, 1 Gale, 98; see *Davis v. Dodd*, 4 Taunt. 602; 2 Ch. Pl. 76). Where, however, they are all stated they must be proved (*Waynam v. Bend*, 1 Camp. 175); unless proof be waived (*Bosanquet v. Anderson*, 6 Esp. 43). But such as are not proved may be struck out at the trial (*Mayer v. Jadis*, 1 Moo. & R. 247; see *Peacock v. Rhodes*, Doug. 633). But then the payee's indorsement must be shown, and those whose indorsements are struck out will be discharged from liability. As an amendment will be allowed at the trial, the safer course will be, when any doubt exists as to the power of proving any of the indorsements, to state them. Where the declaration stated an indorsement by the first indorsee, on an issue whether the bill was so indorsed after it became due, it was held that the deft. proved the fact by showing that the plt. did not become indorsee until after the bill was due, though the intermediate indorsement (not stated) was before that period (*Stein v. Yglesias*, *supra*). The plt. must show an indorsement to himself; an omission would be fatal even after verdict (see *Bishop v. Hayward*, 4 T. R. 471). The declaration stated that the defts. made their promissory note, and promised to pay one H., since deceased, or order, 300*l.* on demand; that H. indorsed the note without making any delivery thereof; that H. died, having appointed his wife sole executrix, who afterwards transferred the note to the plt., *to wit*, by delivery thereof to him. Held, on general demurrer, that the word "transferred" meant a delivery only, and not an indorsement and delivery; and that the declaration was bad (*Bromage v. Lloyd*, 16 Law J. 257, Ex.).

A declaration by indorsee against acceptor of a bill of exchange, stated it to be drawn by certain persons using the name, style, and firm of M. & Co., and that the said M. & Co. indorsed it. *Semble*, this was not a sufficient description, as it did not show that M. & Co. drew or indorsed the bill in that name (*Ball v. Gordon*, 9 M. & W. 345). But where it was stated to be drawn by certain persons by and under the name, style, and firm of G. and Son, and that "these persons, by and under the said name, style, and firm of G. and Son," indorsed it, it was held sufficient (*Tigar v. Gordon*, ib. 347; see *ante*, p. 460). Where the deft. was sued by the initial of one of his christian names, the court refused to set aside a demurrer as frivolous (*Nash v. Collier*, 11 Jur. 1017, C. P.).

*A bill of exchange is a personal contract, entire in its nature, [*467] a part of it, therefore, cannot be assigned so as to entitle the indorsee to an action (*Hawkins v. Gardner*, 12 Mod. 213; *Hawkins v. Cardy*, Ld. Raym. 360; *Carth. 466*); unless he allege that the residue was paid (ib.).

The mark of a person who cannot write is a sufficient indorsement (*George v. Surrey*, M. & M. 516).

Where the indorsement is made by an agent, it is not necessary so to allege it; it suffices to state that the indorsement was made by the principal (*Keys v. Haseltine*, 2 Camp. 694; *Bass v. Clive*, 4 Camp. 78).

It is not necessary to state that one partner indorsed for himself and co-partners, it may be stated that all indorsed (*Bass v. Clive*, 4 Camp. 78; *Keys v. Haseltine*, 2 Camp. 604). The indorsement of one partner must be in the name of the firm, in order to bind the others (*Kirk v. Blurton*, 9 M. & W. 284). Where the declaration stated that a bill of exchange was

indorsed by certain persons trading under the firm of H. & F., by procuration of J. D.: held, that this allegation was supported by evidence of J. D.'s handwriting, and that he, being the managing partner in a firm carrying on their business under the designation of H. & Co., was in the habit of indorsing bills in the manner above stated, although there was no such person as F. in the firm of H. & Co., and no direct proof that J. D.'s partners were privy to these transactions. One partner may act for the whole firm by procuration (*Williamson v. Johnson*, 1 B. & C. 146).

As to initials or contractions of the names of a firm, see *supra*. A variance in the description of indorser's name is sometimes immaterial (*Forman v. Jacob*, 1 Stark. 47). An indorsement made after the bill became due, may be stated as if made before; the date of the indorsement, therefore, if there be one, need not be alleged (*Bayl. B. 402*; *Wright v. Young*, *supra*; *Purcell v. Macnamara*, 9 East, 157). Blank indorsements are alleged in the same manner as those in full.

An affidavit to hold to bail stated the deft. to be indebted on a promissory note made by him, delivered to F., and indorsed by F. to the plt., whereas the declaration alleged that the indorsement was by F. to E., and by E. to the plt.: held, not a material variance (*Lace v. Irwin*, 3 M. & W. 27; 6 Dowl. 92). In an action by indorsee against acceptor, it is not necessary to aver notice to the acceptor of indorsement to the plt. (*Skelton v. Halstead*, 2 D. N. S. 69; *Heald v. Johnson*, 2 Sm. 44); nor in an action on a note by indorsee against the maker (*Reynolds v. Davies*, 1 B. & P. 625).

As to the words "their own proper hand," &c. see *ante*, p. 259. Where the word "delivered" was used, instead of "indorsed," the declaration was holden bad on general demurrer (*Cunliffe v. Whitehead*, 6 Dowl. 63; see *Bromage v. Lloyd*, *supra*).

The indorsee of a note cannot declare against his indorser as maker, even where the latter has indorsed a note, not payable, or indorsed to him, and where, consequently, his indorsee cannot sue the original maker (*Gwinnell v. Herbert*, 5 Ad. & E. 436; 6 Nev. & M. 723). The declaration stated that the deft. made his bill of exchange, and directed the same to J. B., and required him to pay to the deft.'s order 187*l.* 16*s.*, and then indorsed the bill to the plts. It appeared the bill was drawn by F., and indorsed by the deft. in blank, and having been delivered by the deft. to F., was by him taken to the bank of which the plts. were the managers, and given in renewal of another bill discounted by them and drawn and indorsed by the same parties. Held, that proof of indorsement by deft. did not support

*the averment that he was the maker, and even assuming that an [*468] indorser might be treated as a drawer, still the present indorsement, being in blank, was equivalent to the drawing of a new bill payable to bearer, and therefore the bill was mis-described in the declaration, and that the plt. could not recover on the account stated (*Burmester v. Hogarth*, 11 M. & W. 97; 12 Law J., N. S., 178). Where there are several indorsers to a bill between the payee and the deft., the plt. may declare on an indorsement by the payee to the deft., and by the deft. to the plt., without stating those between (*Chaters v. Bell*, 4 Esp. 210; *Williamson v. Johnson*, 1 B. & C. 146); and where the plt. sues a remote indorsee, it is usual to set out in the count every indorsement, and, where the first is in blank, it is prudent to add a count stating the plt. to be the immediate indorsee of the first indorser, and striking out before the trial all such intermediate indorsements, in order to avoid the necessity of proving the signature of the various indorsers (*Peacock v. Rhodes*, Doug. 633; *Kyd*, 206; Ch. Bills. 359). Where the plt. would omit an indorsement, he should represent that which precedes the indorsement to be omitted to have been made in favour of the person who

is indorsee, upon that which follows: thus, if a bill payable to A.'s order be indorsed by him in blank, and delivered to B., and indorsed by B. to C., if C. would omit stating B.'s indorsement, he should state that A. indorsed it immediately to him, C. (Bayl. B. 403). As to the mode of improving an indorsement, and when it must be proved, see *post*, 515.

A promissory note payable by instalments is assignable within the stat. 3 & 4 Anne, c. 9 (*Oridge v. Sherborne*, 11 M. & W. 374; see *Carlton v. Kenealy*, 12 M. & W. 139, *post*).

When the declaration against the indorsee of a bill of exchange alleges that A. made the bill and indorsed it to the deft., the latter is not estopped by his indorsement to deny these allegations, though it is very strong evidence of them (*Armain v. Castrique*, 13 M. & W. 443). By the law of France an indorsement in blank does not transfer any property in a bill of exchange. Held, that the holder of a bill drawn in France and indorsed there in blank cannot recover against the acceptor in the courts in this country (*Trimbey v. Vignier*, 1 B. N. C. 151. A foreign note is transferable in England by indorsement, by virtue of 3 & 4 Anne, c. 9 (*Bently v. Northhouse*, Moo. & M. 66; *Miln v. Graham*, 1 B. & C. 192).

Indorsement by an Administrator, &c.] In an action by indorsee of an administrator it is not necessary to make profert (*Stone v. Linson*, Willes, 559; nor, it seems, to state the letters of administration (*Ib.*), although in practice that form is adopted. H. indorsed a note, but did not deliver it; after the death of H., his executor delivered the note to plt.: held, that plt. had no title to sue on the note (*Bromage v. Lloyd*, 1 Ex. 52).

Delivery of the Bill.] The statement of a delivery of a bill or note to the holder is not necessary, as it is implied in the indorsement (*Brind v. Hampshire*, 1 M. & W. 371; see *Churchill v. Godwin*, 7 T. R. 596). On the other hand, an allegation of delivery alone without indorsement is not sufficient (*Cunliffe v. Whitehead*, 6 Dowl. 63; 3 Bing. N. C. 828; see *ante*, p. 462).

Notice of Indorsement.] An averment of this is unnecessary (*Reynolds v. Davies*, 1 B. & P. 625).

Presentment for Payment, &c.] In an action against the acceptor [*469] *of a bill the presentment need never be stated (*Frampton v. Coulson*, 1 Wils. 33). It is, however, averred in some of the forms prescribed by the judges, and should be used where it is so if it can be proved. If a bill be made payable at a particular place, according to the 1 & 2 Geo. IV. c. 58, *ante*, p. 458, it must be stated (*Fayle v. Bird*, 2 C. & P. 303). Where made payable at a banker's, it is not necessary to aver that the bill was presented to the bankers (*Hawkes v. Borwick*, 4 Bing. 135; *Giles v. Bourne*, 6 M. & S. 73); or that they did not pay (*Ib.*). If the necessary words are not in the acceptance of the bill, presentment at the bankers' need not be averred (*Halstead v. Skelton*, 5 Q. B. 86; and see *Blake v. Beaumont*, 1 D. N. S. 697). And if the holder neglect to present, and the bankers, at whose house it is made payable, fail with money of the acceptor in hand, he is not thereby discharged (*Turner v. Hayden*, 4 B. & C. 1); otherwise, if acceptance be qualified (*Rowe v. Young*, 2 B. & P. 165). Where a bill is drawn as well as accepted at a particular place, it is essential to state the fact, and aver presentment there, in an action against the drawer or indorser (*Gibbs v. Mather*, 8 Bing. 214). In an action by indorsee against drawer,

where bill drawn and accepted at a particular place, it is not necessary to state a presentment to the acceptor (*Skelton v. Braithwaite*, 8 M. & W. 252). If an averment of presentment be unnecessarily stated, it need not be proved (*Ch. Bills*, 378). On a note payable on demand, it is advisable in one count in an action against the maker to aver a demand (*Ib.* 360). No objection can be taken on demurrer; at least, not assigning the cause specially, that after stating the day on which the bill was drawn, which was made payable at a future day, the count alleged that afterwards, to wit on the same day, &c., the demand of payment was made (*Exon v. Russell*, 2 M. & S. 505).

The promise must not be placed before the allegation of default by the acceptor, nor should it be alleged that the acceptor or the deft. did not pay, &c., when due; as, for aught that would appear, he might have paid afterwards (*Hedger v. Stevenson*, 2 M. & W. 799; 5 Dowl. 771; M. & W. 176).

In an action against the drawer or indorser, it is essential to state that the bill or note was presented, or that some sufficient excuse be shown, as that the drawer or maker could not be found; or that the deft. had he paid the bill, would have had no remedy against them (*Bayl. B.* 322; *Mercer v. Southall*, 2 Show. 180; *Doug.* 654; *Rushton v. Aspinwall*, ib. 659, 680; *Heylyn v. Adamson*, 2 Burr. 678; 2 H. Bl. 565). A subsequent promise by the deft. to pay is evidence of the presentment for payment, &c., and no special count is necessary to meet such promise (*Lundie v. Robertson*, 7 East, 231).

An averment, that when the bill became due according to the tenor, to wit, on the 31st of March, 1822, it was duly presented for payment, was held sufficient on a special demurrer, assigning for cause that the 31st of March was on a Sunday; it is sufficient to state that the bill was presented when it became due according to its tenor (*Bynner v. Russell*, 7 Moo. 267; 1 Bing. 23).

Where a person not party to a bill guarantees the payment by the acceptor, he is not entitled to require proof of presentment (*Hitchcock v. Henfrey*, 5 Man. & G. 559; 6 Sco. N. R. 540).

If a presentment by a certain person be alleged, presentment by another may be proved (*Boehm v. Campbell*, 1 Gow, 55).

Where it is ambiguous on the face of an instrument, whether it be a bill of exchange or promissory note, the payee may treat it as either, and presentment is unnecessary (*Adis v. Bury*, 6 B. & C. 433; *Gray v. Milner*, 8 Taunt. 739; *Allan v. Mawson*, 4 Camp. 615; *Shuttleworth v. Stevens*, 1 Camp. 407). Where a bill is drawn, *payable to the [*470] order of the drawer at a particular place, *semble*, that a declaration against the drawer or indorser, alleging a presentment generally, is sufficient after verdict (*Lyon v. Holt*, 5 M. & W. 250). In an action against indorser of a bill, though it is necessary to prove a presentment at the place pointed out by the acceptance, yet the declaration need not allege that the bill was accepted at that place; though, if so stated, there must be a corresponding allegation of presentment (*Parker v. Ade*, 1 Dowl. 643; *Parker v. Edge*, 1 C. & M. 429; *Parkes v. Edge*, 3 Tyrw. 364). In assumpsit on a bill of exchange drawn upon "P. P., No. 6, Budge Row," and accepted, &c., averment that the bill when due was presented, and shown to P. P. for payment, is supported by proof that the holder went to 6, Budge Row, to present it, but found the house shut up, and no one there (*Hine v. Alleby*, 4 B. & Ad. 624). In a declaration against drawer and acceptor of a bill payable for honour, it is necessary to aver that presentment for payment was made to the drawee, and, for want of such averment, judgment was arrested (*Williams v. Germaine*, 7 B. & C. 468; 1 M. & R. 394, 403). In a declaration by indorsee against indorser of a bill of exchange, drawn payable *in London*, the alle-

gation of presentment for payment was general. The venue stated in the margin of the declaration was London. Held, there being no traverse of the presentment,—that, inasmuch as by the rule of court, H. T. 4 Will. IV., such venue shall be taken to be the venue intended by the plt., and no venue shall be stated in the body of the declaration, there was a sufficient allegation in the declaration that the presentment for payment was made in London (*Boydell v. Harkness*, 10 Jur. 476; 15 Law J. 233, C. P.; 3 C. B. 168).

The statute 1 & 2 Geo. IV. c. 78, relating to the acceptance of bills, making them payable at a particular place, does not extend to promissory notes (*Emblin v. Dartnell*, *supra*; per Parke, B.). Where a note is in the body of it made payable at a particular place, a presentment at a particular place must be averred (*Roche v. Campbell*, 3 Camp. 247, 304; *Price v. Mitchell*, 4 Camp. 201; *Sanderson v. Bowes*, 14 East, 500); and an omission would be bad after verdict (*Emblin v. Dartnell*, 1 D. & L. 1011; 12 M. & W. 1010). Where, however, the place of payment is noticed only in the margin, or at the foot of the note, there the averment of presentment need not be made (Ch. Bills, 23); and, if stated, it is mere surplusage, and need not be proved (1b. 8th ed. 640, n. b.).

Day and Time of Presentment.] This should be alleged to be on the third day of grace, and if that should be on a Sunday, Christmas-day, or Good Friday, or on public days of fasts or thanksgivings, then it should be on the day previous (39 & 40 Geo. III. c. 42; 7 & 8 Geo. IV. c. 15, s. 2).

Declaration by indorsee against acceptor of a bill of exchange averred the drawing, acceptance, and indorsement in the ordinary form. Breach: yet deft. hath disregarded his said promise, and hath not paid the said sum or any part thereof. Demurrer: for that the declaration does not show that the three days of grace had passed before the commencement of the suit: held, frivolous, upon motion to rescind a judge's order setting it aside (*Padwick v. Turner*, 11 Jur. 930, Q. B.).

Three days of grace are allowed on promissory notes as well as bills of exchange (*Brown v. Harraden*, 4 T. R. 148; and see *Ward v. Honeywood*, 1 Dougl. 61); even were payable to A. without adding or "to his order" or "to bearer" (*Smith v. Kendall*, 5 T. R. 123; 1 Esp. 231). *Quere*, [*471] whether days of grace are allowed on bills payable at sight* (*Janson v. Thomas*, 3 Dougl. 421). The presentment for payment on the day before the bill became due, allowing days of grace, is premature (*Wiffin v. Roberts*, 1 Esp. 261). The three days of grace are allowed on bills drawn and payable in Scotland (*Ferguson v. Douglas*, 6 Bro. P. C. 276). At *Hamburgh*, the holder need not present it until the eleventh day after the time limited for its payment, when the eleventh day is a post day, and if it be not he must present it on the next preceding post day, unless the drawer reside at *Lubeck* or *Bremen*, or other places near *Hamburgh*, which are in daily intercourse with it, in which case the holder need not present it until the eleventh day, although that day be not a post day (*Goldsmith v. Shee*, and *Same v. Bland*, Bayl. B. 199).

Where a bill is payable at a certain date, a presentment for payment must be proved to have been made on the last day of grace, whether the bill be an inland or foreign bill (*Brown v. Harraden*, 4 T. R. 152; *Tassel v. Lewis*, 1 Ld. Raym. 743; *Anderton v. Beck*, 16 East, 248).

Bills payable on demand have no days of grace (Ch. Bills, 146).

A bill payable after sight, having been refused acceptance and protested, was accepted eight days after, by a person for the honour of the drawer; when at maturity, according to that acceptance, it was presented for payment to the drawee and acceptor for honour: in actions against the latter and the

drawer, held, that these presentments for payment were made at a proper time (*Williams v. Germaine*, 7 B. & C. 468; 1 M. & R. 394). A bill payable sixty days after sight becomes due sixty days after acceptance and after protest for non-payment (*Campbell v. French*, in error, 6 T. R. 200; 2 H. Bl. 163).

Before the new pleading rules, it was held that the declaration should contain an allegation of demand upon, and a refusal by the acceptor on the day when the note was payable, otherwise there was error, which was not cured by verdict (*Rushton v. Aspinall*, *supra*); unless the plt. alleged that "afterwards, and when the said bill became due and payable, according to the tenor and effect thereof, to wit, on, &c." which was considered the safer way (*Bynner v. Russell*, 1 Bing. 23; 7 Moo. 286; but see the forms, *post*, 485). Where, in an action against the acceptor of a bill payable a limited time after sight, the declaration alleged a presentment for payment, mistaking the day on which such presentment was made, it was held immaterial (*Forman v. Jacob*, 1 Stark. 46).

If a bill be payable on an event, it must be alleged that that event has taken place (Ch. Bills, 181, 356). In an action against an acceptor *supra* protest, it was held, that the declaration should aver that the bill was presented at maturity to the original drawee (lb. 243). If, however, it could not be presented, the reason need not be stated if the declaration contained the usual averment that the bill was duly presented, according to the custom of merchants; for the reason might be given in evidence under this averment (*Patience v. Townley*, 2 Sm. 224). Thus, where a bill was drawn at Leghorn, but was not presented in due time, owing to the political state of the country at that time, which rendered it impossible to present it: held, that it being afterwards presented for payment, with due diligence, and refused for want of presentation at the time when it was due, the holder might recover against the antecedent parties, and evidence of this impossibility of presenting at the time of the maturity of the bill might be given on the ordinary averment, that it was duly presented (*Patience v. Townley*, 2 Sm. 223). Duly presented, means according to the custom of merchants, which implies an exception in favour of unavoidable *circumstances (lb.). So, under this averment, plt. may show deft. could not be found to give [*472] him the notice in the usual way (*Firth v. Thrush*, 8 B. & C. 387).

Payable by Instalments.] In declaring on a note payable by instalments, if any one of the days on which an instalment is made payable be incorrectly stated, the variance is fatal (*Wells v. Girling*, 3 Moo. 79; *Gow*, 21). A promissory note, payable by instalments, is assignable (*Oridge v. Sherborne*, 11 M. & W. 374; 7 Jur. 402).

Even, if subject to a condition that, on default being made in payment of the first instalment, the whole amount shall become immediately payable, the note is assignable within the 3 & 4 Anne, c. 9; and, on default being made by the maker in payment of the first instalment, an indorser is liable for the whole amount (*Carlton v. Keneaby*, 12 M. & W. 139; 1 D. & L. 331; 13 Law J., N.S. 64); and the maker is entitled to three days of grace on the falling due of each instalment (*Oridge v. Sherborne*, 11 M. & W. 374; 7 Jur. 402).

Mode of Presentment.] It need not be alleged who made the presentment, and if a particular person be stated, it need not be proved to have been made by him (*Boehm v. Campbell*, *Gow*, 55). The presentment should be stated to have been made, according to the tenor and effect of the bill, to the person who was to pay it; and it seems best always to insert the words, "accord-

ing to the tenor and effect of the bill" (Huffman v. Ellis, 3 Taunt. 415). But these words have not been adopted in the forms prescribed by the judges. Where, however, the bill is payable at a particular place, in compliance with 1 & 2 Geo. IV. c. 78, it is usual to use the above words. The words, duly presented, &c., mean presented according to the custom of merchants (Patience v. Townley, *supra*). If a bill be payable at a banker's, or other person's, it need not be averred that it was presented *to them* (Giles v. Bourne, 6 M. & S. 73; 2 Chit. Rep. 300; Hawkes v. Borwick, 4 Bing. 135); or to the acceptor *at* the banker's, though the acceptance be general (De Bergareche v. Pillin, 3 Bing. 476; see Turner v. Hayden, 4 B. & C. 2). If a bill be made payable by the acceptor, at the house of S., an averment of presentment at the house of S. suffices (Hawkes v. Borwick, 4 Bing. 135). If a bill be accepted payable by certain persons, at a particular place, it suffices, in an action against the drawer, to state an averment of presentment to those persons generally, without saying at what place (Ambrose v. Hopwood, 2 Taunt. 61). An acceptance of a bill drawn payable to plt.'s order in London is a general acceptance within the statute 1 & 2 Geo. IV. c. 78; and a special presentment need not be alleged or proved, nor need proof of averment of presentment, or payment in London, or of excuse for non-presentment in London, be given (Selby v. Eden, 3 Bing. 311; 11 Moo. 511; Fazle v. Bird, 6 B. & C. 531).

A note in the margin mentioning a place where payable need not be averred in the declaration, nor need the bill be proved to have been presented there for payment (Williams v. Waring, 10 B. & C. 2; see Price v. Mitchell, 4 Camp. 200; Trecothick v. Edwin, 1 Stark. 468).

Where a bill drawn with the words "pay to my order in London" in the body of the bill, and directed to the drawees payable in London, was accepted at Messrs. J. L. and Co's., bankers, in London: held, that a presentment to J. L. and Co. was necessary to charge the drawer, though such acceptance is general, and the drawer having *negotiated it after such acceptance made no difference (Gibb v. Mather, in error, 2 Crompt. & J. 254; 8 Bing. 214).

In *assumpsit* by indorser against the indorsee of a bill, plt. declared that A. B. accepted, and by that acceptance appointed the money in the bill specified to be paid at the house of G. and Co., and averred that the bill was in due manner presented to G. and Co. and to A. B. for payment, and that G. and Co. and A. B. were then and there required to pay the same to plt., according to the tenor and effect of the bill, and the acceptance and indorsement. Upon special demurrer, for that it did not appear that the bill was presented at the house; held, that the averment was sufficient (Bush v. Kinnear, 6 M. & S. 210).

Where indorsee declared against the maker of a note, that he made the same payable at the house of Messrs. B. and Co., London; and at the trial it appeared that the address was not part of the note, but only a memorandum at foot thereof: held, that this was a variance (Exon v. Russell, 4 M. & S. 505).

If a particular house be mentioned in the body of a note, a presentment there is necessary, even to charge the maker (Anderson v. Bowes, 14 East, 500); and is not cured by an averment that the note was duly presented (Roche v. Campbell, 3 Camp. 247).

A note promising to pay on demand, at a particular place, must be presented, and a demand of payment made at that place, unless the makers discharge the holders from the presentment and demand; and the presentment and demand must be alleged, unless a discharge be shown (Bowes v. Howe, in error, 5 Taunt. 30; and see 3 Taunt. 399, n.). An allegation that the

makers of a note became insolvent, and ceased, and wholly declined and refused, then and thenceforth, to pay at the place specified, any of their notes, does not suit such discharge, nor can it be intended, from the allegation of refusal, that there was a presentment (*Bowes v. Howe, supra*).

It has been held, at nisi prius, that if a bill is accepted payable at a particular place, in an action against the acceptor, this addition does not require to be noticed in the declaration (*Lyon v. Sundius, 1 Camp. 423; Head v. Sewell, Holt, 363; Macbride v. Woodroffe, 2 Stark. 253*).

Excuse for Presentment.] If the bill be not presented, and there be a sufficient legal excuse therefor, the same must be stated (*Smith v. Bellamy, 2 Stark. 233; Lesson v. Pigott, Bayl. B. 409*); as, that the drawee could not be found, or that the deft., had he paid the bill, had no legal remedy against him (*Bayl. B. 408; Mercer v. Southwell, 2 Show. 180; Doug. 654; Rushton v. Aspinall, ib. 680; see Hine v. Allely, 4 B. & Ad. 624*). It suffices to aver generally the drawee was not to be found, without stating that any inquiry was made after him; though it is now more usual to state, that diligent search was made, and which must be proved; but it is not necessary to state the reason why the bill was not presented at maturity (*Patience v. Townley, supra*).

Want of effects in the hands of the acceptor excuses the indorsee of an accommodation bill from presenting it for payment, as well as from giving notice of dishonour to the drawer (*Terry v. Parker, 1 Nev. & P. 752; 6 Ad. & E. 502*). A mere averment of the drawee's insolvency, &c., is no excuse (*Bowes v. Howe, 5 Taunt. 30; Ch. Bills, 250*); nor is a mere removal without an absconding (*Parker v. Gorden, 7 East, 385*).

In an action against the drawer when the deft. dispensed with presentment, it is necessary to state it in the declaration; it cannot *be given in evidence under an allegation that actual presentment or [*474] notice of dishonour was given (*Bush v. Legge, 5 M. & W. 420*).

In assumpsit for goods sold and delivered, the deft. pleaded that he delivered to the plt. certain promissory notes of A. B. payable on demand, and that the same were not presented within a reasonable time. The plt. replied, that at the time of such delivery, A. and B. were bankrupt and insolvent, and unable to pay their debts, although this fact was unknown to him, the plt.; and that within a reasonable time after such knowledge, and within reasonable time for presentment, he returned the notes to the deft.: held, upon demurrer, that a sufficient excuse for the non-presentment appeared, and that the plt.'s right of action revived upon the notice of such facts being given to the deft. within a reasonable time after the time for presentment. A plea that a note payable to bearer, and on demand, was given for and on account of the debt, and that the same was not duly presented, is *prima facie* a good answer (*Robson v. Oliver, 16 Law J. 437, Q. B.; ante, p. 468, et seq.*).

Indorsee against indorser of a bill drawn by W. C. upon, and accepted by, J. C., payable at the plt.'s bank, and subsequently indorsed by W. C. to the plts. On the day when the bill became due there were no assets of J. C.'s in the bank: held, not necessary to show a presentment of the bill to the acceptor (*Bayley v. Porter, 14 M. & W. 44*).

Non-Payment.] In an action against the acceptor of a bill, payable at a particular place, it need not be stated that payment was refused at such place, the usual breach at the end of the declaration being sufficient (*Butterworth v. Le Despenser, 3 M. & S. 150; Benson v. White, 4 Dowl. 334; Giles v. Bourne, 6 M. & S. 73*). In an action against the drawer or indorser, the non-payment must be averred. If a bill be payable at a banker's, it

need not be averred they did not pay, though usual so to do (Giles v. Bourne, *supra*; S. C. 2 Ch. Rep. 300). It is a sufficient averment of non-payment of a bill accepted by the deft., payable at a particular place, to state that it was presented at his house, without showing that it was presented to him (*ib.*). In an action on a foreign bill, it is not necessary, though usual, to aver the non-payment of the other parts of the bill (Starke v. Cheeseman, Carth. 509; East v. Easington, Ld. Raym. 810; 7 Mod. 86; Wegersloff v. Keene, 1 Stra. 214).

Notice of Dishonour.] In an action against the acceptor of a bill or maker of a note, it is not necessary to aver that he had notice of dishonour (Smith v. Thatcher, 4 B. & A. 200; Edwards v. Dick, *ib.* 212; Treacher v. Hinton, *ib.* 413; Butterworth v. Le Despenser, 3 M. & S. 150; Pearse v. Pemberty, 3 Camp. 261). In an action, however, against the drawer or indorser, this averment, or a sufficient legal excuse for not giving the notice, must be stated, and an omission of such notice is bad, even after verdict (Bayl. B. 412; Rushton v. Aspinall, Doug. 679; Lundie v. Robertson, 7 East, 231). In an action by indorsee against indorser, the special facts rendering valid a deferred notice of dishonour need not be specially averred, the common averment of notice will be sufficient (Ferth v. Thrush, 2 M. & R. 359; 8 B. & C. 387; but see Bush v. Legge, 5 M. & W. 418; 7 Dowl. 84). Where a person, not a party to the bill, guarantees the payment by the acceptor, he is not entitled to notice of dishonour (Hitchcock v. Humfrey, 5 Man. & G. 559; 6 Sco. N. R. 540). Where the drawer of a bill had no notice of the *dishonour thereof, but subsequently promised to pay [*475] it; *semble*, such promise does not admit the notice, but merely waives it (Chapman v. Annett, 1 C. & K. 552, Pollock, C. B.).

A. drew a bill for 10*l.* on B., who owed him 20*l.* The bill was payable on Saturday, the 10th of August. On the following Wednesday A. was told by the bankers of C., the holder, that they understood that he, A., had received the money to take up the bill. He said he should keep the money, as B. still owed him 10*l.*, and that he wished the bankers would sue B. on the bill: held, evidence to go to the jury that A. had received due notice of dishonour (Jackson v. Collins, 17 Law J. 142, Q. B.; 12 Jur. 395; *sed vide* Burgh v. Legge, 5 M. & W. 418; and Croxon v. Worthen, *ibid.* 5).

Where notice of dishonour was sent by letter improperly directed, and consequently the letter did not arrive until the following day, but a few days afterwards the parties met, and in the course of conversation the deft. said that he wished the matter was settled, but declined to put his name to a new bill, although he should have no objection to write a letter: held to be sufficient evidence of the receipt of a former notice of dishonour (Goodall v. Lansfeld, 10 Law T. 376, Ex.).

Any acknowledgment by the drawer of a bill, of his liability to pay, or any promise to pay the amount, though conditional as to the mode of payment, is evidence to be left to the jury of due notice of dishonour; and, in the case of a foreign bill, of its having been duly protested (Campbell v. Webster, 1 C. B. 258; 15 Law J. 4, C. P.).

A notice from an intermediate party may be described as a notice from the plt. (Newen v. Gill, 8 C. & P. 367). In general, when the drawer would have any remedy over against the third party, as in the case of a bill drawn for the accommodation of an indorsee, notice, and not an excuse of notice, ought to be alleged and proved (Cory v. Scott, 3 B. & A. 623; Norton v. Pickering, 8 B. & C. 610; see Carter v. Flower, 16 Law J., N. S., Exch. 199).

A notice of dishonour of a bill of exchange should show directly, or by necessary implication—1st, that the bill has been presented; 2ndly, that it has not been paid; and 3rdly, that the party to whom the notice is given is looked to for payment (*East v. Smith*, 16 Law J., N. S., Q. B. 292; 11 Jur. 412, Q. B.; see *Chapman v. British Guiana Bank*, 11 Jur. 25, P. C.). The deft. drew his bill on Maclean, who accepted it; the deft. indorsed it to Day, and Day to the plt. The bill falling due on a Sunday, the plt.'s son presented it on the Saturday to the acceptor, and he refused to pay. The plt.'s son went and told Day and his foreman; on the same day, the foreman told the deft. of the dishonour. On the Sunday, Day also told him of it. Held, that there was no sufficient notice, there being no sufficient intimation from an authorized person that the deft. would be looked to for payment (*ib.*). *Semble*, that a tradesman's foreman is not to be presumed to have authority to give a notice of dishonour for his master (*ib.*). *Semble* also, that a simple statement of dishonour, made by the holder of the bill, might be good notice, although it would not be sufficient if made by any other person (*ib.*).

A bill of exchange was drawn by H., indorsed by him to B., and by B. to C., in whose hands it was dishonoured. C.'s attorney gave notice of dishonour in due time to A., but stated therein, by mistake, that he was directed by B. (from whence he had no authority) to apply for payment of the bill: held, that the notice of dishonour was sufficient, notwithstanding this misrepresentation, the only effect of which was to give A. every defence against C. that he *would have had if the notice had really been given by B. (*Harrison v. Ruscoe*, 15 M. & W. 231; 10 Jur. 142; 15 Law [*476] J. 110, Ex.).

In an action by indorsee against indorser of a bill of exchange accepted payable at the London Joint-stock Bank, it appeared that the notice of dishonour described it as payable at the London and Westminster Joint-stock Bank. The London Joint-stock Bank and the London and Westminster Joint-stock Bank were distinct banking companies in London: held, that the notice of dishonour was sufficient (*Bromage v. Vaughan*, 10 Jur. 982, Q. B.; 16 Law J. 10, Q. B.).

To prove notice of dishonour of a bill of exchange for 53*l.*, dated Dec. 19th, 1842, evidence was given that a letter was sent to deft., asking payment of 53*l.* 6*s.* 6*d.*, due on your dishonoured note, date 19th Dec. last (1842): held to be a sufficient notice of dishonour, although the instrument dishonoured was a bill, and not a note, and was for 53*l.*, and not 53*l.* 6*s.* 6*d.*, unless it appeared that there was some other instrument to which the notice could apply, and that the proof of the existence of such instrument lay on the deft. (*Stockman v. Parr*, 1 C. & K. 41).

Notice of Dishonour.] A notice of dishonour given by a party to a bill of exchange, other than the holder, should show that the party to whom it was addressed is looked to for payment (*East v. Smith*, 4 D. & L. 744, B. C.).

In action by indorsee against acceptor of a bill of exchange, it was proved that deft. called at C.'s, a party to the bill (but not the holder) to whom notice of dishonour had been given by the plt. the same evening that the bill became due, and on inquiry about it was told by C.'s foreman that it had been presented, and was not taken up; the next day the deft. called on C. about the bill, and was told that it had not been taken up, that it was not paid. There was no evidence of C.'s business, or that his foreman had any authority to give notice of dishonour; held, not sufficient notice (*ib.*). The holder of an indorsed bill is entitled to recover against the indorser if he has

sent the bill in due time to the place of business of the indorser for the purpose of giving notice of dishonour, and found it closed and no one there, although no written notice of dishonour was left by him (*Allen v. Edmundson*, 17 Law J., Ex. 291). Such facts do not, however prove an issue that notice of dishonour was given; for their legal effect is not to give notice, but to dispense with the necessity of giving it, and the pleading must be according to the legal effect (*Ib.*). It seems that the holder may, if he pleases, elect to treat the absence of the indorser from his place of business as extending the time for notice; and that a notice of dishonour, given at the place of business, is in time, if given at the first reasonable opportunity afterwards, and that proof of its having been so given will support an averment of due notice having been given (*Ib.*).

The holder of a promissory note sent to the indorser, who was the father of the maker, and inquired where the son resided (he having changed his residence since the making of the note) and told him that the note had been presented and dishonoured: held sufficient notice (*Chard v. Fox*, 13 Jur. 960). Where the acceptor died before the bill became due, having appointed as his executor the drawee, who accordingly proved the will, and the bill when due was presented by the holder for payment to the drawer at the house of the deceased acceptor, when the drawer said that he was executor, and that as the acceptor was dead the bill must stand over for a few days: held, that this was sufficient notice to the drawer of the dishonour of the bill (*Caunt v. Thompson*, 13 Jur. 495; 18 Law J., C. P. 125): held also that the judge was right in allowing the plt. to amend his declaration by substituting for the allegation of presentment to the acceptor an allegation that he was dead, and that the bill was presented to his executor (*Ib.*).

Assumpsit by Charles Williams, as indorsee of a bill, against the indorser. The declaration averred, that one Charles Williams drew the bill on J. D.; that the deft. indorsed it to the plt., and that the drawer did not pay it when due. Plea, that deft. had not due notice of the non-payment. The plt. was proved to be the drawer, and to have given notice of the dishonour to the deft.: held, that, on these pleadings, the deft. could not object, that the plt. was not competent to give notice of dishonour, on the ground that the Charles Williams suing as indorsee and the Charles Williams stated in the declaration to be the drawer were the same person (*Williams v. Clarke*, 16 M. & W. 834).

A declaration by indorsee against drawer of a bill of exchange averred by way of excuse for want of notice of dishonour, that C. F. accepted the bill for the accommodation of the deft., and that at the time of making and accepting the said bill, and from thence until and at the time when the same was so presented for payment, C. F. had not any effects of the deft., nor had he received any consideration for the acceptance or payment of the said bill, nor had the deft. sustained any damage by reason of not having had notice of the non-payment thereof: held, on motion in arrest of judgment, that it was not necessary that the declaration should deny that the drawer had any reasonable expectation when he drew, or during the currency of the bill, that he would have assets at the time of its maturity in the hands of the drawee (*Thomas v. Fenton*, 5 D. & L. 28, B. C.).

The reasonable expectation of assets entitles to notice only on the ground that the drawer, under the circumstances which raise that expectation, may be damnified. To allege, therefore, that he has sustained no damage, removes the ground on which the necessity of notice arises; and there is no distinction in this respect between a bill of exchange and a banker's cheque (*Ib.*).

Excuse for not giving Notice of Dishonour.] Where the necessary notice has not been given, and there is a sufficient legal excuse for such an omission, such excuse must be averred; therefore, where the deft. told the indorsee beforehand not to send such notice, and that he would pay the amount, this is not evidence to support an averment of notice, but should have been pleaded as a dispensation of it (*Burgh v. Legge*, 5 M. & W. 418). Where, in an action against the drawer, a want of notice of dishonour was excused in the declaration, by an allegation that the bill was accepted for the accommodation of the drawer, it was held to be properly described as, having been accepted for the accommodation of the drawer, that he had no assets in the hands of the drawee, and that he sustained no damage by the want of notice: held, that the excuse was sufficient, and that it was not necessary to state that the deft. had no reasonable expectation of assets in the hands of the drawer at the maturity of the bill (*Thomas v. Penton*, 16 Law J., N. S., Q. B. 362; 2 C. B. 68).

In an action on a promissory note, by indorsee against indorser, to whom it had been indorsed by payee, the declaration alleged that neither at the time when the note was made, nor afterwards, and before it became due, and on presentment for payment, had the maker or payee any effects of the deft. in his hands, nor was there any consideration or value for the making of the note, of the payment thereof, and its indorsement by the payee to the deft., and that the deft. had not sustained any damage by reason of his not having had notice of the non-payment of the note: held, that as against an indorser, the declaration did not state a sufficient excuse of want of notice of dishonour, as it was consistent with the averments in the declaration that the note might have been indorsed by the deft. for the accommodation of a prior party, in which case the deft. would be entitled to notice of dishonour (*Carter v. Flower*, 16 Law J., N. S., Ex. 199; 4 D. & L. 529; 11 Jur. 313; 16 M. & W. 743).

The following are legal excuses. The drawer stated to the holder, a few days before the bill became due, that he would call and see if the bill had been paid by the acceptor; it was held that he had dispensed with notice (*Phipson v. Kneller*, 4 Camp. 285; see *Burgh v. Legge*, *supra*); so where the deft. acknowledged that the bill would not be paid (*Brett v. Levett*, 13 East, 214; but see *Ex parte Bignold*, 1 Deac. 728; *Murray v. King*, 5 B. & A. 165; *Soward v. Palmer*, *2 Moo. 274); so, where the drawer has countermanded payment (*Hill v. Heap*, D. & R. N. P. 57; [*477] *Prideaux v. Collier*, 2 Stark. 57; *Legge v. Thorpe*, 12 East, 171; so, the absence of effects in the drawee's hands, and that he will have no remedy against the acceptor, or any other person, if obliged to pay the bill (*Bickerdike v. Dollman*, 1 T. R. 406; *Kemble v. Mills*, 1 Man. & G. 758; *Terry v. Parker*, 6 Ad. & E. 502; *Lafitte v. Slatter*, 6 Bing. 623; *Legge v. Thorpe*, 12 East, 171; *Cory v. Scott*, 3 B. & A. 623; *Ex parte Heath*, 2 Ves. & B. 240; 2 Rose, 141). In an action by an indorsee against the drawer of a bill of exchange, a letter of the deft., saying, "You know I meant to call upon you immediately after the 24th with the money. E. G. (the acceptor) is an old and intimate friend of mine," is evidence of a waiver of presentment and notice of dishonour (*Mills v. Gibson*, 16 Law J. 249, C. P.). The common form will suffice, if the deft. subsequently promise to pay (*Lundie v. Robertson*, 7 East, 231; *Gibbon v. Coggon*, 2 Camp. 188). A promise of payment, &c., which will dispense with proof of notice of dishonour, may be given in evidence under the usual averment of notice.

Ignorance of a party's residence will excuse neglect to give notice of dishonour, so long as that ignorance continues without neglecting to use the

ordinary means for requiring information (*Bateman v. Joseph*, 2 Camp. 463; 12 East, 433; *Browning v. Kinnear*, Gow, 81; *Harrison v. Fitzhenry*, 3 Esp. 240; *Baldwin v. Richardson*, 1 B. & C. 245).

The want of notice of the dishonour of a check on a banker is sufficiently excused, *prima facie*, by alleging that the banker had no effects of the drawer (*Kemble v. Mills*, 1 Man. & G. 757).

Protest.] The protest need not be stated in an action on an inland bill (*Windle v. Andrews*; *Brough v. Parkins*, *Ld. Raym.* 992; 6 Mod. 80; *Salk.* 131). But, in a foreign one, plt. must either state it (*Rogers v. Stephens*, 2 T. R. 713; *Gale v. Walsh*, 5 T. R. 239), or show that it was not necessary, as that the drawer had no effects in the hands of the drawee (*Legge v. Thorpe*, 12 East, 171). But the omission can only be taken advantage of by special demurrer (*Bayl. B.* 327; *Salomons v. Stavelly*, cited 2 Dougl. 684, n.). If the plt. aver "that he protested the bill, or caused it to be protested," it will be bad on demurrer: but it is unobjectionable if the deft. plead over (*Witherby v. Sarsfield*, 1 Show. 125; *Salomons v. Stavelly*, 3 Dougl. 298, n.). If the protest be omitted when necessary, it seems to be involved in the allegation of notice when that can only be legally given though a protest (*Rosc. Ev.* 219; see *Salomons v. Stavelly*, *supra*). Any acknowledgment by the drawer of a bill of his liability to pay, or any promise to pay the amount, though conditional as to the mode of payment, is evidence to be left to the jury of due protest (*Campbell v. Webster*, 1 C. B. 258). In the case of a foreign bill, notice without protest is not sufficient, unless the party to whom notice is given reside in this country (*Robins v. Gibson*, 1 M. & S. 288), though he should happen, at the time of the dishonour, to be absent (*Cromwell v. Hynson*, 2 Esp. 511). A protest is necessary in the case of the acceptor of a foreign bill for honour (*Hoare v. Cazenove*, 16 East, 391).

A bill is an inland bill where the drawer and acceptor reside in England, or where, although the drawee reside abroad, the drawer resides in England, and draws the bill payable here (*Amner v. Clark*, 2 C. M. & R. 468); but a bill drawn in England upon a person residing out of it and payable out of it, or by a person abroad upon a person residing in England, is a foreign bill.

A bill drawn or payable, *or both, abroad, or drawn in one realm [*478] of the United Kingdom and payable in another, is a foreign bill.

Bills drawn in England, and payable in Scotland or Ireland, or *vice versa*, are foreign bills, for they were so before the union between the countries, and the union does not make them inland bills (*Mahony v. Ashlin*, 2 B. & Ad. 478). But bills drawn and payable in Scotland, or in Ireland, are inland bills within 1 & 2 Geo. IV. c. 78, to which an acceptance in writing is necessary (*Ib.*).

Notice of Protest.] When a foreign bill is refused acceptance or payment, it is necessary, in order to charge the drawer, that the dishonour should be attested by a protest (*Gale v. Walsh*, 5 T. R. 239; *Rogers v. Stephens*, 2 T. R. 713; *Orr v. Magennis*, 7 East, 358; *Poth.* 217; *Brough v. Perkins*, 1 Salk. 131; *Trimleur v. Vignier*, 1 Bing. N. C. 151). Inland bills, though they may be protested for non-payment (9 & 10 Will. III. c. 17), and non-acceptance (3 & 4 Anne, c. 9), yet a protest was held to be unnecessary, except for the recovery of interest (*Harris v. Benson*, 2 Stra. 910); but it is now held to be unnecessary for that purpose (*Wardle v. Andrews*, 2 B. & A. 696; 2 Stark. 425). In an action against the drawer of a foreign bill, protest must be averred (the want of it is matter of form only; *Salomons v. Stavelly*, Dougl. 683) as well as proved, and it has been held that if protest of an inland bill be set forth in pleading, it must be proved (*Boulager v. Tal-*

leyrand, 2 Esp. 550; but see *Wardle v. Andrews*, *supra*). When a bill is refused acceptance it should be protested, a protest afterwards for non-payment not being sufficient, it seems (*Orr v. Magennis*, *supra*), although it would seem unnecessary to protest it for non-payment if it had previously been protested for non-acceptance (*De la Torre v. Barclay*, 1 Stark. 7). Where a foreign bill is accepted for honour, it must be presented for payment to the drawee and protested, before payment can be demanded of the acceptor for honour (*Hoare v. Cazenove*, 16 East, 391; *Mitchell v. Baring*, 10 B. & C. 4); and if the acceptor for honour pay it before protest, he cannot afterwards recover the amount from the party for whose honour he accepted it (*Vandewall v. Tyrrell*, M. & M. 87). A protest for non-acceptance is made in the place where the drawee carries on his business: for non-payment where the bill is to be presented, as to the place and how a bill should be protested, which is payable at a different place to that in which the drawee resides, see 2 & 3 Will. IV. c. 98. The same circumstances which will excuse a notice of dishonour will also excuse a protest. Where, in an action by indorsee against drawer, it appeared that there were no effects of the drawer in the drawee's hands, and that he said he should pay the bill; it was held, not necessary that the protest should be made or notice given (*Rogers v. Stephens*, 2 T. R. 713; *Legge v. Thorpe*, 12 East, 171). So, a promise to pay the bill after it is dishonoured will dispense with the necessity of proving protest, or notice of dishonour (*Gibbon v. Coggan*, 2 Camp. 188; *Hopes v. Alder*, 6 East, 16; *Patterson v. Beecher*, 6 Moo. 319). A bill must be noted on the day on which acceptance or payment is refused (B. N. P. 272); and protest may be drawn up afterwards, dated on the day of noting (Ib.); but it must be drawn up before action commenced upon the bill (*Chaters v. Bell*, 4 Esp. 48; Bayl. B. 266). It is not necessary to send the protest, or a copy of it, with a notice of dishonour, nor to mention it in the notice (*Cromwell v. Heynson*, 2 Esp. 511; *Robins v. Gibson*, 1 M. & S. 288). The protest need not be proved, it suffices to produce it (*Anon.* 12 Mod. 345; Bayl. B. 487).

If the deft. is *prima facie* entitled to notice, it is essentially necessary to prove that he had it, or to show that he was not entitled thereto (*Rushton v. Aspinall*, Doug. 680). Under an allegation of notice, [*479] it may be questionable whether evidence could be given of what would excuse notice (*Cory v. Scott*, 3 B. & A. 619; *Legge v. Thorpe*, 12 East, 171); or whether, to let in such evidence, the facts to excuse notice should not be pleaded specially (Bayl. B. 413).

Payment supra Protest.] This should be averred according to the fact. In an action against the acceptor by a plt., who became a party *supra* protest for the honour of the second indorser, it was held not necessary to state in the declaration that the party for whom the payment was made by the plt. was the party having title to the bill, the declaration stating that the plt., according to the usage and custom of merchants, paid the bill under protest (*Cox v. Earle*, 3 B. & A. 430).

Re-exchange.] Where a foreign bill is dishonoured, the holder is entitled to recover of the drawer not only the value which he formerly gave for the bill, but also the re-exchange (*De Tastet v. Baring*, 11 East, 265; 2 Camp. 65); though the bill pass through never so many hands (*Mellish v. Simeon*, 2 H. Bl. 378). But the acceptor is not liable to the re-exchange (*Napier v. Schneider*, 12 East, 410; *Woolsey v. Crawford*, 2 Camp. 445). Other damages, not necessarily arising from the dishonour, as noting, postages, &c., are not recoverable, unless specially stated in the declaration (*Kendrick*

v. Lomax, 2 Crompt. & J. 410. *Quere*, whether expense of noting inland bill not protested can be recovered, (ib.). But it has been held that postage is recoverable under a count for money paid (Dickenson v. Hatfield, 1 M. & R. 41; 5 C. & P. 46).

Bills taken up by Drawer.] Where the drawer sues on a bill payable to a third person, in order to show his interest therein, it is necessary to state that it was dishonoured, and taken up and paid by plt. (*post*, p. 486).

Promise of Payment.] The action being founded on a legal liability no promise need be stated, though it is usually inserted (Starkey v. Cheeseman, 1 Salk. 128; Carth. 509; Hardr. 486). It seems doubtful whether a promise should be stated; the omission, however, if it can at all, must be taken advantage of on special demurrer (Griffiths v. Roxbrough, 2 M. & W. 734); if the promise be stated, it should correspond with the statement of the liability (Ballingalls v. Gloster, 3 East, 481). In an action by indorsee against the drawer of a bill, the omission of a promise by the drawer to pay is at most mere matter of form, which can only be taken advantage of on special demurrer (Stericker v. Baker, 9 M. & W. 321). It seems it is altogether unnecessary in such cases (ib.). But it is said that a declaration by indorsee against the drawer is bad on special demurrer, for not alleging a promise to pay by the deft. (see Heny v. Barbridge, 3 Bing. N. C. 501; 4 Sco. 296, *infra*; and the point has been decided in Smith v. Cox, 12 Law J. 307, Exch.). A declaration containing counts on bills of exchange by the indorsee against indorser, in the form prescribed by R. G. T. T. 1 Will. IV., stated that the deft. *promised* to pay the bills, and commenced and concluded in the form of a declaration in debt. It contained the *indebitatus* counts in debt: held, that there was no misjoinder (Esdaile v. Maclean, 16 Law J., N. S., Exch. 71).

An averment that deft. was indebted on a bill, and that plt. having lost the bill, had, at his request, given him a bond, *acknowledging pay-
[*480] ment, and conditioned to indemnify him against the bill, states a good consideration for a promise by the deft. to pay the contents of the bill (Williamson v. Clements, 1 Taunt. 523).

The day on which a promise to pay a bill of exchange is alleged, is matter of form only, and no objection can be raised on error that the day stated is more than six years before the action is brought (Hankey v. Borwick, in error, 1 Y. & J. 376; 4 Bing. 135; 13 Moo. 478).

A declaration on a note stated that the deft. thereby promised to pay to the plt. 10*l.* on account of W. H. D. fourteen days after the date thereof, which period had elapsed, and then averred that the deft. in consideration of the premises, "then and there promised to pay the amount of the note to the plt. according to the tenor and effect thereof:" held, sufficient on a special demurrer (Banks v. Camp, 2 Moo. & S. 734; 9 Bing. 604). A similar promise in a special declaration in K. B. was held to be bad on special demurrer (Price v. Easton, 4 B. & Ad. 433; 1 M. & M. 303).

The rule of T. T. 4 Will. IV. as to the averment of a promise when there is a count against the maker of a note or acceptor of a bill, and also the common counts, only applies to the latter (Wainwright v. Johnson, 5 Dowl. 317). Declaration by indorsee against drawer of a bill, with a count on an account stated, and a promise to pay the last-mentioned several moneys on request; special demurrer, for that there was no promise to the count on the bills which was set aside as frivolous (Chevers v. Parkington, 6 Dowl. 75). Declaration against maker of a promissory note, with counts for goods sold, &c., and a general promise to pay on a day long after the note became due.

Plea, *non assumpsit* Held, unnecessary to allege any promise to pay the bill, and that the plea was bad on demurrer (Donaldson v. Thompson, 8 Dowl. 209; 6 M. & W. 316; see Fraser v. Newton, 8 Dowl. 773).

In a declaration against a drawer of a bill, a promise to pay should be alleged, since the action against him is founded upon the promise implied by law (Henry v. Burbridge, 4 Sco. 296; 3 Bing. N. C. 484; 3 Gale, 16; 1 Jur. 215); and the want of such allegation makes the count bad on special demurrer (Smith v. Cox, 11 M. & W. 475; 2 Dowl. N. S. 1035; *semble*, the allegation of a promise in such case is altogether unnecessary (Stericker v. Barker, 9 M. & W. 321; see Griffith v. Roxborough, *infra*); at all events the omission is mere matter of form (lb.).

As the note itself contains a promise, one to pay the amount of the note according to the tenor and effect thereof would seem to be unnecessary; such a statement, however, would be proper, even where the plt. relies on a promise after the note was due (Leaper v. Tatton, 16 East, 420; Ballingalls v. Gloster, 3 East, 481).

A note, "I promise to pay, or cause to be paid," may be declared on in the common form (Lovell v. Hill, 6 C. & P. 238).

Averment that deft. (who had made a note, promising to pay the plt. 10*l.* fourteen days after date, and had delivered it to the plt.) promised, when it was due, to pay plt. according to the tenor thereof; held sufficient on special demurrer (Banks v. Camp. 9 Bing. 604; 2 Moo. & S. 734; but see Price v. Easton, 4 B. & Ad. 433). The promise, however, contained in the note is sufficient, and any other would be informal (Donaldson v. Thompson, 8 Dowl. 209; 6 M. & W. 319; see Shepherd v. Shepherd, 14 Law J. 230; 1 C. B. 849). In debt on a promissory note by payee against the maker, the declaration, after showing that the writ issued on the 17th of May, 1845, alleged that the deft., on the 25th of March, 1844, made his note in writing, and thereby promised to pay to the plt., or order, 690*l.* on the 25th

*of March, 1845, which day had expired before the commence- [*481] ment of the suit, and *then* delivered the note to the plt.; and that thereupon the deft. then agreed to pay the amount of the said note to the plt. *on request*: special demurrer, for that the declaration was double and inconsistent, and uncertain whether the plt. intended to rely on an express or implied agreement: held, that the declaration was sufficient, duplicity being no objection to a count (Shepherd v. Shepherd, 1 C. B. 849).

Assumpsit by indorsee against indorser: held, after verdict, that an averment of a promise to pay was unnecessary (Griffith v. Roxborough, 2 M. & W. 734; 6 Dowl. 133; 1 Jur. 846).

Indorsee against indorser of a promissory note; declaration alleged a promise to pay the note "according to the tenor and effect thereof," and assigned as a breach that the maker did not pay the note, nor did the deft. nor any other person, although the note was duly presented when it became due, whereof the deft. had notice: held, that the promise was not incorrectly laid, and that the breach was sufficient after verdict (Hedge v. Stevenson, 5 Dowl. 771; 2 M. & W. 799).

Indorser against acceptor; declaration alleged that *after* the bill became due, the deft. promised to pay it "according to the tenor and effect of the said acceptance thereof:" held, on special demurrer, that this was in effect a promise to pay on request, and therefore sufficient (Christie v. Peart, 9 Dowl. 291). A declaration, on a bill of exchange by indorsee against acceptor, was in the form settled by the judges in the new rules, except that in stating the breach of the promise to pay, it omitted the words "when due." A demurrer on that ground was set aside as frivolous by order of a learned judge, and the court refused to rescind that order (Parry v. Turner,

10 Law T. 110, Q. B.). In a declaration by payee against maker of a promissory note, the first count averred that, whereas the deft. made his promissory note in writing, and thereby promised to pay the plt. 45*l.* three months after date, which period is now elapsed: held, on special demurrer, that the promise to pay was sufficiently averred (*Conway v. Lewis*, 1*r.* Law R. 4).

Common Counts.] Where the action is brought between the immediate parties to the bill, it is usual to subjoin such counts as will embrace the consideration for which the bill was given; for, as the bill does not merge the original demand, if the plt. fail in substantiating the special count, he may resort to evidence on the general counts, under the New Rules. Counts upon a bill or note, and for the consideration in goods, money, or otherwise, are considered as founded on distinct subject-matter of complaint. Where a promissory note was given for money lent, which when produced in court was unstamped, Lord Kenyon permitted the plt. to recover on a count for money lent, by proving that, when the money for which the note had been given was demanded of the deft., he acknowledged the debt (*Tyte v. Jones*, 1 East, 58, n.).

But at all events, unless there be evidence to prove such additional counts, neither should be added; and if there be certainty of proving the first count, it is better not to add any other. A count upon a supposed account stated is rarely of any utility (1 Ch. Pl. 88).

If the consideration of a bill be stated in the particulars, plt. may prove it to avoid a verdict being entered against him on the common counts (*Ryder v. Ellis*, 8 C. & P. 357). But, in general, plt. can only recover on one count, if he have only one cause of action, and the plt. will, after he has closed his case, be allowed to recall a witness, and prove the consideration to prevent these issues being found for the deft. (*Ryder v. Ellis*, *supra*).

*Postage is recoverable under a count for money paid (*Dickinson v. Hatfield*, 1 M. & R. 41; 5 C. & P. 46).

In an action by the payee, who is a third party, against the acceptor, it may be advisable not to add a count on an account stated, where the bill is the only question of dispute between the parties, for it would seem that as between these parties the bill would not be evidence of an account stated; besides, if deft. should pay into court what is really due upon the bill, this will entitle him to a verdict upon both counts (*Early v. Bowman*, 6 B. & Ad. 889; see *Churchill v. Day*, 1 M. & R. 71); unless indeed there be an express promise by the deft. to pay the plt. (*Ib.* See cases cited in *Wells v. Girling, Gow*, 22, in notis). It seems, that, in an action by an indorsee, the bill is evidence, under the common count for money paid, only when it is produced dishonoured in the hands of the holder (*Lewin v. Edwards*, 9 M. & W. 720; 6 Jur. 401). A post-dated check is altogether void, and cannot be received in evidence for any purpose, therefore the plt. cannot, in an action on such an instrument, resort to the count for money paid, because he cannot prove it without producing the check (*Serle v. Norton*, 9 M. & W. 309). A promissory note, "Five months after date I promise to pay to L. P.'s order the sum of 23*l.* 2*s.* 6*d.*, being the amount of interest due on a promissory note from the undersigned to the late J. N. for 117*l.* dated 6 July, 1838, up to 6 July, 1844," is evidence of a debt of 117*l.* being still due, and will support a count on an account stated with L. P. as executor of J. N. (*Perry v. Slade*, 10 Jur. 31).

The plt. in the first count declared on a bill of exchange, drawn and indorsed to him by the deft., and in the second for money alleged to be due from the deft. upon an account stated—concluding, that, "in consideration

of the premises respectively, the deft. promised to pay the said several last-mentioned moneys respectively to the plt. on request." The deft. demurred to the second count, on the ground that it contained an incorrect statement of the consideration for the promise; or, if "the last-mentioned moneys" included the money in the first count, then the second count was bad for duplicity. The court set aside the demurrer as frivolous (*Lomax v. Wilson*, 2 C. B. 763).

Several Counts.] A declaration contained twenty-five counts; the first fifteen were on bills of exchange drawn at Paris; the next five, which related to the same bills, were special counts, founded on the law of France, and the last five were on a special agreement to pay the bills in consideration of the plt. procuring their discount: application having been made to strike out the last set of counts; held, that they were not in apparent violation of R. G. H. T. 4 Will. IV. r. 5 (*Gilbert v. Hales*, 2 D. & L. 226).

In a declaration containing several counts on the different bills of exchange, each count, after describing the bill, referred to it as "the said" bill of exchange. Held, sufficiently certain, even on special demurrer, for that the words "the said" ought to be referred to the last antecedent (*Esdaile v. Maclean*, 15 M. & W. 277).

The declaration contained a count on a note, and on an account stated. It appeared that the note had been altered by the addition of another maker. In support of the second count an I O U was given in evidence which had been signed by the deft. before the making of the alteration in the note. Held, the note was rightly received in evidence to show the circumstances under which the I O U was given (*Gould v. Combs*, 9 Jur. 494; 1 C. B. 543); and that A. assenting to a verdict being entered against him upon the count on the note, he was entitled to a verdict for 200*l.* on the *account stated, although the particulars of demand merely alleged [*483] that the action was brought to recover the amount of a promissory note (Ib.).

In assumpsit by executors of the payee of a note against the maker, the plt. produced the note with the following indorsement upon it signed by the deft. and one of the plts.: "Hull, 1838. Memorandum that the sum of 1*l.* 7*s.* 6*d.*, one quarter's interest, was paid on the within note." Held, that this was sufficient evidence of an account stated with the executors without any proof of the time of the testator's death (*Purdon v. Purdon*, 10 M. & W. 562).

A declaration, commencing and concluding in the form of a declaration in debt, contained counts on bills of exchange by indorsee against indorser, in the form given by the rule of T. T. 1 Will. IV., and also indebitatus counts in debt. Held, not a misjoinder (*Esdaile v. Maclean*, 15 M. & W. 277).

Particulars of Demand.] Where there is a special count on a bill or note, and common counts on the original consideration, and the deft. calls for particulars of demand, the causes of action in the general counts ought to be stated in the particulars; otherwise the plt. will not be permitted to go into evidence of them (*Wade v. Beasley*, 4 Esp. 7). If the particulars convey the requisite information, however inaccurately they may be drawn, they are sufficient, unless the deft. will undertake to swear that he has been misled by the inaccuracy (*Day v. Bower*, 1 Camp. 69, n.); and although the rule is that a plt. who has delivered an imperfect particular shall be restricted in his evidence, and shall not be permitted to recover anything not in the particulars delivered, yet, if the deft. in attempting to defeat the restricted claim, gives him a better case than he was at liberty to make for himself, he will be entitled to a verdict for all that is proved due to him (*Hunt v. Wat*

kings, 1 Camp. 69, n. See "PARTICULARS OF DEMAND"). Where the particulars of demand made a claim on a promissory note *only*, which could not be given in evidence for want of a stamp, it was held that the plt. could not give evidence of the consideration of the note (*Wade v. Beasley*, 4 Esp. 7).

The declaration contained three counts: first, on a note for 50*l.*; second, on a note for a like amount; third, on one for 100*l.* The particulars were as follow: "This action is brought to recover the sum of 50*l.*, being the amount of a promissory note in the first count of the declaration mentioned, and also the further sum of 50*l.*, being the amount of a promissory note in the second count mentioned: above are the particulars of the plt.'s demand, for the recovery whereof he will avail himself of the whole or any part of the declaration." No evidence of the promissory note was given at the trial, but a conversation with the deft. was proved, in which he acknowledged he owed the plt. 100*l.* Held, that the particulars were insufficient to enable the plt. to recover, and that in order to do so he was bound to prove an admission on an account stated with reference to the promissory notes (*Roberts v. Elsworth*, 10 M. & W. 653).

Pleas, &c.] We shall hereafter see, under the respective heads, what defence may be set up to the action (see *post*, "EVIDENCE FOR DEFENDANT"). By the New Rules, H. T. 4 Will. IV. r. 2, in all actions on bills or notes the plea of *non assumpsit* or *nunquam indebitatus* is inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact, *ex. gr.* the drawing, making, indorsing, accepting, presenting, [*484] or notice of dishonour of the bill or note. So that, in pleading to a declaration which contains a count on a bill and *indebitatus* counts, the plea should be confined to the count in the bill to which it is meant to apply (see *Worley v. Harrison*, 3 Ad. & E. 689; *Hughes v. Pool*, 6 Man. & G. 271); and then the general issue, or other plea, to the residue.

If an executor declare on a bill or note payable to his testator, laying a promise to pay the executor, such promise may still be denied by *non assumpsit*, for the action is not on the bill simply, but on a promise not implied by it (*Timmis v. Platt*, 2 M. & W. 720; 5 Dowl. P. C. 748; *Rollston v. Dixon*, 2 D. & L. 892). So, if the instrument in fact be not a note or bill, though the words "note of hand" be used in the body of it (*Worley v. Harrison*, 3 Ad. & E. 669; but see *Hay v. Fisher*, 2 M. & W. 722). *Non assumpsit by statute* (5 & 6 Vict. c. 122) may be pleaded to an action on a bill of exchange or promissory note. The 40th section enacts, that any contract or security by any bankrupt, or other person, in trust for any creditor, or for securing the payment of money due by such bankrupt at his bankruptcy, as a consideration, or with intent to induce such creditor to forbear opposing, or to consent to the allowance of his certificate, shall be void, and the money secured not recoverable, and though the party sued may plead the general issue, and give the act and special matter in evidence (*Weeks v. Argent*, 16 Law J., N. S., C. P. 209; see 12 & 13 Vict. c. 106, *ante*, "BANKRUPTCY"). If, notwithstanding the above rule, *non assumpsit* be pleaded, all the facts from which the promise resulted will be put in issue, and the plt. can only object to it by special demurrer (*Ib.*; *Finlayson v. Mackenzie*, 3 Bing. N. C. 824; 6 Dowl. P. C. 71; *Hay v. Fisher*, *supra*). When the deft. pleads *non assumpsit* to the whole of a declaration, consisting of a bill of exchange and money counts, the plt. cannot sign judgment generally, but must demur (*Eddison v. Pigram*, 16 M. & W. 131); and the court will not allow him to amend the judgment by confining it to the count

on the bill, and entering a *nolle prosequi* on the other counts (Eddison v. Pigram, *ib.*). In an action by indorsee against acceptor, plea *non assumpsit*, held, that the cause could not be tried on this plea, and the jury being sworn, the plt. took a verdict for the amount of the bill and interest, without adducing any evidence, and without putting in the bill (Neale v. Proctor, 2 C. & K. 456). If the defence be that the bill or note was drawn, indorsed, or accepted by way of accommodation, or that it was obtained by fraud, or under any circumstances which disentitle the plt. to sue upon it, such defence must be specially pleaded (Passenger v. Brooks, 7 C. & P. 110; 1 Bing. N. C. 587). Infancy, coverture, tender, set-off, payment, bankruptcy, insolvency, Statute of Limitations, and, in fact, all defences to an action on a bill or note must now be specially pleaded.

When the declaration contains a count on the bill and the common counts, the plea which applies to the cause of action on the bill must be confined to the count setting it out (Worley v. Harrison, *supra*; Hughes v. Poole, 6 Man. & G. 271); and then the general issue, or whatever plea is intended to be relied on in answer to the common counts, must be pleaded to the residue of the declaration. If, however, the general issue be pleaded to the count on the bill, and the deft. be under terms to plead issuably, the plt. may either sign judgment on the whole declaration, unless it be also pleaded to another count, or on that count (Arch. Pr., 8th ed., 219, 222; Eddison v. Pigram, *supra*; Sewell v. Dale, 8 Dowl. P. C. 309; Kelly v. Villebois, 3 Jur. 1171; see Panet v. Goddard, 9 M. & W. 458); but, where he signs judgment on the special count, *he should enter a *nolle prosequi* to the common [*485] counts (Frazer v. Newton, 8 Dowl. P. C. 773). If the general issue be pleaded to the special count, and the deft. be not under terms, such plea is demurable (Donaldson v. Thompson, 6 M. & W. 319; Morse v. James, 11 *ib.* 458; see Arch. Pr., 8th edit. 226). When the deft. pleaded that the bill of exchange in the first count mentioned was paid when due, and also as to the first count that he did not promise, and as to the other counts that he put himself upon the country: held, that the plt. might treat such as a separate plea, though the second was declared inadmissible by the New Rules, and the last put nothing in issue, and that the plt. was right therefore in signing judgment, there being no signature to the pleas, and rule to plead double (Hockley v. Sutton, 2 Dowl. P. C. 700).

Demurrer.] If there be any misstatement or defect apparent in the declaration of the cause of action, or in the right of action itself, the same may be taken advantage of by general or special demurrer; by a general demurrer when the misstatement is substantially bad, and by a special demurrer when it is informally so.

Precedents in Assumpsit.

ON INLAND BILLS.

Declaration in assumpsit on a bill, drawers (being payees) against acceptor.

In the Q. B. (or C. P., or Ex. of P.) On the day of A. D. 1846, *ante*.

[Commencement *as post*, "DECLARATION"]. For that the plts. (*ante*, p. 225) heretofore, to wit, on &c. (*date of bill*) made their bill of exchange in writing (*and directed the same to the defts. by the name, style, firm, and addition of Messrs. Twis and Co., Merchants, Birchin Lane, London, ante*, p. 450. 466), and thereby required the defts. to pay to the plts. or their order fifty pounds (*ante*, p. 460), two months (*days or weeks*) after the date (*or after sight*) thereof, which period had elapsed before the commencement of this suit and the defts. then accepted the said bill and then in consideration of the premises promised the plts. to

pay them the same according to the tenor and effect thereof and of their said acceptance thereof but did not pay the same when due or at any time before or since (*if there be no other count conclude*), to the damage of the plts. of £ (*enough to cover principal and interest*), and therefore they bring suit, &c. (*A count upon the consideration of the bill, if any, between the plts. and defts., and on an account stated, may be added, and if so state the general promise and breach thus:*) And the defts. afterwards to wit on the day and year last aforesaid in consideration of the last-mentioned premises respectively promised the plts. to pay them the last-mentioned (*this only extends to the last counts, there must be a promise to each of the special counts, or else this must be made to apply to all*) sum or sums of money on request, yet the defts. have disregarded their last-mentioned promise (*this breach only applies to the last counts: if there be no breach in the special counts, say, "their said several promises"*), and have not paid the said last-mentioned sum or sums of money or any part thereof to the plts. to the damage of the plts. of £ (*enough to cover the whole claim: if the breach refer to the special counts, say, "and have not paid any or either of the said several sums of money or any part thereof to the, &c."*); and therefore they bring suit, &c. See "DECLARATION.")

Payee against acceptor.

[*Observe the references in preceding precedent.*] For that certain persons designated in the bill hereinafter next mentioned by the name style and firm of *Hull and Sons*, did, under that name style and firm, heretofore, to wit on &c. make their bill of exchange in writing, and direct the same to the deft., and did thereby require the deft. to pay to the [*486] plt. **(or order)* fifty pounds, two months after the date (*or after sight*) thereof, which period had elapsed before the commencement of this suit; and the said persons so designated by the name style and firm of *Hull and Sons* did then deliver the said bill to the plt. and the deft. then accepted the said bill. And then in consideration of the premises promised the plt. to pay the same according to the tenor and effect of the said bill and the said acceptance thereof but did not pay the same or any part thereof when due. (*Conclude as in the preceding precedent; as to the propriety of adding the common counts, see ante, p. 481.*)

Indorsee against acceptor.

[*Observe the notes and references supra, first precedent.*] For that one *J. H. on &c.* made his bill of exchange in writing and directed the same to the deft., and thereby required the deft. to pay to one *W. B. (or to the said J. H.)* or order fifty pounds two months after the date (*or after sight*) thereof, which period had elapsed before the commencement of this suit, and the deft. then accepted the said bill. And the said *W. B. (or J. H.)* then indorsed the said bill to the plt., and the deft. then in consideration of the premises promised the plt. to pay the amount of the said bill according to the tenor and effect thereof and of the said acceptance and indorsement but did not pay the same when due. (*Add other counts, if necessary, and conclude as in first precedent.*)

The like where there are several indorsements.

It is usual, as we have seen, to strike out all the indorsements after that of the drawer; but, if they be stated, they may be shortly, thus:—"And the said *W. B.* then indorsed the said bill of exchange to one *G. H.*, who then indorsed the same to one *I. K.*, who then indorsed the same to the plt.," and so on.

Against acceptor, where bill payable at a particular place, and not elsewhere.

For that, &c. (*The statement of the bill is the same as in other cases, ante, p. 485, until deft.'s acceptance, which is usually stated thus:*) And the deft. then accepted the said bill, payable at *P. and Co.'s, Lombard Street, London*, and not otherwise or elsewhere, and the said *E. F.* indorsed the same to one *J. H.*, who then indorsed the same to one *T. K.*, who then indorsed the same to the plt., and the deft. then promised the plt. to pay him the amount of the said bill according to the tenor and effect thereof and of the said acceptance and indorsements; but neither the deft., nor the said *P. and Co.* (*ante, p. 474*), nor any person or persons on behalf of the deft., did or would pay the said bill or any part thereof, although the said bill was duly presented for payment (*ante, p. 468*) at the said *P. and Co.'s, Lombard Street*, aforesaid, when the same became payable according to the tenor and effect thereof, of all which the deft. had due notice. (*Add common counts, and conclude as ante, p. 485.*)

Drawer against acceptor, where bill payable to a third person, and drawer has been obliged to take it up.

For that the plt. heretofore, to wit, on &c., made his bill of exchange in writing and directed the same to the deft. and thereby required him to pay to one *J. D.*, or order £ , two months after date (*or after sight*) thereof, which period had elapsed before the com-

mencement of this suit; and the deft. then accepted the said bill, and then promised the plt. to pay the said bill according to the tenor and effect thereof, and of the said acceptance thereof, yet the deft. did not pay the amount thereof, although the said bill was presented to him on the day when it became due, and thereupon the same was then returned to the plt., of all which the deft. then had notice. (*Conclude as ante, first precedent.*)

Indorsee against drawer on default of payment.

[*Observe the notes and references, ante, p. 445.*] For that the deft. heretofore, to wit on &c. (*ante, p. 455*) made his bill of exchange in writing and directed the same to one John Twis, and thereby required the said John Twis to pay to the deft. or order 50*l.* two months after date (*or sight*) thereof, which period had elapsed before the commencement of this suit (*ante, p. 46*), and the deft. then indorsed the said bill to one T. R., who then indorsed the same to the plt., and the said John Twis did not pay the bill although the same was presented to him on the day when it became due, of all of which the deft. then had due notice, and then in consideration of the premises promised the *plt. to pay him the same on request. (*Add a count on an account stated, if requisite, and con. [*487] conclude as ante, p. 485.*)

Indorsee against drawer on default of payment.

Averment that the drawee could not be found, see Chit. jun. Pl., 2nd ed. by Pearson, 88; averment where drawee was dead, *ib.* 89; averment where deft. dispensed with presentment, *ib.*

Averment of want of effects, to excuse notice of dishonour.

[*After stating the dishonour, and omitting to state the notice thereof to deft., say:*] And the plt. avers, that neither at the time when the said bill was drawn, nor at any time afterwards from thence until at the end of the day when the said bill became due according to its tenor and effect, nor from thence until and at the time when the same was so presented for payment thereof as aforesaid had he the said J. T. (*drawee*) any effects of the deft. (*drawer*), nor had the deft. ever any reasonable or probable cause for expecting that he had or would have any effects in the hands of the said J. T. (*drawee*), or that the said J. T. would accept the said bill, or pay or discharge any part of the amount of the said bill or be provided with funds wherewith the said J. T. ought to or could pay the said bill or any part thereof; nor was there at any time any consideration or value for the deft. drawing the said bill or for the acceptance or payment by him the said J. T. (*drawee*) of the amount of the said bill or any part thereof, nor hath the deft. sustained any damage by reason of his not having had notice of the dishonour by the said J. T. of the said bill. (*Add count on consideration, and conclude as ante, p. 485.*)

Against drawer on default of acceptance.

For that, &c. (*As in other declarations against drawer, ante, p. 486, as far as statement of acceptance, which should be omitted. The indorsement should be stated, after which conclude thus:*) And the same was then presented to the said J. T. (*drawee*) for acceptance; and the said J. T. (*drawee*) then refused to accept the same; of all which the deft. then had due notice, and then in consideration of the premises promised the plt. to pay him the amount of the said bill on request, but hath not paid the same or any part thereof. (*Add count on the consideration, and conclude as directed, ante, p. 485.*)

Indorsee against indorser.

For that one E. F. heretofore, to wit on &c. made his bill of exchange in writing and directed the same to G. H. and thereby required the said G. H. to pay to the said E. F. or order £100, two months after the date thereof, which period had elapsed before the commencement of this suit. And the said E. F. then indorsed the said bill to the deft., who then indorsed the same to one J. K., who then indorsed the same to the plt.; and the said G. H. did not pay the said bill although the same was presented to him on the day when it became due; of all which the deft. then had due notice; and then in consideration of the premises promised the plt. to pay him the said bill on request. (*Add count on the consideration, and conclude as directed, ante, p. 485.*)

In debt. Drawee against acceptor.

[*Commence as post, "DEBT."*] For that the plt. heretofore, to wit on &c. made his bill of exchange in writing and directed the same to the deft. and thereby required the deft. to pay him the plt. or order £ , two months after the date thereof, which period had elapsed before the commencement of this suit, and the deft. then accepted the said bill and then in consideration of the premises agreed with the plt. to pay the said bill accord-

ing to the tenor and effect thereof, and of his said acceptance thereof; but the deft. did not pay the amount thereof when due, whereby an action hath accrued to the plt. to demand of the deft. the said sum of money in the said bill specified, parcel of the said sum above demanded. (*If there be a count on the consideration for the bill, commence thus: And also, and conclude with a breach, as post, "DEBT."*)

See forms of declarations by persons in their representative character, and by husband and wife, Ch. Pl. by Pearson, 90—95.

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*FOREIGN BILLS.

Drawer against acceptor of foreign bill.

For that the plt. (*ante*, p. 449) heretofore, to wit on, &c. in parts beyond the seas, to wit, at Paris (or Dublin in Ireland), made his bill of exchange in writing and directed the same to the deft. (by the name and addition of, &c., *ante*, p. 456), and thereby required the deft. to pay (that his second of exchange (*according to the bill*), first and third of the same tenor and date not paid) to the plt. or order £ sterling (or francs), two months after date thereof (or at two usances), that is to say, at two calendar months after the date thereof (*as in the bill*), which period had elapsed before the commencement of this suit (*if necessary state any indorsement in the common form*); and the deft. then accepted the said bill, and then promised the plt. to pay the same according to the tenor and effect thereof and of the said acceptance thereof, but did not pay the same when due (*if payable in foreign money, say* :) And the plt. avers that the said sum of francs in the said bill mentioned at the time of making of the said bill and when it became due was and is of great value, to wit of the value of £ of lawful money of Great Britain. (*Add any other necessary count, and conclude as ante*, p. 485.)

[Payee or indorsee against acceptor of foreign bill.

For that certain persons, designated in the bill of exchange hereinafter next mentioned by the name, style and firm of James Hall and Co. (*or, one J. H.*), did under that name, style and firm on &c. in parts beyond the seas, to wit at Malta, make their bill of exchange in writing and direct the said bill of exchange to the deft. and thereby required the deft. to pay (that their first of exchange, second and third of the same tenor and date not paid) to the plt. or order the sum of 10,000 livres tournoises, at two usances, that is at two months after the date thereof; which period &c., and the said deft. then accepted the said bill. (*If action be by indorsee, state indorsement, as ante*, p. 485; *conclude as ante*, p. 486.)

Payee or indorsee against drawer, on refusal to accept.

For that the deft. (*same as first form down to "before the commencement of this suit," then add* :) And the deft. then indorsed the said bill of exchange (*state the indorsement in the common form down to "that"*) to the plt. and the said bill was then presented to the said J. T. for acceptance and the said J. T. then refused to accept the same (*if drawn in sets, say*), nor did nor would accept the said second or third of exchange in the said bill mentioned (*if payable at usances, see first form*). Whereupon the said bill was then duly protested for non-acceptance thereof, of all which the deft. then had due notice; and the plt. avers that by reason of the promises he hath incurred sundry expenses, to wit, to the amount of £5 in and about noting, protesting and re-exchange of the said bill and for commission and postages incidental thereto, and the deft. then, in consideration of the premises, promised the plt. to pay him the amount of the said bill on request, but hath not paid the same nor any part thereof.

Payee or indorsee against drawer on refusal to pay.

For that defts. on &c. in parts beyond the seas, to wit at Jamaica, made their bill of exchange in writing and directed the same to John Twis and thereby required the said John Twis at two usances, that is to say, at two months after the date of that their first of exchange, second and third of the same tenor and date not paid, and which period had elapsed before the commencement of this suit, to pay to the said plt. or order 10,000 livres tournoises, and then delivered the said bill of exchange to the plt., which said bill the said John Twis then accepted. (*If the action be at the suit of an indorsee, insert the indorsements accordingly, ante*, p. 486.) And the said John Twis did not pay the said bill, although the same was presented to him on the day when it became due, and thereupon the said bill was then duly protested for non-payment thereof, of all which the deft. then had due notice, and then promised the plt. to pay him the amount of the said bill on request. (*Add averment of English currency, and conclude as ante*, p. 485.)

Excuse for not giving notice of dishonour.

See form of want of effects, *ante*, p. 487.

See a great variety of other precedents on bills, Chit. jun. Pl. by Pearson, 96, and 2 Chit. Pl. 7th ed. 127, 131. They are too numerous to be inserted here.

**Evidence for Plaintiff.*

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General Proofs—Production and Proof of Bill.] It is not necessary to produce the bill at the trial, unless some issue be joined which renders it requisite, for otherwise the plea admits the bill; and, where that is the case, there is no necessity to prove it (*Shearne v. Burnam*, 10 Ad. & E. 593, per Patteson, J.; see *Lane v. Mullins*, 2 Q. B. 254; 1 Gal. & Dav. 712; 11 Law J., 51). The deft. can neither compel the plt. to produce a bill at the trial, nor go into secondary evidence of its contents, if he plead only pleas in confession and avoidance, and give no notice to produce it (*Goodered v. Armorer*, 3 Q. B. 956; *Lawrence v. Clarke*, 15 Law J. 40, Exch.); unless on a plea, impeaching the bill on the ground of alteration (*Barker v. Malcolm*, 7 M. & W. 101). It need not be produced when the count on the bill or note is demurred to, so that it is only necessary to assess the damages upon it (*Lane v. Mullins*, *supra*; nor, it seems, upon a writ of inquiry (*Ib.*); nor before master, on a reference to compute, &c. (*Davis v. Barker*, 16 Law J., N. S., C. P. 86). To an action on a check, the deft. pleaded that it was given for money won at an unlawful game at dice; issue thereon; the deft. did not give notice to produce the check: held, that on this issue the plt. was not bound to produce the check, either as part of his own case, or, when called upon to do so at the trial, as part of the deft.'s (*Read v. Gamble*, 10 Ad. & E. 597); and a notice served at half-past eight o'clock the evening before the trial is too late (*Lawrence v. Clark*, 3 D. & L. 87). When the deft. pleaded fraud, it was held that the plt. was not bound to produce the bill without notice (*Lawrence v. Clark*, *ib.*). The payee of a note, not negotiable, may require payment without producing it (*Wain v. Baily*, 10 Ad. & E. 616). In the case of foreign bills drawn in sets, both sets should be produced (Ch. Bills, 378).

To a declaration on a bill of exchange, the deft. pleaded an agreement to give credit, and that the period of credit had not expired. A witness proved the agreement by an admission: but the bill was not produced, and no notice to produce had been given. Held, that upon that issue the production of the bill was unnecessary (*Ingram v. Webb*, 9 Law T., Q. B. 147).

So the production of a bill may be dispensed with when in the possession of the deft., or where destroyed; but, in these cases, plt. should show sufficient probability to satisfy the court that the original note was genuine (1 Atk. 445; *Anon.* 1 Ld. Raym. 731).

Where the bill is in the deft.'s possession, the plt. must prove such possession, and that he gave notice to deft., or his attorney, to produce the bill: as to proof of service of notice, *post*, "SECONDARY EVIDENCE." Where an acceptor improperly detains a bill in his hands after acceptance, the drawer may sue him on it, and give notice to produce it; and on his default, give parol evidence of it (per Lord Ellenborough, *Smith v. McClure*, 5 East, 476). Without giving such notice, plt. cannot recover interest on the instrument itself, though he may give it, on an admission of the debt, in evidence, and recover on the money counts (*Fryer v. Brown*, R. & M. 145;

see *post*, "INTEREST"). In trover for a bill, no notice to produce is necessary (How v. Hall, 14 East, 274). Notice to deft. to produce a check drawn by him, and paid by his banker, is sufficient to let in secondary evidence, though the check remains in the banker's hands, as the banker being deft.'s agent, the check, while in his hands, is considered in the possession of the deft. (Partridge v. Contes, R. & M. 156). A post-dated check is altogether void, and cannot be received in evidence for any purpose (Searle v. Morton, *9 M. & W. 309). As to the *copy*, offered [*490], as secondary evidence, plt. must prove that it is an accurate one, or transcript of it, by having compared it with the original. The draft of the declaration, in which the bill is set out, will be a sufficient copy, if the bill was not attested by a subscribing witness (Glover v. Thompson, R. & M. 403).

When a bill is *destroyed*, a copy may be given in evidence; but, if the bill or note were of a negotiable nature, evidence of its having been actually destroyed, as by fire or otherwise, must be given, for the purpose of showing that deft. will not be compelled to pay it again; and, without proof to that effect, the plt. cannot recover (Pierson v. Hutchinson, 2 Camp. 211; Mayor v. Johnson, 3 Camp. 324; Davis v. Dodd, 4 Taunt. 602; Bayl. B. 378; see and consider Hansard v. Robinson, 7 B. & C. 90).

When the bill is *lost* or *mislaid*, the plt. cannot recover by merely proving the loss, and giving a copy in evidence, as *no action at law* can be supported against a party to a bill of exchange, note, or check, transferable to a *bona fide* holder, and lost before or on the day it is due, although a bond of indemnity have been tendered to the deft., and notice given (Pierson v. Hutchinson, 2 Campb. 211; S. C. 6 Esp. 126; Hansard v. Robinson, 7 B. & C. 90); or even after it became due, and after action brought (Poole v. Smith, Holt, C. 144; Powel v. Roach, 6 Esp. 76; Toulmain v. Price, 5 Ves. 238; Hansard v. Robinson, *supra*). An acceptor would not be liable on a lost bill, if the loss was before the bill was due, though he promised to pay it, without a fresh consideration (Davis v. Dodd, 4 Taunt. 602). And it has been decided, that when a bill has been lost after it was due, it having been indorsed by the payee, the indorsee losing it cannot, in an action, recover the amount from the acceptor, though he had promised to pay a renewed bill (Hansard v. Robinson, 7 B. & C. 90; 1 R. & M. 404, n.; and Dart v. Hinks, *ib.*). But it was ruled at nisi prius, in an undefended cause, that an action might be maintained on a lost bill, if the loss did not happen till after the bill became due (Glover v. Thompson, *ib.*); but this decision seems questionable, and, according to the cases above referred to, could not be maintainable. The deft., being indebted to the plt. for goods sold, gave him a bill not due, drawn and accepted by two other persons, to a greater amount than the price of the goods, and the plt. gave the deft. the difference in money, who indorsed the bill in blank; the plt. lost the bill before it was paid; held, that he could not sue the deft. upon it, nor recover the price of the goods, as the deft. had given full value for the bill, and might still be compelled to pay its amount to a *bona fide* holder (Champion v. Terry, 7 Moo. 130; 3 B. & B. 295). A check given for stock sold, is lost by the vendor; the purchaser is immediately informed of this fact, but refuses to pay without an indemnity; four months after, the bankers, on whom the check was drawn, stopped payment, with sufficient money of the drawer's in their hands to answer it: held, that, under these circumstances, an action would not lie for the price of the stock (Bevan v. Hill, 2 Camp. 381). If a bill or note, transferable by delivery, is cut in halves, and half lost, the holder cannot sue at law upon the other half, as plt. must produce the entire instrument, or prove that the part wanting has been destroyed (Bayl. B.

299; *Mayor v. Johnson*, 3 Camp. 324). But, if the bill were in such a state, when lost, that no person but plt. could have acquired a right to sue thereon; as, if the bill were not negotiable (*Mossop v. Eadon*), or has not been indorsed, or has been only indorsed specially (*Long v. Bailie*, 2 Camp. 214; *Bayl. B.* 297; *Rolt v. Watson*, 4 Bing. 273), plt. may give evidence of its contents (Ib.). *The bearer of a bill, which was lost, may maintain an action on it against the drawer (*Grant v. Vaughan*, 3 [*491] *Barn.* 1516; 1 *Bla.* 485). The note purported to be for value received in Penzance shares, pursuant to annexed contract; no contract was in fact annexed. Held, that this did not render it necessary for the plt. to put in any contract or other document besides the note itself (*Fox v. Frith*, 1 *Car. & M.* 502, *Erskine*).

Variance.] The bill or note must be proved, as stated; and any variance in the statement of it in the declaration will be fatal (see *ante*, p. 449), unless the judge at nisi prius will allow an amendment. Where a bill has been altered, it lies upon the party producing it to show that the alteration was not improperly made (*Henman v. Dickinson*, 5 Bing. 183). As to variance in the different parts of the bill, see *ante*, 491.

Averments in General.] If there are any explanatory averments or circumstances connected with the instrument necessary to be proved, whether to rectify a mistake or remove any apparent ambiguity, as where plt. sues upon a bill, &c., purporting to be payable to a person of a different name, and there is an averment to that effect, it must be proved (*Willis v. Barrett*, 2 *Stra.* 29); or, where the bill has been incorrectly dated by mistake, and there is an averment to rectify such mistake, it will be incumbent on the plt. to prove it, and show that it was justifiable (*Ch. Bills*, 376); and, where the indorsee sues the acceptor of a bill, the date having been altered, plt. must prove that the alteration was made by the acceptor, previous to the indorsement by the drawer (*Johnson v. Marlborough* (Duke of), 2 *Stark.* 313); and, if there have been any erasures, the circumstances under which they were made should be proved (Ib. *ante*, 491). Where plts. have no title upon a bill or note, unless they constitute a particular firm, they must prove that they constitute such firm, as where they sue upon a bill or note payable to that firm, without specifying its members (*Bayl. B.* 470, 471, *post*). If the bill were in foreign money, it should be proved what was the rate of exchange, and the value of such money, when the bill fell due, and, if the bill were payable at usances, the duration of such usances should be proved (*Ch. Bills*, 377).

Handwriting in general, Proof of.] The name of the party to the note must appear in some part of it, signed by himself or his agent (*Bayl. B.* 31). Where the only evidence against one of the defts. was a signature, bearing his name to a joint retainer by him and the other defts. on which the attorney had acted in defending the action, without having seen C., or having other means of knowledge of his handwriting: held insufficient (*Drew v. Bryer*, 12 *Law J., N. S.*, 144). Where the only proof of the handwriting of the deft. was that by a banker's clerk, who stated that, two years ago, he saw a person calling himself by the deft.'s name sign a book; that he had never seen him since; but that he thought the handwriting was the same, and had since seen checks bearing the same signature: held, that this was evidence to go to the jury (*Warren v. Anderson*, 8 *Scot.* 384). As to the manner of proof, *post*, "HANDWRITING."

Subscribing Witness to Bill, &c.] If the bill, or the indorsement to it, or any other material part, be *attested* by a witness, it must be proved by him, or some sufficient reason for his absence shown, as that the witness is abroad, or out of the process of the court, as, in **Ireland* (Hadnet [*492] v. Forman, 1 Stark. 90); or, that he cannot be found on diligent inquiry (Cunliffe v. Sefton, 2 East, 183; Burt v. Walker, 4 B. & A. 697). See further, as to what is a sufficient reason for such absence, *post*, "DEEDS, SUBSCRIBING WITNESS TO." If a subscribing witness to a note swear that he did not see it drawn, it may be proved by evidence of the handwriting of the maker (Simon v. Dean, 2 Camp. 636, n.). Where there are several subscribing witnesses, it suffices to call one, if he can prove the signature (Holdfast v. Dowsing, Stra. 1254). If the subscribing witness, when called, cannot prove it, &c., the plt. may proceed to prove it by other means (per Le Blanc, J., Pea. 23; *ante*, p. 236). If the subscribing witness be dead, proof of his death and handwriting, and that the debt was present when the note was prepared, is sufficient (Nelson v. Whittall, 1 B. & Ad. 19); and, where the subscribing witness has become insane, blind, &c., proof of his handwriting has been held sufficient proof of the note (per Bailey, J., *ib.*; Wood v. Drury, Raym. 734; see Crank v. Frith, *infra*). He must be called, even though the attestation be on the back of the bill (Richards v. Frankrum, 9 C. & P. 221); and though he be blind (Crank v. Firth, 2 M. & R. 262). But it is most prudent to prove both the handwriting of the maker and of the witness, in order to establish the identity of the maker, for proof of the handwriting of the attesting witness alone establishes, merely, that some person assuming the name which the instrument purports to bear executed it, and does not establish the identity of that person (Nelson v. Whittall, per Bailey, J., 1 B. & A. 21). It should seem that proof of the subscribing witness's handwriting alone would not be sufficient (Ray v. Brookman, M. & M. 286).

Where there is no attesting witness, the signature of the bill may be proved by any person who has seen the party write, or has received letters from him: there must also be some identity of the person whose signature is proved with the debt.; mere correspondence of christian and surname is no evidence of identity (Whitelock v. Musgrave, 1 C. & M. 511; Jones v. Jones, 9 M. & W. 75; Bell v. Gunn, 11 Law J. 57).

In an action against Henry Thomas Ryde, as acceptor, it appeared that a Henry Thomas Ryde had kept cash at the bank, where the bill was made payable, and had drawn checks which the cashier had paid. The cashier knew the parties' handwriting by the checks, and swore that the acceptance was in the same writing, but he had not paid any checks for some time, did not know the party personally, and could not further identify him with the debt.: held, a sufficient *prima facie* case. (Roden v. Ryde, 4 Q. B. 626).

If a bill or note be signed or indorsed with a mark, such mark may be proved by a person who has seen the party so execute instruments, and can recognize some peculiarity in the mark (George v. Sarny, M. & M. 516). Where an acceptance is by the christian and surname of the drawer, a witness who has seen him sign his surname only, is competent to prove the acceptance (Lewis v. Sapio, M. & M. 39; overruling Powell v. Ford, 2 Stark. 164).

When signed or accepted by Agent.] If the bill or note be not signed by the debt. himself, but by another person in debt.'s name (Helmsey v. Loader, 2 Camp. 450), or by procuration in his name by an agent, the handwriting of such person, and his authority as agent, must be proved (Attwood v. Munnings, 7 B. & C. 278); and this may be done by calling the agents,

or by showing any act of the deft.'s which amounts to a knowledge of the act, or that he consented to it or permitted it (see *Smith v. Strange*, Pea. 116; **Curtis v. Barrs*, ib.). But in order to charge an agent personally on a bill thus drawn, it will be requisite to prove that he [*493] had no authority to draw it, or that he had not acted *bona fide* (*Wilson v. Barthrop*, 2 M. & W. 863). An authority by parol is sufficient: this may be proved, either by showing an express authority or a general one, derived from the usual course of the agent's employment (10 Mod. 110; 12 ib. 346); or an implied one, by proving that the deft. knew of it, or consented to it, or paid other bills accepted in the same way (Bayl. B. 488; Comb. 450; *Barber v. Gingell*, 3 Esp. 60; Bayl. B. 487; see *Lay v. Pyne*, 1 Car. & M. 453). A farm bailiff has no implied authority to bind his employer by drawing or indorsing bills in his name by procuration; it must be shown that the latter knew, or had the means of knowing the acts done in his name (*Davison v. Stanley*, 2 Man. & G. 721). A general authority is supposed to continue, until its determination is notorious. Therefore, after the discharge of a servant usually employed, a man will be bound by his signature, until his discharge is generally known (Bayl. B. 488, citing *Beawes*, s. 231, p. 445; Mol. b. 2, c. 10, s. 27). The agent himself is a competent witness (see 6 & 7 Vict. c. 85), and should in general be subpoenaed; but his authority or handwriting may be established by other testimony; as, where the principal has used an affidavit of the agent, in an application to the court in which it is admitted, the affidavit of the agent may be used as evidence of it (*Johnson v. Ward*, 6 Esp. 47). A declaration of an agent can only be evidence against the principal, where it accompanies the transaction about which he is employed, and, if made at another time, it is not admissible (*Betham v. Benson*, 1 Gow, 489). If the authority was in writing, the instrument must be produced, and proved (*Johnson v. Mason*, 1 East, 90, 115).

When a bill is drawn by an agent without mentioning the fact of agency, the action must be against him (*Sowerby v. Butcher*, 2 C. & M. 368; *Lead-bitter v. Farrow*, 5 M. & S. 345; *Lefevre v. Lloyd*, 5 Taunt. 749; *Ducarry v. Gill*, Moo. & M. 450).

If an order to admit a bill of exchange is made where the notice describes it as having been accepted by one H. B., for the defts., it is not competent to the defts. to dispute the authority of H. B. to accept as their agent (*Wilkes v. Hopkins*, 3 D. & L. 184).

The deed of association of a mining company provided that its affairs should be managed by a committee of seven shareholders, called managing directors, and that they should vote by proxy; B. was appointed resident director and manager, to superintend the mine and local concerns, hire workmen, provide machinery, subject to instructions from managing directors to whom he was to transmit monthly accounts of ore raised, wages paid, &c., and a full statement of all debts and liabilities due from the company, with a proviso that he should not engage or expend the credit of the company for any sum exceeding 50*l.* in any one month without express authority in writing of three managing directors: held, that B. was not thereby authorized to draw or accept bills in the name of the company without the express authority of the managing directors. Held also, that such directors who were represented at a meeting by proxy, were not bound by a resolution of the directors present at such meeting, authorizing the resident director to accept bills for the company (*Brown v. Byers*, 16 M. & W. 252; see *ante*, "AGENT," and *post*, "PUBLIC COMPANIES").

Proof of Handwriting by Admission of Party.] It will be sufficient if plt.

prove that deft. acknowledged the signature to be his (*Cooper v. Le Blanc*, Stra. 1051; *Leach v. Buchanan*, 4 Esp. 226); *and this, though [*494] the acknowledgment were made pending a treaty for a compromise (*Waldridge v. Kennison*, 1 Esp. 143). The admission by an indorser of his handwriting is evidence against the maker (*Maddocks v. Hankey*, 2 Esp. 647). In an action by payee of a note, who was also indorser: held, that his indorsement was an admission of the handwriting of the maker (*Free v. Hawkins*, Holt, 550). In an action on a note, a declaration made by the plt. before he became the holder will invalidate the note (*Williams v. —*, 5 M. & R. 121). An offer from the deft. to the plt. after a note is become due, to give another instead of it, will amount to an admission of deft.'s signature and plt.'s title (*Bosanquet v. Anderson*, 6 Esp. 43). A promise to pay the amount of the bill, or a part payment of it after it is due, is an admission of the acceptance (*Jones v. Morgan*, 2 Camp. 474); so is an offer by deft. to compromise the action (see *Harding v. Jones*, 1 Tyrw. & G. 135); and of the other party's handwriting (*Helmsley v. Loader*, 2 Camp. 450); and payment of money into court generally also admits deft.'s signature (*Gutteridge v. Smith*, H. Bl. 374; *Middleton v. Brewer*, Pea. 16). It admits everything which the plt. must have proved to recover it (*Dyer v. Ashton*, 1 B. & C. 4, *per cur.*). It is an admission that the plt. has a legal demand to the extent of the money brought in (*Blackburn v. Scholes*, 2 Camp. 341), but not beyond that extent. Therefore, payment of money into court, in an action on a promissory note, payable by instalments, is only an admission that money to the amount paid in was due on it, and does not bar the Statute of Limitations, as to a further sum claimed on the same note (*Reid v. Dickens*, 5 B. & Ad. 499). In an action against an indorser, proof that the deft. admitted to have received a bill corresponding with that upon which the action was brought, that after issue joined he had declared that he came to town to hasten the trial of a cause brought against him on an indorsement he had made upon a bill, and that he carried the cause down by proviso, was held sufficient (*Dale v. Lubbock*, 1 Barn. 199; Bayl. B. 486). If an acceptor is sued, and he give plt. a notice to produce papers relating to a bill described therein "as accepted by the said defendant," it is an admission of deft.'s acceptance (*Holt v. Squire*, R. & M. 282). If deft. speak of having been arrested for a debt, and offer a bill, proof of this admission will entitle the plt. to a verdict (*Braithwaite v. Churchill*, 2 C. & P. 341). Where an admission was made before the bill was due, and the holder received the bill on the faith of such admission, the party making it was held precluded from afterwards disputing the fact, on the ground that the signature was a forgery (*Leach v. Buchanan*, 4 Esp. 226); and, where deft. is sued as acceptor, though the plt. fail in proving his handwriting, and it appear to be a forgery, yet proof that deft. had paid several other bills accepted in like manner, will establish his liability (*Barker v. Gingell*, 3 Esp. 80). Where an acceptance is signed by the wife for the husband, and he, with a knowledge of the circumstance, promises to pay the bill, it will be an admission of his signature, and no proof will be required (*Helmsley v. Loader*, 2 Camp. 450). But, in an action on a bill, which has been shown to the drawer, with the name of the payee indorsed on it, and he merely objected to pay it because he had drawn it without consideration, it was held, in an action against him by the indorsee, that this admission did not dispense with regular proof of the indorsement (*Duncan v. Scott*, 1 Camp. 101). An admission of the party's signature will not operate against any other party than the one making it (*Bayl. B. 483*); therefore, in an action against several drawers, indorsers, or acceptors, an admission upon the pleadings by one, of his signature, will not exempt the plt. from proving it against the *others

(Esp. 125; Barnes, 381); and proof that one of the indorsers had confessed his signature is not admissible in evidence in an action by an indorsee against the drawer of a bill (Ib.; Bayl. B. 487). The admissions of a prior holder of a bill are not evidence against a subsequent one, if the bill is not proved to have been in his possession at the time he made the admission (Pocock v. Billings, 2 Bing. 269; Barough v. White, 4 B. & C. 328; see Woodbury v. Row, 1 Ad. & E. 114). A note was dated 10th November: an admission was put in, made by the deft., of the handwriting of a note, dated 10th October: held, evidence of handwriting not necessary; for it is evident that the deft.'s intention in the admission was to admit the handwriting of the note declared on, and that the mis-description could not have misled him (Field v. Fleming, 5 Dowl. 450; 1 Jur. 24; see *ante*, "ADMISSIONS").

Evidence under the Common Counts.] If the plt. cannot substantiate in evidence the facts necessary to support the count on the bill or note, or such count should be defective, he can go into evidence of the consideration for which he received it, and may recover on the common counts, if adapted to such consideration (see Ch. Bills, 363, and cases there referred to; Thompson v. Morgan, 3 Camp. 101, 102; Tyte v. Jones, 1 East, 58, n. a; Alves v. Hodgson, 7 T. R. 241; Tatlock v. Harris, 3 T. R. 174; Wilson v. Kennedy, 1 Esp. 245; see *ante*, p. 481); provided the particulars of his demand state the consideration of the bill, &c. (Wade v. Beasley, 4 Esp. 7; Ryder v. Ellis, 8 C. & P. 857); and his counsel notices such demand in opening the case on the trial (Paterson v. Zachariah, 1 Stark. 72; see the cases in Wells v. Girling, 1 Gow, 22, 23; S. C. 3 Moo. 79). It is not necessary to declare on a promissory note, for, in an action for money lent, the note may be given in evidence (B. N. P. 137, 138; Storey v. Atkins, 2 Stra. 719). Where, however, the party is discharged by alteration of the bill, &c., or by the laches of the holder, the plt. will not be allowed to go into evidence of the common counts (Long v. Moore, 3 Esp. 155); and, where a promissory note has been given for money due from the deft. to the plt., who declares thereon, together with the money counts, he must prove the note to have been destroyed before he can have recourse to the money counts, if it appear that the money so claimed was that for which the note was given (Dangerfield v. Wilby, 4 Esp. 159; Hadwen v. Mendisabel, 2 C. & P. 20; *ante*, p. 481). The above rule does not, in general, apply when there is *no privity* between the plt. and deft., as between the indorsee and the acceptor of a bill, and the indorsee and the maker of a note (Johnson v. Collins, 1 East, 98; Barlow v. Bishop, ib. 434, 435; Whitewell v. Bennett, 3 B. & P. 559; Houle v. Baxter, 3 East, 177); between whom, if the plt. cannot succeed on the count upon the bill, and there be no express promise to pay the amount, the common counts are in general of no avail (Waynam v. Bend, 1 Camp. 175; Ch. Bills, 364; Bentley v. Northhouse, M. & M. 66; Eales v. Dickin, ib. 324; but see Ch. Bills, 9th ed. 581). And a person who becomes a party to a bill or note, as a mere surety, is not liable under the common counts (Wells v. Girling, 3 Moo. 79).

The instrument itself, will, it is said, when duly stamped, in certain cases, be evidence in support of the counts for money lent, paid, had, and received, and that founded on an actual or supposed account stated (Wells v. Girling, 1 Gow, 22; S. C. 3 Moo. 79; Gould v. Coombs, 1 C. B. 435). But, according to Waynam v. Bend, 1 Camp. 175, such instrument is only evidence under the money counts, as between the *original* parties to it. Thus, a bill *is *prima facie* evidence of money lent by the payee [*496] to the drawer, and a note, of money lent by the payee to the maker

(Clarke v. Martin, Raym. 758; 1 Burr. 373); and an indorsement is *prima facie* evidence of money lent by the indorsee to his immediate indorser (Bayl. B. 164, 286); and a promissory note in such cases is admissible as a paper or writing, to prove the receipt of so much money from the plt., and that, though it has been invalidated as a note by alteration (Sutton v. Toomer, 7 B. & C. 416; Tomkins v. Ashby, 6 ib. 541; Gould v. Coombes, 1 C. B. 543). Where plt. cannot recover on a count for want of a stamp, he may on a count for money lent, on proof of an acknowledgment on demand made (Tyte v. Jones, 1 East, 58, n.; see Alves v. Hodgson, 7 T. R. 241; Kennedy v. Wilson, 1 Esp. 345; see Jardine v. Payne, *post*, p. 497). A bill which never was properly stamped is not admissible in evidence for collateral purposes, though formerly held to be so (Jardine v. Payne, 1 B. & Ad. 670, *post*, p. 496; Jones v. Ryder, 4 M. & W. 32). A check, not presented, has been held not to be evidence of money lent by the drawer to the payee (Pearce v. Davis, 1 M. & R. 365). When the deft. had admitted that he owed the money due upon a bill which was in his possession, Abbott, C. J., held, that such an admission might be given in evidence under the common counts, without a notice to produce the bill (Fryer v. Brown, R. & M. 145). *Quære*, whether a note which is misdescribed is receivable in evidence under the common counts (Wells v. Girling, *infra*; and see Gibson v. Minet, 3 T. R. 481; 1 H. Bl. 569). When a bill is given in payment of goods sold, which is refused acceptance, such bill may be treated as a nullity as against the drawer, and the holder may recover his demand on the common counts, although the credit on the bill has not expired (Hickling v. Hardy, 1 Moo. 61; 7 Taunt. 312). The payment of interest is evidence to show that a principal sum, corresponding with and bearing such interest was due; and a note bearing such interest may be looked to, to see the terms on which the deposit was made (Sutton v. Toomer, 1 M. & R. 125; 7 B. & C. 416).

A count for money lent is supported by evidence acknowledging the receipt of it, on behalf of the deft.'s grandson, and promising to be accountable for it on demand; and a count for money laid out and expended at the deft.'s request is proved by evidence of a note of hand requesting the plt. to pay it to a gardener for the workmen's use (Harris v. Huntack, 1 Burr. 371; 2 Ld. Raym. 28).

A bill or note is *prima facie* evidence of *money paid* by the holder to the use of the drawer of the one, and maker of the other; and a bill, when accepted, is evidence of money paid by the holder to the use of the acceptor; and, if an indorser has taken up a bill, he may, having failed in his first count against the acceptor, on account of a variance, recover under the count for money paid (Pownal v. Farrand, 6 B. & C. 439; Le Sage v. Johnson, Forr. R. 23; S. C. Bayl. B. 164; *sed vide* Gibson v. Minet, 1 H. Bl. 602; Howle v. Baxter, 3 East, 177; Cowley v. Dunlop, 7 T. R. 572; Buckley v. Buttevant, 3 East, 72; Simmonds v. Parminter, 1 Wils. 186; Ch. Bills, 365). If the drawee, without having effects of the drawer in his hands, accept and pay the bill without having it protested, he may recover the amount in an action for money paid, laid out, and expended, to the use of the drawer (Smith v. Nissen, 1 T. R. 269; Cowley v. Dunlop, 7 T. R. 576). But, if he has not actually paid the bill in money, and has only given security for it, or he has not sustained any costs or damage, he cannot recover, unless the declaration be special (3 East, 169; 8 T. R. 610; 7 T. R. 204).

In an action on a note, and also for goods sold and delivered, if [*497] *plt. prove the delivery of the goods before the note was given, and do not show the consideration to have been distinct from the goods, the deft must have a verdict on one of the counts; the plt. cannot take a

verdict on one, and have the jury discharged from giving one on the other (*Mutrie v. Harris, M. & M.*).

A bill, as well as a note (*Vin. Abr. Evidence, A. b. 36*; *Ford v. Hopkins, 1 Salk. 283*), is *prima facie* evidence of money had and received by the drawer or maker, to the use of the holder (*Bayl. B. 487, 4th ed., cites Grant v. Vaughan, 3 Burr. 1516*; *sed vide Waynam v. Bend, 1 Camp. 175, ante, p. 195*). And an acceptance is evidence of money had and received by the acceptor to the use of the drawer (*Thompson v. Morgan, 3 Camp. 101*; *Bayl. B. 163*). A bill will also be evidence under the count for money had and received, in an action by the payee, who is also the drawer, against the acceptor (*Ib.*). It has been supposed, that, in an action by an indorsee against an acceptor, the bill may be given in evidence under the count for money had and received (*2 Phil. Ev. 50*; *sed vide Waynam v. Bend, 1 Camp. 175*; *Enon v. Russell, 4 M. & S. 507*; *Wells v. Girling, Gow, 22*; *S. C. 3 Moo. 79*; *Ch. Bills, 366*; *Eales v. Dickon, M. & M. 324*). An instrument promising payment on condition is not admissible in evidence to sustain the money counts, or on an account stated (*Morgan v. Jones, 1 Crompt. & J. 162*).

A bill will be evidence under the *account stated* in an action by the payee, who is also drawer, or by the drawer against the acceptor (*per Abbott, C. J., Rhodes v. Gent, 5 B. & A. 245*). It has been said, an acceptance is evidence of an account stated by the acceptor with the holder of the bill (*Israel v. Douglas, 1 H. Bl. 239*; *sed vide Taylor v. Higgins, 3 East, 169*; *Whitwell v. Bennett, 3 B. & P. 559*). An admission of the debt. may be proved as evidence of an account stated under that count (*Highmore v. Primrose, 5 M. & S. 65*; *Wade v. Beasley, 4 Esp. 7*). So, it seems, in an action by payee against acceptor the bill would not be evidence of an account stated (*Early v. Bowman, 1 B. & Ad. 889*). Indorsee against indorser of a bill: evidence of an acknowledgment of an existing debt, and of a promise to pay by the debt. is admissible, and sufficient to support a count upon an account stated (*Wagstaffe v. Boardman, 9 D. & R. 248*). Count on bill by indorsee for 57*l.* 10*s.*, and an account stated against acceptor, and the bill was on an insufficient stamp; and the plt. in order to recover on an account stated, produced two letters of the debt.'s after the dishonour of the bill; in the first, dated the day the bill became due, and addressed "To the gentleman who calls with the bill," the debt. expressed his regret that it was not in his power to take up the bill for 57*l.* 10*s.* In the second, in answer to one from the plt.'s attorney requiring payment of the debt.'s acceptance by Tilbury for 57*l.* 10*s.*, the debt. said if he had had the money he should not have let his acceptance be dishonoured, and proposed that Tilbury should draw upon him in a month. Held, that these letters did not amount to an acknowledgment that the sum of 57*l.* 10*s.* was due to the plt., but merely that it was due to the person legally entitled to the bill; that it was necessary, therefore, for the plt. to prove an indorsement of the bill, and that the bill, not being on a sufficient stamp, could not be looked at by the jury for the purpose of ascertaining this fact (*Jardine v. Payne, 1 B. & Ad. 663*). "Received of A. B. 150*l.*, which I promise to pay on demand, with interest," is a promissory note, and requires to be stamped as such. Where, therefore, an instrument in these words on being produced in evidence, was stamped with a receipt stamp; held, that an acknowledgment by the debt. that he owed the party to whom it was given the sum mentioned in the note was held sufficient to entitle the executors of the latter to recover on an account *stated, although the consideration for which the note was given was goods [*498] sold and delivered, for which there was no count in the declaration (*Ashby v. Ashby, 3 Moo. & P. 186*). On the death of one of the par-

ties to a note one of the makers got possession of it, for the purpose of adding another party to it, and as a guarantee for its re-delivery gave I O U for the amount of the note: held, in an action by the payee against the maker, that assuming the note to be void by reason of the alteration, inasmuch as the note was free from objection, an I O U which was given before the alteration was admissible in evidence in support of a count upon an account stated by the I O U (*Gould v. Coombs*, 1 C. B. 543).

Evidence in Answer to Defence, of defect of stamp, incapacity to contract, illegal consideration, want of consideration, improper presentment, laches of holder, giving time to parties, plt. an outlaw, bankruptcy, award and satisfaction, &c. The answers which plt. should be prepared to show, in making out his case against the intended defence, will be found interspersed amongst the various defences which it will be hereafter seen deft. may set up (*post*).

Damages.] See "DAMAGES." Plt. may, in most cases, recover, 1st, the principal sum due; 2nd, interest; 3rd, all incidental expenses occasioned by the non-acceptance or non-payment, re-exchange, costs of dishonour, provision, &c.

With respect to the Principal Sum, plt. will in general be entitled to recover it to its full amount; and in an action by the indorsee against the drawer of a note, although the indorser had paid the indorsee a part of the note, it was held that the indorsee was entitled to recover the whole as against the drawer, he being merely a trustee of the indorser as to the part received from him (*Johnson v. Kennion*, 2 Wils. 262; but see *Bacon v. Searles*, *infra*). Where a bill was sent to get it discounted, and a bank upon getting a guarantee advanced 100*l.* upon it, the party obtaining the advance having no other interest in the bill; upon the bill being dishonoured, he paid the 100*l.* to the banker, and then sued the acceptor on the bill: held, entitled to recover the amount of the bill, and that he would be trustee for the 200*l.* to the party entitled to it (*Reid v. Furnival*, 1 C. & M. 538). In an action by second indorsee against acceptor, where the pleadings admitted that the acceptance and first indorsement were without consideration, and the issue was whether the plt. gave value for the indorsement to him, and he proved a debt of 57*l.* due to him from the first indorser, and one of 20*l.* from the second indorser, it was held that he was entitled to recover 20*l.* only (*Simpson v. Clarke*, 3 C. M. & R. 342). So, if the party who had received the accommodation pay part of the amount the holder can recover only the balance from the party accommodating (*Bacon v. Searles*, 1 H. Bl. 88).

The acceptor is liable to the full amount of the bill as between himself and third parties, but only as to the sum for which the acceptance was given as between himself and the drawer (*Darnell v. Williams*, 2 Stark. 166); he may therefore show that he accepted it for value as to part, and for accommodation as to the rest (*Ib.*); and the liability of the maker of a note given to secure the debt of a third party, is the same as that of one who gives a regular guarantee (*Stone v. Compton*, 1 Wil. 436). A partial failure of the consideration will, in general, be no defence of the quantum to be deducted on that account, as it is matter, not of definite computation, but of unliquidated damages (*post*). Where the holder or indorsee of an*

[*499] accommodation-bill takes it, knowing it to be such, and advances on it but part of the amount, he can only recover as much as he has really paid (*Wiffin v. Roberts*, 1 Esp. 261); and where the deft. accepted a bill of 415*l.* to accommodate P. and Co., P. and Co. indorsed it to their bankers for value and became bankrupts, the bankers knew it to be an ac-

commodation acceptance, and their demand against P. and Co. was 205*l.* only, in an action by them upon this acceptance, it was held, that they could only recover the 205*l.* (*Jones v. Hibbert*, 2 Stark. 304; and see *Solomon v. Turner*, 1 ib. 51). If, in an action by the indorsee against the drawer or acceptor, he has received any part from the acceptor or drawer, he can only recover the balance, as it operates, so far, as a satisfaction (*Bacon v. Searles*, 1 H. Bl. 88; and see *Beck v. Robley*, 1 ib. 89, n.; Bayl. B. 167); but, if the part-payment be received from the first indorser, he may recover the whole amount against the drawer or acceptor (*Walwyn v. St. Quintin*, 1 B. & P. 638; 2 Wils. 262; 1 Rose, 10). However, "where a bill is given for money really due from the drawee to the drawer, or is drawn in the regular course of business, in such case the indorsee, though he has not given to the indorser the full amount of the bill, yet may recover the whole, and be the holder of the overplus above the sum he has really paid to the use of the indorser" (per Lord Kenyon). But this rule only applies where there is some person to receive the overplus (*Pierson v. Dulop*, Cowp. 571). If a bill be given in consideration of the deft. entering into partnership with the plt., and the treaty be afterwards broken off, the plt. is entitled to recover a verdict on the bill to the amount of the damages he has sustained, and not to the full amount of the bill (*Lager v. Ewer*, Pea. 216). Where an indorser paid part of the amount of a bill to the holder, it was held, that he might recover the same against the acceptor as money paid to his use (*Pownall v. Ferrand*, 6 B. & C. 439). The sum mentioned in the body of the bill is that only which can be recovered, and where it differs from the figures at the top, parol evidence is not admissible to explain the intention of the parties (*Saunderson v. Piper*, 8 Law J. 227; 5 Bing. N. C. 425).

Interest.] See "INTEREST." As to when *interest* is recoverable see 3 & 4 Will. IV. c. 42, ss. 28, 29. It was so before the act in an action on a bill or note, as a debt, when stipulated for in the bill, and as damages, when not specified (*Ex parte Marlan*, 1 Atk. 151; *Cameron v. Smith*, 2 B. & A. 305); and if the delay of payment arose from the holder's neglect, it might be withheld (per Bailey, J., ib. 308; *Laing v. Stone*, 2 M. & R. 561; *Upton v. Ferrers* (Lord), 5 Ves. jun. 808; *Murray v. East India Company*, 5 B. & A. 204). So, where the note had been overdue thirty years the jury withheld it, and the court, on motion, could not increase the verdict by giving it (*De Belloni v. Waterpark* (Lord), 1 D. & R. 16). It ought not to be allowed for any time that it was in the hands of an alien enemy (ib.); and after a tender, it has in some cases been withheld (*Dent v. Dunn*, 2 Camp. 296). Plt. held a bill of exchange drawn by deft.; at its maturity the deft. asked for time; in about three months after the acceptor gave another bill for the same sum, plt. telling him that something was due for interest, and continuing to hold the first bill; the second bill was paid after it became due. Held, that plt. was entitled to sue the drawer of the first bill as well as the acceptor for interest due on it (*Lumley v. Hudson*, 4 Bing. N. C. 167; 5 Sco. 238; *Lumley v. Musgrove*, 4 Bing. N. C. 9; 1 Jur. 799).

The plt. must produce the bill to entitle him to recover it (*Fryer v. *Brown*, R. & M. 145). But plt. need not prove a protest to entitle him to interest, whether against the acceptor or maker of the [*500] bill or note, or the drawer or indorsers (*Walker v. Barnes*, 5 Taunt. 240; 2 B. & A. 305, 696). Nor does it seem essential that he should have declared on it (*Paine v. Pritchard*, 2 C. & P. 558). And he may recover under a particular, merely stating the action to be brought "to recover the amount of a note, &c., of 100*l.*" (*Blake v. Lawrence*, 4 Esp. 147). If the bill or note be expressly made payable with interest, it is pay-

able from the date (*Doman v. Dibdin*, Ry. & M. 381; *Kennerly v. Nash*, 1 Stark. 452; *Hopper v. Richmond*, 507), and the jury are bound to give it. If it be silent as to interest it is to be computed in general from the time the bill or note would regularly have been payable (*Bayl. B.* 352; *Orr v. Churchill*, 1 H. Bl. 227; *Roffey v. Greenwell*, 10 Ad. & E. 222). Thus, if the bill or note be payable after date, in an action against the acceptor of the bill and the maker of a note, payable at a given time after date or sight, interest is recoverable from the day on which they became due, without proof of any demand (3 Ves. 134; 3 Bing. 353). Where a note is payable by instalments and on failure of payment of any instalment the whole is to become due, the interest is to be calculated on the whole sum remaining unpaid, on default of any instalment, and not on the respective instalments at the respective times when they would become payable (*Blake v. Lawrence*, 4 Esp. 148).

In an action against the drawer interest is only recoverable from the time of his receiving notice of dishonour (*Walker v. Barnes*, 5 Taunt. 240). Interest is given on a note of hand from the time of its becoming payable (*Lithgow v. Lyon*, Coop. C. C. 29). When a note is regularly indorsed with acknowledgments of receipt of interest up to a given time it is *prima facie* evidence of interest being due from that time (*Braley v. Greenslade*, 1 Pri. P. C. 144). Interest was given from the date of the following note: "I promise, for myself and my executors, to pay F. M. H. or her executors, one year after my death, the sum of 300*l.*, with legal interest" (*Roffey v. Greenwell*, 10 Ad. & E. 222). In order to entitle a party to interest on a bill accepted payable at a particular place, it must be presented there (*Phillips v. Franklin*, Gow, 196); unless it appear that it would be unavailing (*Bayl. B.* 350; see 1 & 2 Geo. IV. c. 78).

An engagement to give a bill will create a liability to interest where otherwise the contract would not carry it; thus, where goods are sold to be paid for by a bill which is not given, interest may be recovered as part of the contract, even in an action for goods sold and delivered (*Marshall v. Poole*, 14 East, 98; *Farr v. Ward*, 3 M. & W. 26).

To a declaration in debt on a promissory note for 40*l.* payable on demand "with lawful interest for the same," without alleging that any interest was due, with counts for money lent, and money due, and on an account stated, the deft. pleaded "as to the said debts in the declaration mentioned, except as to 5*l.* which he paid into court, payments to a larger amount, which the plt. accepted in full satisfaction and discharge of the said debts, except as aforesaid, and of all damages by the plts. sustained by reason of the detention." Replication traversed the acceptance in satisfaction. Held, that the interest was part of the debt, and also that it was recoverable as such upon the pleadings (*Hudson v. Fawcett*, 7 Man. & G. 348). So, upon a bill or note payable on presentment, interest must be computed from the presentment (*Bayl. B.* 279; *Blaney v. Hendricks*, 2 Bl. R. 761; *Ex parte Cocks*, 1 Rose, 317; *Pierce v. Fothergill*, 2 Bing. N. C. 167; 2 Scott, 334); the issuing of the writ is a demand *(*Ib.*; see *Barough v. White*, 4 [*501] B. & C. 327; *King v. Taylor*, 5 Ves. jun. 808). And if, at the time a bill falls due, there is no person to recover on it, as where the holder dies intestate, and administration be not taken out, the acceptor will be liable only from the time the administrator demands payment of the principal (*Murray v. East India Company*, 5 B. & A. 204); but interest is payable from the date of the bill or note, if it appear to have been for money lent (*Bayl. B.* 352); or it promise to pay on demand (*Ib.*; *Weston v. Tomlinson*, per Abbott, C. J., cited Ch. Bills, 686, 9th ed.; *Hopper v. Richmond*, 1 Stark. 508). Where the action is against the drawer of a foreign

bill, dishonoured for non-acceptance here, and where plt. is allowed a percentage, as of ten per cent., he is only entitled to interest from the day the bill ought to have been paid (*Garth v. Mackenzie*, 3 Camp. 51); but, where there is no such allowance, the plt. is entitled to interest from the day the bill was dishonoured for non-acceptance (*Harrison v. Dickson*, ib., n.). A party who guarantees the due payment of a bill of exchange by the acceptor is liable for interest upon it if it be not paid when due (*Ackermann v. Ehrensherger*, 16 M. & W. 99).

As to bills payable by instalments, *ante*, 472.

As to the Rate of Interest.] Five per cent. is usually allowed in this country (5 Ves. 803); but the jury may allow either four or five, according to their judgment of the value of money (per Bailey, J., *Cameron v. Smith*, 2 B. & A. 308). Where a note was made payable with interest at 6l. per cent. the judge told the jury in allowing interest up to the time of signing judgment, to allow it at 5l. per cent. only (*Ward v. Morrison*, 1 Car. & M. 368); and, in the case of a foreign bill, it may be regulated by the rate of interest established in the country where the bill is drawn; so, upon a bill drawn in Bermuda on England, which ought to have been paid in England, the plt. recovered seven-and-a-half per cent. interest, such being the rate of interest at Bermuda (*Congan v. Banks*, cited Ch. Bills, 423); but the acceptor can never be liable to pay more than the legal rate of interest in the place where the bill is due (*Worsley v. Crawford*, 2 Camp. 446). Where a bill is payable by instalments, the plt. is only entitled to recover the instalments due at the time of the trial, and the interest thereon (*Ashford v. Hand*, Andr. 370; *Robinson v. Bland*, 2 Burr. 1085; 1 H. Bl. 547; *contra*, *Beckwith v. Nott*, Cro. Jac. 505); unless it contain a clause that they shall all become due, and the interest is to be calculated on the whole sum remaining unpaid, and not on the respective instalments, when they would become payable (*Blake v. Lawrence*, 4 Esp. 147). Interest ceases in general at the time when final judgment may be signed (Bayl. B. 352; *Robinson v. Bland*, Burr. 1088). Interest was refused beyond the time of verdict, even where plt. had been unjustly delayed more than two years (*Jarold v. Rowe*, 8 Pri. 582). Where money is paid into court on a security carrying interest, interest must be paid to the time of payment into court (*Mercer v. Jones*, *infra*); or plt. may proceed for the difference (*Kidd v. Walker*, 2 B. & A. 705). Interest ceases to run after tender (*Dent v. Dunn*, 3 Camp. 296). Interest has been allowed in trover for bills, from the date of the final judgment upon all such as had been received before the judgment, and upon all such as had been received afterwards, from the time of the receipt (*Atkins v. Wheeler*, 2 N. R. 205); but it was held at nisi prius, that interest could not be recovered after the time of conversion (*Mercer v. Jones*, 3 Camp. 477). But now by the 3 & 4 Will. IV. c. 42, the jury may give damages over and above the value of the goods at the time of the *conversion. With regard to usurious interest, see 3 & 4 Will. IV. c. 98, [*502] s. 7; 1 Vict. c. 80; 2 & 3 Vict. c. 37.

Expenses of Dishonour, Protest, &c.] The expense incurred by the holder of a bill, at the time of its dishonour, is the charge for noting and protesting; but the antecedent parties are liable for re-exchange, or the usual damages, postage, &c. (*Bayl. B.* 355; *De Tastet v. Baring*, 11 East, 265).

Re-Exchange.] See *ante*, p. 479. When a foreign bill is dishonoured in the country in which it was payable, and returned to that in which it was drawn, and there taken up by the payee or other party, he is entitled to

recover re-exchange. But plt must prove that there was at the time a course of re-exchange between the countries through which the bill has been negotiated (*De Tastet v. Baring*, 11 East, 268; 2 Camp. 65), as well as the amount of such re-exchange (*Cullen*, 172). But it is not necessary for him to prove that he has actually paid it (*Ib.*); and plt. may recover against the drawer the whole amount of the re-exchange occasioned by a circuitous mode of returning the bill through the various countries in which it has been negotiated, and different hands upon each return; and that, though the non-payment of the bill arose from a law of the country on which it was drawn, passed to prohibit such payment (*Mellish v. Simeon*, 2 H. Bl. 378). Plt. when holder of a note, by which he has the option of being paid either at the place where it was made, or, "according to the course of exchange, may insist upon being paid according to such course of exchange as exists between them when the note became due" (*Bayl. B. 357*; *Pollard v. Herries*, 3 B. & P. 335). Though, between this country and India, there appears to be no distinct course of re-exchange, yet, "on the return of a bill drawn here for the payment of pagodas in the East Indies, the practice is to allow for the sum payable by the bill, interest, and all incidental charges, after the rate of 10s. for each pagoda, and five per cent. thereon, from the expiration of 30 days after notice of the bill's dishonour" (*Bayl. B. 357*; *Auriol v. Thomas*, 2 T. R. 52). An acceptor is never liable for re-exchange (*Napier v. Shneider*, 12 East, 420; *Woolsey v. Crawford*, 2 Camp. 445). In an action on a bill or note, the expense of noting cannot be recovered (*Kendrick v. Lomax*, 2 Cr. & J. 405); nor can the plt., who has had an action brought against him, and been obliged to pay costs, recover those costs in an action by him against the acceptor, for the custom of merchants does not make an acceptor liable for the costs of all actions against subsequent holders (*Dawson v. Morgan*, 9 B. & C. 618). Upon the subject of damages on the protest and dishonour of a bill, where it appeared that a bill drawn in Demerara had been sent back dishonoured and protested, and the plt. claimed damages to the amount of 25*l.* per cent., which was considered to be the amount of the loss, but, as the bill for 500*l.* had been sent back dishonoured, protested for the whole, as 400*l.* had been paid on it, and that the usual practice, in such cases, was to retain the dishonoured bill here, and send a protest to Demerara, where, upon the arrival of the protest, security was demanded and given by the drawers, and that the whole of the loss from the dishonour was not incurred, unless the bill in the result was not paid, only 25*l.* damages were allowed on the 100*l.* which had not been paid (*Laing v. Barclay*, 3 Stark. 42).

[*503] *DRAWER, WHO IS ALSO PAYEE, AGAINST ACCEPTOR.

Proof of Bill.] The bill, where requisite (see *ante*, p. 489), must be produced and proved, as directed *ante*, 489 to 491. But the proofs will depend upon the pleadings; if the acceptance be intended to be put in issue, it must be traversed by the plea; and then it must be proved: if not, it is admitted since the New Rules, and need not be proved.

Proof of Acceptance.] See *ante*, p. 462. By 1 & 2 Geo. IV. c. 78, s. 2, every acceptance of an inland bill must be in writing upon the bill, or, if there be several parts of the bill, on one of such parts. An inland bill cannot be protested for non-payment, unless it has been accepted in writing (8 & 9 Will. III. c. 17, s. 1). By an inland bill is meant, a bill drawn in England, Wales, or Berwick-upon-Tweed; in London, or some other place within

these parts of the realm (*Mahony v. Ashlin*, 2 B. & Ad. 478). Therefore, a bill drawn in Ireland upon one in England, is a foreign bill (*Ib.*); so is a bill drawn in Scotland upon one in England, Berwick-upon-Tweed, or Wales (*Ib.*).

In the case of foreign bills, a valid acceptance may be by parol, or by writing on the bill itself, or on another paper, as by letter, undertaking to accept bills already drawn (*Clarke v. Cock*, 4 East, 71; *Ex parte Dyer*, 6 Ves. 9; see *ante*, p. 465). A letter from the drawees of a foreign bill here, to the drawer in America, stating that, their prospect of security being better, they would accept, or certainly pay the bill, is a valid acceptance, though they had previously refused to accept the bill, and again refused payment of it, when presented for payment, and though the letter was not received in America till after the bill became due (*Wynne v. Raikes*, 5 East, 514). A collateral writing, saying that a foreign bill, "shall meet with due honour" (*Clarke v. Cock*, 4 East, 57; *Powell v. Monnier*, 1 Atk. 611; *Wynne v. Raikes*, 5 East, 520), or "that the holder may rest satisfied as to payment" (*Wilkinson v. Lutwich*, Stra. 648; *Wynne v. Raikes*, 5 East, 514; *Clarke v. Cock*, 4 East, 57), or a direction by the drawer to a third party to pay the sum in the bill out of a particular fund (B. N. P. 270), is a sufficient acceptance. So, transcribing the word "accepted," "presented," "seen," or even the day of the month (Comb. 401), or writing upon it an order upon another to pay it (*Moor v. Whitby*, B. N. P. 270), amounts to an acceptance of a foreign bill (*Pillans v. Van Mierop*, 3 Burr. 1663); and it is sufficient acceptance if the party write "Accepted, C. N." (3 Moo. 91; 5 East, 520; *Pierson v. Dunlop*, Cowp. 571); or the words "not accepted" will, in some instances, amount to an acceptance; as, where it is accompanied by circumstances which may show an intention to deceive the party presenting it (*Bayl. B. 185*). But it is no acceptance if the drawee apprize the party at the time, that what he had written was no acceptance (*Ib.*). A verbal acceptance of a foreign bill is, as we have seen, sufficient; but it is no acceptance where the drawer, on presentment, said, "There is your bill—it is all right" (1 Esp. 17); and the words, "Your bill shall have attention," were deemed too ambiguous to admit of an acceptance, unless evidence be adduced to show that these particular words denoted an acceptance between the parties (*Rees v. Warwick*, 2 B. & Ad. 113). A verbal promise to accept, though the party expressly defer a written acceptance, as, where he says, "Leave the bill, and I will accept it," is a complete acceptance; and a verbal promise to *accept a returned bill when it shall come back is binding, if it [*504] do come back (*Cox v. Coleman*, Bayl. B. 192). Saying, "Send ^{back} the bill to my counting-house, and I will give directions for its being accepted," is not, of itself, an acceptance: the bill must be sent to the counting-house (*Bayl. B. 147*; *Anderson v. Hick*, 3 Camp. 179).

Indorsee against three defts. as acceptors of a bill of exchange drawn on "E. M. and others, trustees of the Clarence Temperance Hall, Liverpool," and accepted thus—"Accepted, E. M." The three defts., with E. M. and another, were the five trustees of a body of persons associated together for the purpose of building the Temperance Hall. E. M. had authority from all the trustees to accept the bill on their behalf; held, that the defts. were bound by the acceptance, though it did not show on the face of it that E. M. intended to accept not individually, but for himself and four others (*Jenkins v. Morris*, 16 M. & W. 877).

The acceptor of a bill payable to the order of the drawer cannot deny the authority of the drawer to draw and to indorse (*Halifax v. Lye*, 18 Law J., 197, C. P.; see *Smith v. Marsack*, 6 C. B. 486).

The declaration alleged that the Governor and Company of Copper Miners

drew a bill upon the deft., payable to their order; that the deft. accepted the same; and that the drawers inclosed the same to the plts. Plea, that the Governor and Company of Copper Miners are a body corporate; that the bill was made by them, and accepted by the deft. as a bill so made by the said body corporate, and that the said body corporate had no authority to indorse any bill of exchange: held bad, on special demurrer (Ib.).

Constructive Acceptance.] A *constructive acceptance* will, in some cases, render the acceptor liable on foreign bills; as, where a bill is left for the express purpose of being accepted, and the bill is kept, under particular circumstances, an unreasonable length of time, or other act, which induces the holder not to protest it, or which is intended to surprise him, and induce him to consider the bill as accepted (Clavey v. Dolbin, Rep. t. Hard. 278). Where the drawee, as soon as he received the bill, transmitted it to the acceptor, desiring him to accept and hand it over to plt.'s agent in London, which was the usual mode of dealing between the parties; plt. hearing nothing of his bill from his agent, wrote to deft. as to the delay, who replied that he had retained the bill because he once meant to accept it, which he now declined doing, Lord Ellenborough said, such a retention was as much an acceptance as if he had written his name upon the face of it (Harvey v. Martin, 1 Camp. 425, n.); so if he destroys it (Bayl. B. 194). The question of reasonable time will necessarily depend upon the facts of each particular case, and the conduct of the parties (per Abbott, C. J., Mason v. Barff, 2 B. & A. 36). The mere non-return of the bill, unaccompanied by any other act, or the disfiguring or even destroying the bill, will not of itself constitute an acceptance (Jeune v. Ward, 1 B. & A. 653; S. C. 2 Stark. 326; see *supra*, Ellenborough, C. J., diss.); and the drawee may erase an acceptance previous to any communication of his having accepted the bill (Cox v. Tory, 5 B. & A. 474; but see Thornton v. Dick, 4 Esp. 270). But he cannot revoke or cancel it after he has parted with it (Bayl. B. 204); as to cancellation by mistake, see Warwick v. Rogers, 12 Law J., 113, C. P. By the usage of trade in London, it is usual for bankers on whom checks are drawn to retain them till five o'clock in the afternoon of the day they are presented for payment, and they may then be returned any time before that hour, though previously cancelled by mistake (Fernandez v. Glyn, 1 Camp. 426). The acceptance of a foreign bill, if written on the bill, is proved in the usual way (*post*, p. 509); if implied only, then on proof of the facts from which it is to be implied.

An acceptance, being an absolute undertaking to pay, may be made even *after* the time appointed by the bill for payment (per Lord Ellenborough, in Wynne v. Raikes, 5 East, 521; Chit. B. 169); and even after a prior refusal to accept (Ib.), so as to bind the acceptor, who would, in such case, be liable to pay the bill on demand (Ib.; see Bayl. B. 183; Jackson v. Pigott, 1 Ld. Raym. 364; Mutford v. Walcot, ib. 574). The acceptance may be written before the drawer has signed the bill (Molloy v. Delves, 7 Bing. 428), or before it is drawn, if drawn pursuant to acceptor's authority (Leslie v. Hastings, 1 Moo. & R. 119).

Absolute Acceptance.] An *absolute acceptance* is an engagement to pay the bill according to its tenor (Ch. B. 173). Such acceptance is usually made by writing on the face of the bill "*Accepted*," and subscribing the acceptor's *name*, or by doing either alone. However, on a written acceptance by any other person than the drawee, it would seem essential [*505] that his name should appear (Bayl. B. 181). *If the acceptance were in fact conditional, it will not support the allegation of an absolute one, though the condition have been performed (Layton v. Corney,

4 Camp. 177; Ball v. Sarell, D. & R. N. P. C. 33; Swan v. Cox, 1 Marsh. 176; if the condition have not been performed a legal excuse must be averred and proved if denied (Rose, Ev. 205). When the bill is payable at sight, the day of the acceptance should be also written (Beawes, Pl. 266); but, if the acceptance appear to have been written by the deft. under a date which is not in his handwriting, the date is evidence of the time of acceptance; as it is the usual course of business for a clerk to write the date, and for the party to write his acceptance under it (Glossop v. Jacob, 4 Camp. 227). A mark put on a check by a London banker to show that the drawer has effects in his hands, and that it will be paid, amounts to an acceptance; as it is the practice of London bankers, if one banker holds a check drawn on another, and presents it after four o'clock, not then to pay it, but to put such a mark on it, and it is in consequence paid next day at the clearing-house (Robson v. Bennet, 2 Taunt. 388; see further, Ch. B. 173 to 178).

Conditional Acceptance.] A conditional acceptance of a bill is good (Julian v. Shobrooke, 2 Wils. 9; Smith v. Abbott, 2 Stra. 1152; Stevens v. Hill, 5 Esp. 247; Mendizabel v. Machado, 3 Moo. & S. 841; see Solomon v. Rougemont, 9 Law J. 158, C. P.): it depends on a contingency, and is an engagement to pay according to the tenor of such acceptance, and, as it seems, becomes absolute so soon as the conditions of it are performed. The plt. cannot recover on it unless he prove that the condition has been performed (Swan v. Cox, 1 Marsh. 176; Miln v. Prest, Holt, 181; Banbury v. Lisset, 2 Stra. 1211), or prove a sufficient excuse for the non-performance (Leeson v. Pigot, Bayl. B. 187; Bowes v. Howe, 5 Taunt. 30). If A. accept a bill payable on a condition to be performed by B., the performance of this condition by C. will not support an action by the holder of the bill against A. (Swan v. Cox, *supra*; and see Harrison v. Hannel, 1 Marsh. 319; 5 Taunt. 780). Any act which evinces an intention not to be bound unless upon a certain event, is a conditional acceptance; as, where the drawee of a bill on account of a cargo consigned to him writes that it will not be accepted till a cargo of wheat arrives, the deft. is liable as acceptor on such arrival (Miln v. Prest, 4 Camp. 393). Saying, "Send the bill to my counting-house, and I will give directions for its being accepted," is not of itself an acceptance; the bill must be sent to the counting-house (Bayl. B. 192; Anderson v. Hick, 3 Camp. 179). So an "acceptance to pay when remitted," is a conditional acceptance (Bayl. B. 153); and plt. must give evidence to show that he had remitted (Banbury v. Lisset, 2 Stra. 1211). So, an answer by a drawee, who lived in London, that a ship was consigned to him and a person in Bristol, and that, till he knew to which port the ship would come, he could not accept, connected with a subsequent answer, that the bill was a good one, and would be paid, though the ship should be lost, was held a conditional acceptance only; it being clear that the drawee looked for an opportunity of reimbursing himself, and had three events in contemplation—the ship's arrival at Bristol, her arrival at London, and her loss: in the two latter he should have the opportunity, and therefore accepted, and in the former he should not, and did not accept (Bayl. B. 153; Sproat v. Matthews, 1 T. R. 182). So, an answer by the drawee that he could not accept until a navy bill should be paid, will operate as an absolute acceptance upon the payment of the navy bill (Pierson v. Dunlop, Cowp. 571). If the drawee say he cannot accept without further directions from J. S., and J. S. afterwards desires *him to accept, and draw upon A. B. for the [*506] amount, the mere drawing upon A. B. will not make this an acceptance, although the actual payment of the bill drawn upon him may (Bayl. B. 199; Smith v. Nissen, 1 T. R. 269). And a promise to accept in future,

made on an executory consideration, will not bind while the consideration remains executory, unless it influence some person to take or to retain the bill (Bayl. B. 174; Pillans v. Van Mierop, 3 Burr. 1669). On the presentment for acceptance of certain bills of exchange, the drawee said he would have accepted them if he had had funds (meaning the funds on account of which the bills were drawn); that he had not been able to obtain these funds from France, but that when he did he would pay them: held, that this amounted to a conditional acceptance of the bills, and that the deft. having become possessed of the funds in question was bound to pay the bills (Mendizabel v. Machado, 2 Moo. & S. 841; 6 C. P. 218). Whether an acceptance be conditional, or absolute is a question of law (Sproat v. Mathews, *supra*). If a man purpose making a conditional acceptance only, he should be careful, if he make it in writing, to express the conditions therein; for it may at least be doubtful whether parol evidence of such conditions would be admissible: if it were, the *onus* of proving them would be upon the acceptor, and the proof would be of no avail if the holder, or any person under whom he claims, took the bill without notice of such conditions, and gave a valuable consideration for it (Bayl. B. 197). Nevertheless the holder of a bill who presents it for acceptance is not bound to take a conditional acceptance; he may strike it out, and treat it as a nullity (Boehm v. Garcia, 1 Camp. 125, n.); Gammon v. Schmoll, 5 Taunt. 344; see Sproat v. Mathews, 1 T. R. 182).

The acceptance may be *general*, to pay any where, or *special*, to pay at a particular place. By act 1 & 2 Geo. IV. c. 78, an acceptance stating the bill to be payable at a banker's or particular place, is not a special acceptance, unless it expressly state the bill to be payable at that place *only*, and *not otherwise or elsewhere* (*ante*, p. 469). As to presentment of such bill, *post*.

Partial or varying Acceptance.] A *partial* acceptance *varies* from the tenor of the bill; as, where it is made to pay part of the sum for which the bill is drawn (Wegersloff v. Keene, 1 Str. 214; Ch. B. 182), or to pay at a different time (Molloy, 283; Bayl. B. 178; Walker v. Atwood, 11 Mo. 190), or place (see the cases of Sebag v. Abitol, 4 Moo. & S. 462; Gammon v. Schmoll, 5 Taunt. 344, *post*; per Abbott, J., Cowie v. Halsall, 4 B. & A. 198-9; Ch. B. 182). An acceptance may also vary from the tenor, in the manner in which the acceptor undertakes to pay the bill (Petit v. Benson, Comb. 452); as, for instance, part in money, and part in bills, or payable at a banker's, &c. Where an acceptance varies in a material respect from the tenor of the bill, if the holder intend to resort to the other parties to the bill in default of payment, he should immediately give notice to them of such conditional or partial acceptance (Marsh. 68, 85; Patton v. Winter, 1 Taunt. 482-3; per Bayley, J., in Sebag v. Abitol, 4 Moo. & S. 466; Ch. B. 182), and should, if he meant to avail himself of the acceptance, express in his notice the nature of it; for any act from whence it may be collected that the holder does not acquiesce in the acceptance, such as a general notice of non-acceptance, will be a waiver of it (Sproat v. Mathews, *supra*; Bentinck v. Dorrien, 6 East, 200; Bayl. B. 202; Ch. B. 182). The holder who presents the bill for acceptance is not bound to take a partial acceptance; he may treat it as a nullity, and proceed for want of an acceptance (Bayl. B. 202). But he cannot after protest of a foreign [*507] *bill for non acceptance, in such case, treat the offer of a partial or conditional acceptance as an acceptance, and sue upon it, (Sproat v. Mathews, 1 T. R. 182). So, if he acquiesce in the acceptance, he cannot afterwards repudiate it (see Paton v. Winter, 1 Taunt. 420).

An acceptance in blank is sufficient to charge the acceptor when the bill is afterwards drawn in pursuance of his authority. The 1 & 2 Geo. IV. c. 78, s. 2, does not affect such acceptances (*Leslie v. Hastings*, 1 M. & R. 119). A. having signed his name to a blank paper duly stamped, and delivered it to B., for the purpose of drawing a bill in such manner as B. should think fit, B. drew a bill payable to a fictitious payee, or order, and indorsed it over for a valuable consideration to C., who was ignorant of the transaction between A. and the indorser: held, that C. might maintain an action against A. as the drawer of a bill payable to bearer on a count to that effect (*Collis v. Emmet*, 1 H. Bl. 313); or on a count stating the special circumstances (*Ib.*). The deft. gave a blank acceptance on a bill stamp, and a person who was quite unknown to the acceptor afterwards wrote his name as drawer and indorser of the bill, and it was subsequently filled up as a bill of exchange for 500*l.*: held, that it does not lie in the mouth of the acceptor to say that such drawing and indorsing of the bill was irregular (*Schultz v. Astley*, 2 Bing. N. C. 544; 2 Sco. 815; 7 C. & P. 99). In an action by indorser against acceptor it is no objection that the acceptance actually took place before the drawer's name be signed, although the declaration be in the usual form, viz., that the bill being drawn, the deft. afterwards accepted, and that the transaction was according to the custom of merchants, and it is not necessary to offer any evidence to show that it is the custom of merchants so to transact business (*Molloy v. Delves*, 7 Bing. 428; 5 Moo. & P. 275).

If a servant, clerk, or agent, accept a bill by procuration of the drawee, and so express it upon the acceptance, if he had authority he will not be personally liable (*Hays v. Haseltine*, 2 Camp. 604: on the other hand, if the bill be drawn upon the drawee as servant, &c., of another, and he accept it generally, he becomes personally liable (*Bayl. B.* 181; *Thomas v. Bishop*, Stra. 955; and see *Sowerby v. Butcher*, 2 Cr. & M. 368). If the agent had not authority to accept, the drawee is not liable, although the bill be passed to an indorsee for value (*Atwood v. Munnings*, 7 B. & C. 278); the assumed agent however is Polhil v. Walter, 3 B. & Ad. 114). In such cases inquiry should be made as to the extent of authority, for if a bill be improperly accepted by procuration, the acceptor will not be liable (see *Atwood v. Munnings*, 7 B. & C. 278); and *Williams v. Thomas*, 6 Esp. 18).

A third person may accept a bill for the honour of the drawer, or of any of the indorsers (*Bayl. B.* 178; see, where deft. accepted specially after acceptance by the drawee, *Jackson v. Hudson*, 2 Camp. 447); but such acceptor is only liable in the event of the drawee not paying the bill when due (*Hoare v. Cazenove*, 16 East, 391; see *Mitchell v. Baring*, 10 B. & C. 4). So that the plt. must prove, in addition to the acceptance, presentment to the drawee for payment, a refusal by him, and if requisite a protest (*Ib.*). The holder is not bound to acquiesce in such acceptance; if he do he is not bound by it (*Mutford v. Walcott*, 1 Ld. Raym. 575; *Pillans v. Van Mierop*, Burr. 1674).

But the acceptor may be discharged from liability by an agreement to waive the acceptance; thus, where it is agreed not to sue the acceptor if he will make an affidavit that it is a forgery, which is complied with (*Stevens v. Thacker*, Pea. 187). So, where a message *was sent to the acceptor that the matter had been settled with the drawer (*Black* [*508] v. *Peele*, Doug. 236). So, where it is agreed that the acceptance should be at an end (*Walpole v. Pulteney*, *ib.*). But telling the acceptor that he should not be troubled about the bill, though he knew him to be an accommodation acceptor, will not operate as a waiver (*Adams v. Gregg*, 2 Stark. 531); nor saying that the party would look to the drawer, and that all he

wanted from the acceptor was another debt not connected with*the bill (Parker v. Leigh, 2 Stark. 228); nor by protesting a bill for non-acceptance after an implied acceptance of it (Fairlee v. Herring, 3 Bing. 625); nor from giving time to the drawer (Fentum v. Pocock, 5 Taunt. 192; Raggett v. Axmore, 4 Taunt. 730; Kerrison v. Cooke, 3 Camp. 362; see Laxton v. Peat, 2 Camp. 185; Anderson v. Cleveland, 13 East, 430; Dingwall v. Dunster, Doug. 235; Farquhar v. Southey, Moo. & M. 14).

With respect to the effect of the acceptance, Mr. Chitty observes, that, if absolute, the acceptor is liable to pay it, according to the tenor of the bill (Poth. Pl. 164; Lefley v. Mills, 4 T. R. 174), and, if conditional or partial, he is liable to pay according to the tenor of the acceptance (Poth. Pl. 115—117). A drawee, having accepted a bill after a condition annexed thereto by the indorser, is bound thereby, and need not pay the bill until the condition be performed (Robertson v. Kensington, 4 Taunt. 30). He is *primarily* liable to pay the bill (Laxton v. Peat, 2 Camp. 187, n.). If he accepted the bill without value, and for the accommodation of the plt., he may resist the payment, and show that the acceptance was partly only for value, and, as to residue, that it was for the plt.'s accommodation (Darnell v. Williams, 2 Stark. 166; Ch. Bill, 69). As the interests of third persons are generally involved in the efficacy of a bill, an acceptance will, when the bill is in the hands of a third person who has given value for it, and who became the holder before it was due, be obligatory on the acceptor, though he received no consideration, and that circumstance were known to the holder (Simmons v. Parminster, 1 Wils. 187, 188; Knox v. Smith, 3 Esp. 46; Ch. Bills, 183); as the object of an accommodation acceptance is to enable the party accommodated to obtain money or credit from a third person; the want of consideration, therefore, furnishes no defence to one who has advanced money on the credit of the acceptor, though he may have been defrauded by the drawer (Ib.; Ex parte Marshall, 1 Atk. 231). See further, as to defence of want of consideration, *post*; as to how far acceptance is revocable, see *post*; and when the acceptor is discharged, *post*.

Effect of Acceptance.—Admission of Drawer's Handwriting.] The acceptance admits the drawer's ability, and the acceptor cannot set up as a defence the want of it, as, that he was an infant (Taylor v. Croker, 4 Esp. 187; sed vide 4 Price, 300). It admits the drawer's handwriting to the bill, and, if drawn by procuration, the procuration (Robinson v. Yarrow, 7 Taunt. 455; Porthouse v. Parker, 1 Camp. 82); and it is no defence for an acceptor in an action by a *bona fide* holder, that the drawer's name has been forged (Price v. Neal, 3 Burr. 1354; S. C. 1 Bla. 390; Smith v. Chester, 1 T. R. 655; and see further, *infra*). If the bill be drawn in the name of a firm, the acceptor cannot object that it was drawn by a single person (Bass v. Clive, 4 M. & S. 15). An acceptance by an executor on account of debts due from his testator is an admission of assets, and will therefore make him personally responsible in case there be no effects of the testator in his hands (semb. King v. Thom, 1 T. R. 487; Ch. Bills, 7th ed.). If the holder of a bill, the acceptance of which *turns out to have been forged by an in-
[*509] dorser, deliver it up to him, and receive a fresh bill, he may recover upon the latter, unless there was an agreement between him and such indorser to stifle a prosecution for the forgery (Wallace v. Hardacre, 1 Camp. 45).

As to the Mode of proving Acceptance.] The *written* acceptance must be proved by evidence of the handwriting (Drew v. Bryer, 12 Law J. 144, C. P., *ante*, p. 503); if not admitted under a judge's order (R. G. H. T. 4 Will.

IV. r. 1, s. 20; 1 Arch. Pr. 391); or otherwise (see *Holt v. Squire*, Ry. & M. 282); or, if there be a subscribing witness, by calling him (*ante*, p. 491), or by the party's admissions (*ante*, p. 493). If the deft. acknowledges his handwriting, or promises to pay (*Jones v. Morgan*, 2 Camp. 474), or pays part (*Vaughan v. Fuller*, 2 Stra. 1246), it is a sufficient admission to dispense with any further proof (*Ib.*, *ante*, p. 150). In an action on a bill of exchange, alleged to have been accepted by the defts. under the style and firm of A. and Co., an order was made by consent, to admit the handwriting of the acceptance. The notice to admit was as follows:—"Bill of exchange for 121*l.* 10*s.*, drawn by the plt. upon and directed to the defts. as A. and Co., and accepted by B. for the defts. as A. and Co., payable, &c., and indorsed, &c." held, that this admission precluded the defts. from denying the authority of B. to bind the firm of A. and Co. by such acceptance, and was not a mere admission that he signed an acceptance purporting to bind that firm (*Wilkes v. Hopkins*, 1 C. B. 737). If a party to a bill, on being asked if it be his own handwriting, answer that it is, and will be duly paid; or if he has paid several other bills, accepted in the same handwriting; proof of either of these facts will preclude him afterwards setting up as a defence the forgery of his name; for he has accredited the bill, and induced acceptor to take it (*Leach v. Buchanan*, 4 Esp. 226; 3 Esp. 60; 1 Marsh. 159). Where, in an action against the acceptor of a bill, his attorney gave a notice to produce all papers relating to a bill described as the bill in question, "accepted by the said deft.," the notice was held to be *prima facie* evidence of the acceptance (*Holt v. Squire*, 1 Ry. & M. 282). If the acceptor, on being applied to for payment, desire the party to call again, it will not preclude him from proving the acceptance to be a forgery; otherwise, if he adopted the acceptance by paying bills accepted by the same party, or by acknowledging the handwriting to be his (*Barber v. Gingell*, 3 Esp. 60; *Leach v. Buchanan*, 4 Esp. 226; see *Griffiths v. Payne*, 11 Ad. & E. 131). In the case of a conditional acceptance, if the terms of it be ambiguous, parol evidence may be resorted to, to explain them (*Swan v. Cox*, 1 Marsh. 179).

If the acceptance of a foreign bill were by *parol*, it should be proved by calling the witness who heard the drawee accept; and, if the answer or undertaking to accept were given to a clerk, he must be subpœnaed. If the acceptance were by an agent, his authority and handwriting must be proved, and the agent himself is competent to prove the authority. If it be in writing, it should be produced and proved (*Johnson v. Mason*, 1 Esp. 90). It will not be enough to prove that the deft.'s name was subscribed with the sanction merely of his wife, who usually conducted his business, and signed promissory notes in his name, and applied the proceeds of the bill in payment of his debts (*Goldstone v. Tovey*, 6 Bing. N. C. 98). The declaration stated that the deft., by T., his agent, accepted; plea, *non accepit*. It appeared to have been accepted by T. on behalf of the directors of a mining company, of whom the deft. was one: held, no variance (*Ferth v. Buckingham*, 2 Dowl. N. S. 555).

**Agents.*] In an action against a party as acceptor of a bill ac- [*510] cepted in his name by another person, where evidence of a general authority in that person has been given to accept bills in the deft.'s name, an admission by the deft. of liability on another bill so accepted, is good evidence confirmatory of the former (*Llewellyn v. Winkworth*, 13 M. & W. 598; 14 M. & W. 329).

Acceptance may be proved by any person who has seen the deft. write (*Garrills v. Alexander*, 4 Esp. 37), or from having corresponded (*Gould v. Jones*, 1 Bla. 384), or having acted upon letters received from him (*Thorpe*

v. Gisbourne, 2 C. & P. 91; R. v. Slaney, 5 C. & P. 213); and where a witness had seen the deft. write once, and swore that the acceptance was like his handwriting, but that he could not form any belief upon the subject; held, evidence to go to the jury (*Garrills v. Alexander, supra*); indeed, all that is required is to swear to the best of his belief (*Lewis v. Sappio, M. & M. 39*; overruling *Powel v. Ford, 2 Stark. 164*). The evidence in one case was, that the witness had not seen the party write, but had corresponded with one of that name residing at Plymouth Dock, and the letters produced he believed to be in that person's handwriting; and another witness proved that the deft. was a shipowner, residing at Plymouth Dock, and that there was not any other person of that name there: held, sufficient evidence to go to the jury (*Harrington v. Fry, Ry. & M. 90*). But where the belief is derived from a mere comparison of hands, it is not evidence: thus, where the plt.'s attorney swore to his belief of the handwriting of the deft., from having seen other papers in the master's office, which the deft.'s attorney admitted to be in deft.'s handwriting, and upon which the witness had acted (*Greaves v. Hunter, 2 C. & P. 477*; but see *contra, Smith v. Sainsbury, ib. 196*); nor can the acceptance be compared with other writings, which are admitted to be the deft.'s, even where the comparison is made by one who had seen the deft. write (*Strange v. Searle, 1 Esp. 14*; *Garrills v. Alexander, supra*). Where the witness has a document which he has seen the deft. write, he may refresh his memory as to the character of the handwriting (*Burr v. Harpur, Holt, 420*). But the court or jury may compare the handwriting when the documents are properly in evidence (*Griffith v. Williams, 1 C. & J. 47*; *Saliter v. Barrow, 1 M. & R. 133*; and see *Allesbrook v. Rouch, 1 Esp. 351*). The witness's accuracy cannot be tested by putting into his hand other writings, which are not evidence in the cause (*Griffith v. Young, 11 Ad. & E. 322*); and should he answer that they are in the deft.'s handwriting, no evidence can be given afterwards with respect to the handwriting of them (*Hughes v. Rogers, 8 M. & W. 123*).

Proof merely that some person at the house of the drawee said that the bill would be taken up when due, without any evidence of such person's having authority to give the answer, would be insufficient (*Sayer v. Kitchen, 1 Esp. 209*).

The identity of the deft., as the person who accepted the bill, must be proved. Slight evidence will suffice; but it is not enough merely to prove that a person calling himself by the same name accepted the bill (*B. N. P. 171*; *Middleton v. Sandford, 4 Camp. 34*; *Parkins v. Hankshaw, 2 Stark. 239*). It has, however, been held, that it is not necessary for the plt. under ordinary circumstances, if the handwriting of the acceptor be proved, to give evidence of his identity with the deft. on the record (*Roden v. Ryde, 12 Law J., N. S. 276*; *7 Jur. 554*; *Sewell v. Williams, ib.*; *Sewell v. Evans, 4 Q. B. 626*). Where the name was a very common one, it was held necessary (*Jones v. Jones, 9 M. & W. 75*). So, where the acceptance *was [*511] by that of a mark (*Whitlock v. Musgrave, 1 Cr. & M. 511*). If the witness speak of the same name and description further evidence of identity must be given (*Barber v. Stead, 3 C. B. 946*).

Where the acceptor was described as "C. B. Crauford, East India House," proof that the signature was that of a person of the same name, a clerk of the East India House, was held to be sufficient (*Greenshields v. Crawford, 9 M. & W. 314*). The sufficiency of proof is a question of fact (*Ib.*, per Lord Abinger, C. B.); but whether there be any evidence of identity, one of law (*Corfield v. Parsons, 1 Cr. & M. 730*).

In an action against several acceptors of a bill, or makers of a note, the handwriting of each must be proved (*ante, p. 491*; *Gray v. Palmer, 1 Esp.*

135); one of whom is competent to prove the handwriting of the others (Ib.; York v. Blott, 5 M. & S. 71). An acceptance by one will bind him alone, and not the others (Bayl. B. 52; B. N. P. 279). If the defts. are partners, plt. must prove the partnership at the time of the acceptance (*post*, "PARTNERS"). If a bill be accepted by one of several partners, proof of the partnership, and the party's handwriting, will be evidence to charge the firm (Mason v. Rumsey, 1 Camp. 384), except it appear that the plt. had notice that the firm would not be bound by the party's acceptance (Gallway v. Smithson, 10 East, 264); or the bill was not accepted for partnership purposes, or that there was covin between the party accepting and the plt. (Skirreff v. Wilks, 1 East, 48; Ridley v. Taylor, 13 East, 175; Green v. Deabin, 2 Stark. 347; Stevens v. Steel, 7 East, 210); and it will not be binding, even though the other partner be a dormant one (Lloyd v. Ashley, 2 C. & P. 138). But where the partner has subscribed in the name of the firm, slightly differing from the real name, it is a question for the jury whether he had authority to do so, or whether he must be taken to have issued the bill on his own account (Faith v. Richmond, 11 Ad. & E. 339); and it seems that no partner has any implied authority to bind in any but the true style of the firm (Kirk v. Blurton, 9 M. & W. 284). But if they be partners in a business, which does not necessarily require the acceptance of bills, and one partner accept in the name of the partnership, or in his own, the other will not be liable unless it appear that that other gave authority, either generally or specially, to accept the particular bill for the partnership; thus, in the case of joint occupiers of a farm (Greenslade v. Dower, 7 B. & C. 635); or where the partners are attorneys (Levy v. Pyne, 1 C. & M. 453). But an acceptance of one partner in the name of the firm, in fraud of the others, will not bind them in the hands of one who was privy to, or had notice of, the fraud (Bayl. B. 180). Where A. and B. who had been partners in trade, took in C., and afterwards accepted a bill in the name of the new firm for a debt due partly by the old and partly by the new firm, in an action by the drawer against the new firm, held, that plt. was entitled to recover only the amount due from the new firm (Wilson v. Bayley, 9 Dowl. 18); and if the trade of the partnership be not of such a nature as necessarily to require the acceptance of bills, the plt. must prove the authority of the partner who accepted it in the same manner as he would in case of the acceptance of an agent by procuration (see Levy v. Pyne, 1 C. & M. 453; Greenslade v. Dower, 7 B. & C. 653). Indorsee against indorser; allegation that the bill was accepted, "payable at T. S.'s, King's Yard, Whitechapel, and not elsewhere;" the latter words were not on the acceptance: held, a variance, although there was no traverse of the acceptance (Higgins v. Nichols, 7 Dowl. 551; see Blake v. Bowman, 4 Sc. N. R. 617; 1 Dowl. N. S. 697). After one of two partners has become bankrupt, the solvent one may *bind the firm by accepting bills in the hands of a *bona fide* indorsee for a debt previously due from the firm [*512] (Ex parte Robinson, 1 Mont. & Ayr. 18). The director of a joint-stock company has no implied authority to accept bills of exchange on the part of the directors of the company, such company not being a trading partnership (Bramah v. Roberts, 3 Bing. N. C. 972; Dickinson v. Valpy, 10 B. & C. 128; see "PUBLIC COMPANIES"); and where the declaration states the acceptance to be by A., B., and C., which A. and B. deny, and C. allows judgment to go by default, if A. and B. prove that the bill was drawn on the directors of a company, and accepted by them as such, but only signed by C. as a manager, and not as a director, they will be entitled to a verdict (Bult v. Morrell, 12 Ad. & E. 745). The admission of a partner concerning a partnership transaction, though made after dissolution, is suffi-

cient evidence to charge the firm (*Wood v. Braddick*, 1 Taunt. 104); and, after the partnership has been established, an admission by one partner, in an answer to a bill filed, will bind the firm (*Grant v. Jackson*, Pea. 268; *Hodenpyl v. Vingerhoed*, Ch. Bills, 489, 5th ed.; 2 Phil. Ev. 26); but, where there is no partnership, an admission by one party to a bill will not bind the other (*Gray v. Palmers*, 1 Esp. 135). In an action against three persons as acceptors of a bill, the circumstance of two of them having been outlawed, will not dispense with proof of their joint liability, although the deft., who alone pleaded to the action, was in justice liable to pay the debt, (*Skirreff v. Wilks*, 1 East, 48); but an admission by one partner of his partnership with his co-defts., who had been outlawed, was sufficient proof of the partnership as against him (*Sangster v. Mazzarredo*, 1 Stark. 161). In an action against three partners, as drawers of a bill of exchange, drawn by an agent of the firm upon one of the partners, it was held that the acceptance by the drawer was evidence against the three partners of the bill having been regularly drawn (*Porthouse v. Parker*, 1 Camp. 82). The admission of one of several makers of a promissory note, is sufficient to take the case out of the Statute of Limitations in a separate action against the others (Ch. Bills, 374). Where one of two defts., makers of a note, suffers judgment by default, his signature must be proved on the trial of the other (Ch. Bills, 381, n. g).

In an action by an executor against the acceptor of a bill, on a promise laid to the testator, the plt. must prove that the bill was accepted in the testator's lifetime (*Anon.* 12 Mod. 447; *Sarel v. Whine*, 3 East, 409).

Proof of Presentment.] In an action against the acceptor, if the acceptance is a general one, as where no place is specified for payment, or where a particular place is mentioned, without any further expression (*Bayl. B.* 157), it is not necessary to prove presentment (*Turner v. Hayden*, 4 B. & C. 1), even though such presentment has been unnecessarily averred (*Freeman v. Rennell*, cor. Abbott, C. J., May, 1826; cited Ch. Bills, 402; *Fayle v. Bird*, 6 B. & C. 531); and though the acceptor has sustained damage from the want of presentment (*Turner v. Hayden*, *supra*; Ch. Bills, 7th ed. 192); and an acceptor of a bill payable generally is not discharged, though the holder neglect to present it for three or four years (*Farquhar v. Southey*, 2 C. & P. 497; S. C. 1 M. & M. 14; *Turner v. Hayden*, *supra*; and see *Williams v. Waring*, 10 B. & C. 2). But, if the acceptance be a qualified one, payable at a particular place *only*, and *not otherwise or elsewhere*, under 1 & 2 Geo. IV. c. 78, or if it be made payable in the body of it at a particular place, and the contract is thereby qualified, the plt. must prove that it was *presented at the place specified in the acceptance [*513] (*Rowe v. Young*, 2 B. & B. 165; *Lyon v. Walls*, 9 Bing. 660); and a demand at such particular place is a demand on the acceptor (*Saunderson v. Judge*, H. Bl. 509; *De Bergareche v. Pillin*, 3 Bing. 476). It is not necessary that a bill so accepted at a place named, should be presented there on the very day it becomes due, provided the money is not lost by such neglect (*Rhodes v. Gent*, 5 B. & A. 244); and although a presentment must be proved, yet it is not necessary to show a notice of dishonour (*Burrell v. Lonsdale*, *coram* Littledale, 1826; *Rose. Ev.* 125). Where a promissory note is expressed on the face of it to be payable at a particular place, it is necessary to aver and prove presentment there (*Emblin v. Dartnell*, 1 D. & L. 1010; 12 M. & W. 830). See further, as to the mode of, and time for presenting a bill for payment, *post*.

Proof under Common Counts.] As to this, see *ante*, p. 495.

Proof in Answer to Defence.] As to this, see the defences, *post*.

DRAWER, WHO IS NOT PAYEE, AGAINST ACCEPTOR.

Proof of Return and Payment of the Bill.] When the drawer of a bill, payable to the order of a third person, and returned to and taken up by him, sues the acceptor, he must, if denied, prove the acceptance, as *ante*, 493, 503; and also the presentment to the deft. and his refusal to pay, which may be done by calling the person who presented the bill, or else by proving a promise by the deft. to pay, as that will dispense with proof of the presentment; as well as the return to him, and his payment of the bill, in order to show that the right of action is vested in him (*Simons v. Parminster*, 1 Wils. 185). The payment of the bill may be proved by the payee or indorsee, who returned the bill; but plt. must adduce some direct evidence of payment by him, as a general receipt, on the back of the bill, is *prima facie* evidence of its having been paid by the acceptor, and will not of itself be evidence of payment by the drawer, though it is produced by him (*Scholey v. Walsby*, Pea. 24; *Pfiel v. Vanbatenberg*, 2 Camp. 439).

Proof of Acceptance.] This is necessary, as in other actions against acceptors, and as to which see *ante*, p. 503. It is not necessary to prove that the acceptor had effects in hand, as the acceptance is itself *prima facie* evidence that the acceptor received value from the drawer (*Veré v. Lewis*, 3 T. R. 183). The bankruptcy of the acceptor is no defence against the drawer, who has paid the bill since the bankruptcy (*Mead v. Braham*, 3 M. & S. 91).

PAYEE, WHO IS NOT DRAWER, AGAINST ACCEPTOR.

The evidence in this case will be similar to that required in an action by the drawer, who is also payee, against acceptor (*ante*, p. 503). If a bill or note, however, be payable to the firm of A. B. and Co., and A. B. and C. D. sue thereon, they must prove that they were, at the time the bill or note was given, the component members of such firm (*Ch. Bills*, 389).

*INDORSEE AGAINST ACCEPTOR.

[*514]

Proof of Defendant's Acceptance.] If the deft. by his plea put it in issue, the plt. must prove the *acceptance* which creates deft.'s liability, as *ante*, p. 503. Assumpsit on a bill payable to the order of C. Plea, that, before the making and accepting of the bill, C., being a trader, became and was adjudged bankrupt, and that the assignees of his estate and effects were appointed; that C. had never obtained his certificate; that the bill was made and accepted after the bankruptcy of C., and that, after the commencement of this suit, the assignees required deft. to pay to them the said bill of exchange, by reason whereof they were entitled to the amount of the bill: held, that the deft. was estopped, by his acceptance of the bill payable to the order of C. from saying that C. was incapable of transferring the bill by indorsement (*Braithwaite v. Gardner*, 10 Jur. 591, Q. B.).

In an action on a bill of exchange by second indorsee against acceptor, the deft. pleaded that he accepted for the accommodation of the drawer and

first indorsee, upon condition that the same might be negotiated for their use only, before the same became due, and not afterwards; and that the bill was indorsed to the plt. without the consent, privity, or default of the deft., after the same became due; and that the plt. did not become the holder of, or entitled to the bill until after it so became due. On motion for judgment *non obstante veredicto*, held, a bad plea (*Carruthers v. West*, 10 Law T. 160, Q. B.).

Declaration in assumpsit stated that E. drew a bill of exchange on defts., payable to order of O.; that defts. accepted, that O. indorsed to "The Treasurer-General of the Royal Treasury of Portugal," and that C., then being the treasurer-general as aforesaid, indorsed to plt. Pleas—2. That the said treasurer-general of the Royal Treasury of Portugal did not indorse to plt. and issue thereon. 3. That the said treasurer-general by whom the indorsements were alleged to have been made, *at the time when he indorsed*, was not such treasurer-general as was designated and intended by the indorsement of O., but minister of a hostile government, and had no title or authority to indorse. Replication, that the treasurer-general who indorsed was the treasurer-general designated (not adding, at the time, &c.), and issue thereon. It was proved that the bills were indorsed for the use of M., then king of Portugal, and received by C., being then, and at the time of the first indorsement, his treasurer; but that, after M.'s government had been subverted by a hostile one, and C. removed from office, C. indorsed: held, that C., by the indorsement and delivery to himself, acquired an absolute title to the bills, and a power to indorse, which could not be qualified by any intention of O. not expressed in the indorsement, even if such qualification could be annexed to an indorsement at all, and *semble*, that it could not. And that it was immaterial whether C. was treasurer-general at the time of his endorsing over or not; and that the words "at the time," &c., were therefore properly omitted from the issue taken (*Soares v. Glyn*, 8 Q. B. 24).

In assumpsit by indorsee against acceptor, if it appear that there are words not in the acceptor's handwriting, making the bill payable at a particular place, it is incumbent on the plt. to show that the words were written by the acceptor's authority, and it seems that an addition of such words is a material alteration of a bill, since and notwithstanding the passing of the stat. 1 & 2 Geo. IV. c. 78 (*Desbrow v. Weatherby*, 6 C. & P. 758; 1 Moo. & R. 438).

Count on a bill of exchange drawn by C. W., payable to her order, accepted by the deft., and indorsed by C. W. to the plt. Plea, that C. W., before and at the time of the indorsement, was and still is the wife of one E. W., and that he never authorized or consented to the indorsement by her: held, that the plea was bad, on the principle that a person shall not dispute the power of another to indorse an instrument, when he asserts by the instrument that the other has such power (*Smith v. Marsack*, 12 Jur. 1050, C. P.; 6 C. B. 486; see *Halifax v. Lye*, 18 Law J. 197, C. P.).

Proof of Drawing.] The handwriting of the drawer to the drawing is considered as admitted by the acceptance, and need not be [* 515] *proved, and cannot be contradicted by the deft.; and the circumstance of its having been forged constitutes no defence, unless it appear the bill was accepted before the drawee, deft., had sight of the bill; in which case, it appears, the drawer's handwriting must be proved (*Tree v. Hawkins*, Holt, C. 550; *Pea. Ev.* 248; *sed quere*; see *Ch. Bills*, 389, n. a).

Proof of Indorsement, when Necessary.] In an action against the ac-

ceptor of a bill, all the indorsements stated, though some may have been unnecessarily so, must be proved, if denied (Bayl. B. 476; Waynam v. Bend, 1 Camp. 175; Bosanquet v. Alanson, *infra*; Critchlow v. Parry, 2 Camp. 182; Ch. Bills, 391; see *ante*, p. 466). None of the indorsements are admitted by the acceptance (Smith v. Chester, 1 T. R. 654; Cooper v. Lindo, 1 Selw. N. P. 380); and if the bill be negotiable in the first instance only by indorsement, the indorsee plt. must prove the bill was indorsed by the person to whose order it was intended to be made payable (Ib.; McFerson v. Thoytes, Pea. 20); and such first indorsement must be proved, though the bill be payable to the drawer's own order, and indorsed by him (Ib.; Bosanquet v. Anderson, 6 Esp. 43). Where the first indorsement is in full, directing the acceptor to pay the bill to a certain person, who has indorsed the same to plt., he must, in an action against the drawer or acceptor, prove that person's indorsement (Potts v. Read, 6 Esp. 57; Mead v. Young, 4 T. R. 28; Ch. Bills, 186, 187). Even the circumstance of the deft.'s having accepted the bill after it was indorsed, does not dispense with the proof of such indorsement (Ib.; Robinson v. Barrow, 7 Taunt. 455; Bosanquet v. Anderson, 6 Esp. 43; Smith v. Chester, *supra*). And, where the bill was shown to the drawer, with the name of the payee indorsed on it, and the drawer objected to the want of consideration only, it was held not to supersede the necessity of proving the indorser's handwriting (Duncan v. Scott, 1 Camp. 100; see also Sidford v. Chambers, 1 Stark. 326). And, though the drawee deft., by the terms of his acceptance, make it payable at a banker's, in an action by the latter, as for money paid for deft.'s use, the first indorser's handwriting must be proved (Foster v. Clement, 2 Camp. 17). An offer to pay a bill, with certain names on it, is sufficient admission of the plt.'s title to dispense with proof of each indorser's handwriting (Bosanquet v. Anderson, *supra*). If the indorser admit his handwriting it is not evidence of indorsement in an action against the acceptor (Hemmings v. Robinson, Barnes, 426; but see Maddocks v. Hankey, 2 Esp. 647).

Where the bill is payable to the order of a fictitious person, proof that the deft. knew of that circumstance when he accepted the bill, will dispense with the proof of the supposed indorser's handwriting (Ch. Bills, 64). Where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as the drawer, and therefore an indorsee may bring evidence to show that the signature of the supposed drawer to the bill and to the indorsement are in the same handwriting (Cooper v. Meyer, 10 B. & C. 468).

With respect to the proof of indorsements *subsequent* to the first, if the first indorsement was in blank, it will be unnecessary, in any action, to state or to prove any of the subsequent indorsements, although they were in full (Walwyn v. St. Quintin, 1 B. & P. 658; Charters v. Bell, 4 Esp. 210; Smith v. Clarke, 1 Esp. 180); they may be struck out from the bill at the time of the trial: if, however, they be stated in the declaration they must be proved if denied (Smith v. Chester, 1 T. R. 654; Bosanquet v. Anderson, 6 Esp. 43; Cocks v. Borrodaile, Ch. Bills, 392, 7th ed.). Indorsements may be struck out *even after the bill has been read in evi- [*516] dence, and objected to on the ground of omission to state them in the declaration (Mayor v. Jadis, 1 M. & R. 247). By striking out intermediate indorsements, the plt. loses the security of these indorsements. The indorsement must be in writing (Moxon v. Pulling, *supra*); if written in pencil it will suffice (Geary v. Thisick, 5 B. & C. 234).

If the indorsement be by *procuracion*, the indorsement, as well as the authority to make it, must be proved (Robinson v. Yarrow, 7 Taunt. 455;

S. C. 1 Moo. 150). An authority to draw does not imply an authority to indorse. It is, however, a question for the jury. The payees of a bill authorized their clerk to draw bills and checks for them, and in one instance to indorse a bill, and in two others he indorsed bills that had been discounted by the payees at their bankers': held, the jury were warranted in finding a general authority to the clerk to indorse (*Prescott v. Flynn*, 9 Bing. 19). Nor has a farm bailiff, who merely receives and pays money for his principal, any authority to indorse bills in his name (*Davidson v. Stanley*, 2 Man. & G. 721). An indorsement by a *feme covert*, of a bill payable to her order, conveys no interest, although circumstances may raise a presumption that she has authority to indorse in her husband's name (*Barlow v. Bishop*, 1 East, 432); unless, indeed, the jury can infer that she had authority so to indorse, which they may from a promise by the husband to pay the bill (*Ib.* 434; *Cotes v. Davis*, 1 Camp. 485; *Prince v. Brunatte*, 1 Bing. N. C. 435). A note payable to a *feme sole*, or order, who afterwards marries, cannot be indorsed by her during coverture (*Conner v. Martin*, 3 Wils. 5). An indorsement by a married woman, with her husband's consent, of a bill drawn by her, will pass the interest to the indorsee (*Prestwick v. Marshall*, 5 Moo. & P. 513; 7 Bing. 565; *post*, "PRINCIPAL AND AGENT").

If the bill or note be payable to the order of *several persons*, not in partnership, the right to transfer is in all collectively, and they must all indorse the bill (*Bayl. B.* 57); and the handwriting of each must be proved (*Carvick v. Pickery*, Doug. 663, n.: and, per Lord Ellenborough, *Bosanquet v. Anderson*, 6 East, 57); and though it was held, in a case at N. P., that an acceptance after the indorsement by one of the payees admitted the regularity of the indorsement (*Jones v. Radford*, 1 Camp. 83) this decision seems questionable (*Ch. Bills*, 393; *Bosanquet v. Anderson*, *supra*). In an action by the indorsee against the acceptor, where there was no actual proof of the handwriting of one of the indorsers, but it appeared that the indorsement was upon the bill when the deft. accepted it, and that he promised to pay it, it was left to the jury, who found for the plt., and the court refused a new trial, and thought it a question for the jury, whether the acceptance and promise did not amount to an admission, that the name of every indorser was authentic (*Hankey v. Wilson*, Say, 223). An offer made by the acceptor to pay the bill with certain names on it, is a sufficient admission to supersede the necessity of proving the different indorsements (*Lidford v. Chambers*, 1 Stark. 326; *Bosanquet v. Anderson*, 6 Esp. 43).

If the bill be payable to the order of several persons *in partnership*, it is in general necessary to prove the partnership and handwriting of some member of the firm, or of an agent acting in their name (*Carvick v. Vickery*, *supra*). Where several persons sue as indorsees of a bill of exchange, if the bill be indorsed in blank, that is, generally, the holders, whoever they may be, are, as such, entitled to recover, and there is no necessity for their proving that they were in partnership together, or that the bill was indorsed or delivered to them jointly (*Rordasnz v. Leach*, 1 Stark. 448; *Ord v. Portal*, 3 Camp. 239; *Atwood v. Rattenbury*, 6 Moo. 579); but,

*when a bill is indorsed specially, the promise being only to pay a [*517] certain firm, strict evidence must be given that the firm consists of the persons who are plts. (*Ib.*). And, if a note be payable to a firm of A. B. and Co., and A. B. and C. D. sue thereon, they must prove that they were the component members of the firm at the time the note was given (*Waters v. Paynter*, cited *Ch. Bills*, 389). Where plts. sue in a particular capacity, they must show that the bill was indorsed to them in that character (*Bernasconi v. Argyle* (Duke), 3 C. & P. 29). Where a bill of exchange is, by the direction of the payee, indorsed in blank, and delivered to A. B.

and Co., who are bankers, on the account of the estate of an insolvent, which is vested in trustees for the benefit of his creditors, A. and B., two of the members of the firm, and also trustees, cannot, conjointly with a third trustee, who is not a member of the firm, maintain an action against the indorser, without some evidence of the transfer of the bill to them, as trustees, by the firm, by delivery or otherwise (*Machell v. Kinnear*, 1 Stark. 499). On the dissolution of a partnership, the power given to one of the partners to receive and pay debts, does not authorize him to indorse and pay a bill in the name of the partnership (*Kilgour v. Finlayson*, 1 H. Bl. 155; *Lacy v. Woolcott*, 2 D. & R. 458). But a retiring partner may give to his late partners parol authority to indorse existing securities, and such authority may be inferred from circumstances (*Smith v. Winter*, 4 M. & W. 454). In proving partnership, the plt.'s counsel may suggest to the witness the names of the firm (*Acerro v. Petroni*, 1 Stark. 100). The deft. may show, that though the indorsement be in blank, it was never delivered to the plt. as indorsee, but only as agent for a particular purpose (*Adams v. Jones*, 12 Ad. & E. 455); or that it had been obtained by fraud from the real holder (*Marston v. Allen*, 8 M. & W. 494). Deft., however, cannot show on this traverse that a prior indorsement was fraudulent, if plt. be a *bona fide* holder for value (*Hayes v. Caulfield*, 5 Q. B. 81). As by the law of France an indorsement in blank does not transfer any property in a bill, the holder of a bill drawn in that country, and indorsed there in blank, cannot recover against the acceptor in the courts in this country (*Timbey v. Vignier*, 1 Bing. N. C. 151; 4 Moo. & S. 595; 6 C. & P. 25). An indorsement in blank by the maker, and a delivery by his executor to the plt. is no indorsement to the plt. so as to give him a title to sue (*Bromage v. Lloyd*, 1 Exch. 32).

Indorsement by Procuration—Agents.] An indorsement "per procura-tion," imports that the indorser acts under a special authority; and the person who takes a bill so indorsed does it at his own risk: he is bound to satisfy himself as to the extent of that authority (*Alexander v. McKenzie*, 13 Jur. 346; 18 Law J. 94, C. P.). A power of attorney having been given by the payee of notes, to agents, empowering them to sell, indorse, and assign, they, under the power, indorsed the notes to a bank, by way of security for a loan to them. The agents failed: held, that the transaction was valid, and that the payee could not recover from the bank (*Bengal (Bank of) v. McLeod*, 13 Jur. 945, P. C.).

A bill of exchange, having been indorsed [in blank, was afterwards indorsed by the deft. specially to "Barber and Walker and Co." The plts., who carried on business under the respective firms of "Barber and Walker and Co.," and "The Eastwood Company," indorsed the bill by the name of "The Eastwood Company." The bill was duly presented, but payment refused for want of an indorsement by "Barber and Walker and Co.:" held, that the bill, having been indorsed in blank, its negotiability could not afterwards be restrained by a special indorsement; and that the presentment was such as to render the deft. liable on his indorsement to the plts. (*Walker v. McDonald*, 2 Exch. 527).

Mode of Proof of Indorsements.] The indorsements should be proved by evidence of the handwriting of the parties (*ante*, 491), and the indorser may be called for that purpose (*Richardson v. Allan*, 2 Stark. 334; *Hobson v. Rich*, Ch. Bills, 396); as also to prove the consideration given by the plt.; and he may be called after other witnesses for the plt. have negatived it (*ib.*) If there was a subscribing witness to the indorsement, he should be called

(Stone v. Metcalf, 1 Stark. 53). If the indorsement have been by procura-tion, it must be proved, as *ante*, p. 466.

A promise by deft. to pay (Jones v. Morgan, 2 Camp. 474; Lundie v. Robertson, 7 East, 231; Hankey v. Wilson, Say. 223; Hodge v. Hills, 3 Camp. 463); or offer to renew (Bosanquet v. Anderson, 6 Esp. 43), made to the indorsee, is a sufficient admission to dispense with proof of the indorsement (Sidford v. Chambers, 1 Stark. 326; *ante*, 466, 491). An admission by the indorser himself of his indorsement, will not suffice (Bosanquet v. Anderson, 6 Esp. 43; Sidford v. Chambers, 1 Stark. 326). The payment of money into court generally, on the whole declaration, amounts to an admission of the indorsement, and dispenses with the necessity of proving it

(Gutteridge v. Smith, *2 H. Bl. 374), after proving the payment [*518] into court (Israel v. Benjamin, 3 Camp. 40. See "RULE OF COURT"). If the payee of a bill deliver it with the name indorsed upon it to another, no proof is required of the handwriting of the indorsement (Glover v. Thomson, Ry. & M. 443).

A bill is presumed to be issued when dated; but the date of an indorsement, when material, must be proved, either directly, or by circumstances (Anderson v. Weston, 6 Bing. N. C. 296). A bill was dated before the dissolution of a partnership, but the indorsement was not dated, and a question arose, whether the indorsement was before or after the dissolution; and it was held that this was a question for the jury, and that, as it was drawn payable to the partnership, the jury might infer that it was indorsed shortly after the drawing (Anderson v. Weston, 6 Bing. N. C. 296).

Where the deft. pleaded that the bill was drawn by a partner, but not for partnership purposes, and was indorsed to the plt. after it became due, and the plt. replied that it was not indorsed after it became due, but was indorsed to and taken and received by him before it became due: held, sufficient to put in the bill, and not necessary that the plt. should show that the bill was indorsed to him before it became due (Parkin v. Moon, 7 C. & P. 408).

Identity.] In general, it is unnecessary to prove the identity of the persons by whom the indorsements were made; and proof that the bills were indorsed by a person of the same name as the person intended, will, *prima facie*, suffice (Bulkeley v. Butler, 2 B. & C. 444; Mead v. Young, 4 T. R. 28). But, if there be any doubt whether the transfer were made by the proper party, the witness who is to prove the indorsement, or some other person, should be prepared to prove the identity of the party (Ch. Bills, 391). In an action by the indorsee against the acceptor of a bill of exchange, whereof E. S. was the payee, the plt. proved, that a person, calling himself E. S. came to C., having in his possession the bill in question, and also a letter of introduction (proved to be genuine), which was expressed to be given to a person introduced to the writer as E. S., and also another bill of exchange, drawn by the writer. The bearer of these documents, after remaining ten days at C., during which time he daily visited the plt., indorsed to him the bill in question, and received value for it, and also a letter of credit. Held, that this was evidence of the identity of this person with E. S., the payee of the bill, and, in the absence of any evidence, an answer sufficient to justify a verdict for the plt. (Bulkeley v. Butler, 2 B. & C. 434). Proof of indorsement by a person who professed to be and called himself by the name of the indorser and drawer, and whose handwriting resembled that on the bill, is evidence of the identity as against the acceptor (Smith v. Money Penny, 2 M. & R. 317).

INDORSEE AGAINST DRAWER.

The declaration in an action between these parties alleges as well the indorsement to the payee as subsequent ones, and also the usual allegations, in an action between the payee and drawer: it will be necessary to prove the same facts as in an action between these parties, together with the indorsements.

Proof of Drawing the Bill.] Plt. must produce and prove the bill, as *ante*, 489. The deft.'s handwriting to the drawing must be *proved if traversed (*ante*, 491); and, as to proof when drawn by an agent, [*519] or partnership, see *ante*, 492).

Proof of Indorsement.] The plt. must prove his title by evidence of the indorsement of the deft. or the payee; and, as to such proof, see *ante*, 466, et seq.

Proof of Acceptance.] In an action against the drawer or indorser, for default of payment by the drawee, his acceptance of the bill need not be proved, and this, although it has been stated unnecessarily in the declaration (Tanner v. Bean, 4 B. & C. 312; S. C. 6 D. & R. 338. overruling Jones v. Morgan, 2 Camp. 474).

Proof of Presentment for Acceptance, and Default of Acceptance.] See *ante*, p. 462, 472.] When a bill is payable at so many days after sight, the plt. must prove a presentment for acceptance (O'Keefe v. Dunn, 1 Marsh. 616; 6 Taunt. 305; S. C. 5 M. & S. 28; Bayl. B. 182). But, in other cases, it is sufficient to prove a presentment for payment when the bill becomes due, and a refusal to pay (B. N. P. 269; 3 East, 483; Ch. Bills, 405). If the bill has been refused acceptance, though it was unnecessary to present it (*Ib.*), the holder cannot, in general, recover, unless he give notice, &c. (see *post*, p. 521).

No certain time is fixed within which a presentment for acceptance of a bill payable at sight, or so many days after sight, must be made; but it should be made with due diligence, and within a reasonable time (Muilman v. D'Eguino, 2 H. Bl. 565; Fry v. Hill, 7 Taunt. 397). What shall be deemed a reasonable time must depend upon the particular circumstances of each case: keeping it a whole day, exclusive of the day of receiving it without negotiating it, or sending it for acceptance, is not necessarily an unreasonable delay (Fry v. Hill, *supra*). No delay warranted by the common course of business is improper; nor is any delay which is occasioned by keeping the bill in circulation at a distance from the place where it is payable; but a delay by locking it up for any length of time is (Muilman v. D'Eguino, *supra*). If a bill payable abroad at a certain time after sight is taken in a course of negotiation, it is not necessary to send it by the first opportunity to the place where it is payable (*Ib.*). Upon a presentment for acceptance, the bill should be left with the drawee twenty-four hours, unless, in the interim, he either accept or declares a resolution not to accept (Ld. Raym. 281; Bayl. B. 228). The reasonableness of the time appears to be a mixed question of fact and law (Darbishire v. Parker, 6 East, 3; Shute v. Robins, Moo. & M. 133; Mellish v. Rawdon, 9 Bing. 423); though in Fry v. Hill and Muilman v. D'Eguino, it was left to the jury. The question in these cases is, whether looking at the interest and situation of both holder and drawer, the former has been guilty of unreasonable delay in presenting the bill for acceptance, or putting it into circulation (Mellish v. Rawdon,

supra). A bill drawn at one month after sight on London was delivered at Windsor on the 9th to the plt., who presented it on the 12th; the jury found a verdict for him, and the court refused to disturb it (*Fry v. Hill, supra*).

Lord Tenterden has drawn a distinction between bills payable after sight, which are drawn by country bankers on their correspondents in London, his lordship being of opinion, that such bills do not require immediate presentment, but may be retained by the holders for the purpose of using them for a moderate time, as part of the circulating medium of the country (*Shute v. Robins, supra*).

When bills drawn here upon India, dated 5th March, were on [*520] *that day purchased by the plt. for a house in Paris, and on the 30th April he sent them to India, which they reached on the 3rd October, and on the 5th were presented to the drawee for acceptance, who, being from home, gave no answer until the 17th, when he refused to accept them; the case was left to the jury, Eyre, C. J., expressing his opinion that they were sent to India in time, and were there presented in time: and the jury found accordingly (*Muilman v. D'Eguino, supra*). A bill drawn in London upon Lisbon, at 31 days after sight, was sent by the deft. in Paris to the plt. on the 12th May, who sent it to a house at Genoa, who negotiated it. It was presented for acceptance on the 22nd of August, but refused; the deft. insisted that it should have been sent direct to Lisbon for acceptance; but the judge held otherwise, and the jury said that such a bill might be sent round the world before presentment, and found a verdict for the plt. (*Goupy v. Harden, 7 Taunt. 159*). Where the plt. purchased of the deft. in the London market a foreign bill, drawn by himself upon a merchant at Rio Janeiro, but in consequence of the exchange falling immediately after, the plt. kept the bill, and in five months after sold it to another; when the bill was presented it was refused, the drawee having become bankrupt, and was protested, returned, and taken up by the plt. It was proved that foreign bills were bought and sold in the market for speculation, and it must have been known to the deft.; some witnesses stated that they conceived the bill should have been forwarded by the first or second packet after the receipt of it, whilst, on the other hand, others stated that such bills were usually kept without being forwarded for acceptance, so long as it suited the convenience of the holder; but that, if the drawer wished to limit the period of his responsibility, he either sent one part forward for his acceptance, and brought the other to the market for sale, with the time indorsed on it at which the first one had been forwarded, or he made it the subject of express stipulation with the purchaser that the bill should be sent forward for acceptance within a limited time; but all the witnesses said, that if the bill had been once circulated, it might be sent to any part of the world, and kept a reasonable time by each successive holder. The judge told the jury that they were to determine upon the evidence before them, whether there had been unreasonable delay in the plt. in sending the bill forward for acceptance, or putting it into circulation, and that they must take into their consideration the situation and interests, not merely of the drawer or holder, but of both: the jury found for the plt., and the court held that the question had been properly left to them, and that their attention was properly not confined as to whether due diligence had been used by the plt. with reference to the interest of the deft. only (*Meluish v. Rawdon, 9 Bing. 416*).

But in *Graham v. Straker* (4 M. & W. 721), the court held, that the jury had properly found that the bill had not been presented for acceptance within a reasonable time; in that case, it appeared that a bill drawn in duplicate on the 12th of August, at C., in Newfoundland, on a house in England,

at 90 days after sight, for the freight of a vessel from Liverpool to C., was not presented for acceptance until the 16th of November; that C. was only 20 miles from St. John's, with a daily communication between them, and that there was a post-office packet from St. John's to England three times a week; but the delay was not explained.

A presentment for acceptance should be made at a seasonable time, and if, by the known custom of any place, bills and notes are only payable within limited hours, a presentment there out of those hours is unreasonable; and so is a presentment out of the hours of *business to a person of a particular description, as a banker, in a place where, by the [*521] known custom of that place, all persons of his description begin and leave off business at stated hours (Parker v. Gordon, 7 East, 385; Elford v. Teed, 1 M. & S. 28). But, to a drawee not so circumstanced, eight o'clock in the evening is not an unseasonable hour for making a presentment (Barclay v. Bailey, 2 Camp. 527; Morgan v. Davison, 1 Stark. 114, *post*), nor half-past seven o'clock, though no one is there (Wilkins v. Jadis, 2 B. & Ad. 188). And no objection can be made to a presentment on the ground of its being at an unseasonable hour, if a person is stationed there at the time to give an answer (Garnett v. Woodcock, 1 Stark. 476; Henry v. Lee, 2 Chit. Rep. 124; see Whittaker v. England (Bank of), 1 C. M. & R. 744). Therefore, a presentment at a banker's out of the usual hours will be unobjectionable, if the banker, or any agent on his behalf, is there at the time of such presentment (*Ib.*; Bayl. B. 180). A presentment to a banker's clerk at the clearing-house is a presentment at the banker's (Reynolds v. Chittle, 2 Camp. 596; Harris v. Packer, 3 Tyrw. 370, n.). A neglect to make a presentment in proper time may be excused by illness, or by the circumstance of war having been declared, or from the political state of the country, or by other reasonable cause or accident not attributable to the laches or misconduct of the holder (Ch. Bills, 163).

Where proof of presentment for acceptance is necessary, it should be shown that such presentment was made to the drawee himself; or to his authorized agent (Check v. Roper, 5 Esp. 175; Brown v. McDermott, *ib.* 265). The bill may be left with him twenty-four hours, unless, in the interim, he refuse to accept (see Ingram v. Forster, 2 Sm. 243; Com. Dig. Merchant, F, 6; Bellasis v. Hester, 1 Ld. Raym. 281); or unless, in such interim, a post go out (*Ib.*; Mar. 62). If the drawee has left the kingdom, a presentment at his house will suffice (Cromwell v. Hyrison, 2 Esp. 511; 4 M. & S. 48); unless he have a known agent, when it should be presented to him (*Ib.*; 2 Taunt. 206). On the death of the drawee, the bill should be presented to his personal representatives, if they live within a reasonable distance; if there be none, at the house of the deceased (Molloy, b. 2, c. 10, s. 34; Ch. Bills, 5th ed. 317). If the drawee has absconded, or cannot be found at the place addressed to him, the bill is dishonoured, and, upon due notice given, the drawer and other parties may sue (*infra*; 1 Ld. Raym. 743); but a mere removal of the drawee, without diligent and continued search to find out where he has gone, will not be deemed a default of acceptance. Plt. must show that every possible inquiry was made (Collins v. Butler, Stra. 1087; Gow, 81). See further, as to what will excuse a presentment, *post*, p. 522. It is sufficient for the plt. to show that the drawee refused to accept the bill generally, or according to the tenor of the bill (Boehm v. Garcias, 1 Camp. 425, n.). It will not suffice to show that the bill was presented to some person on the drawee's premises who refused to accept it, without connecting that person with the drawee (Check v. Roper, 5 Esp. 175); unless there be no one else on the premises where the acceptor is

described as living (*Brown v. McDermott*, ib. 265). The refusal may be proved by a person who presented the bill for acceptance.

Notice of Default of Acceptance.] If a bill, whether it were necessary to present it or not, have been presented for acceptance, and the drawee have refused acceptance, or made a conditional, partial, or varying one, a notice of that fact should be proved to have been given, within a reasonable time after, to the persons to whom the *holder means to resort [*522] for payment, or they will be discharged (*Bridges v. Berry*, 3 Taunt. 130; *Rucker v. Hiller*, 16 East, 43; Ch. Bills, 197; *Blesard v. Hirst*, 5 Burr. 2670; *Goodall v. Dolby*, 1 T. R. 712; *Orr v. Maginnis*, 7 East, 359); and in such case, it will not suffice for the holder to wait till the time mentioned in the bill for payment has elapsed, and then to give notice of non-acceptance as well as non-payment (*Roscow v. Hardy*, 2 Camp. 458; S. C. 12 East, 434; Ch. Bills, 197): though the drawer is not discharged by want of notice where the bill has passed into the hands of a *bona fide* indorsee for value who has no notice of dishonour (*Dunn v. O'Keefe*, 5 M. & S. 282). If no notice, or an insufficient one be given, and an indorser, through ignorance of the fact pay the amount of the bill to the holder, this does not revive the liability of the previous indorser or drawer (*Roscow v. Hardy*, *supra*). A *bona fide* holder, however, to whom a bill has been transferred after a refusal to accept, is not affected by the neglect of any previous holder in giving notice of that fact (*Crossly v. Han*, 13 East, 498). As to the mode of giving a notice of dishonour (*post*, p. 534). A want of effects of the drawer in the drawee's hands, at the time of the making of the bill, till presentment and dishonour, will excuse the want of a notice of dishonour (and see further, *infra*). The bill being on a wrong stamp will also excuse it (4 Taunt. 288); and the drawer may, by his conduct or agreement, dispense with it. And see further as to what will do so, *post*, p. 523. As to what is a waiver of presentment and notice, *post*, p. 524.

Protest for Default of Acceptance.] Whenever notice of non-acceptance of a *foreign* bill is necessary, a protest is so likewise (*Rogers v. Stephens*, 2 T. R. 713). The presentment of a foreign bill in this country must be proved as if it were an inland bill, and the protest is not evidence of it (*Chesman v. Noyes*, 4 Camp. 129; and see further as to proof of protest, *post*, p. 527). By 3 & 4 Anne, c. 9, s. 4, inland bills of 5*l.*, and upwards, may be protested for non-acceptance (and see, *post*).

Presentment for Payment.] When the drawer is sued for default of payment of the bill by the drawee or acceptor, a presentment for such payment must be proved, and that at the time when the bill fell due, according to the time specified in the bill, or, if no such time be specified, then within a reasonable time after receipt of the bill (*Poth. Pl.* 129; *Cowley v. Dunlop*, 7 T. R. 581; *Tassell v. Lewis*, 1 Ld. Raym. 743; Bayl. B. 198; *Cocks v. Masterman*, 9 B. & C. 902). A neglect to do this discharges the drawer or indorsers, whose implied contracts are to pay only on default of the drawee (2 Burr. 669); and it discharges them, not only from payment of the bill, but even from the original consideration for indorsing it (Ch. Bills, 245).

Proof of Excuse of Presentment for Payment.] Evidence in excuse for non-presentment is inadmissible when due presentment is traversed (*Burgh v. Legg*, 5 M. & W. 421). Where, therefore, a presentment for payment is excused, it must be specially averred, and cannot be shown upon an issue joined upon presentment, (*ante*, p. 469). When issue is joined on the want

of effects in the drawee's hands, the required proof will be sufficiently indicated by the terms of the averment in the declaration. In order to excuse the presentment on the day the bill becomes due it suffices to show that the drawee had not effects of the drawer in his hand from the time of drawing the bill to the time it became due *(Cory v. Scott, 3 B. & [*523] A. 619; Claridge v. Dalton, 4 M. & S. 229; 12 East, 171; Leach v. Hewitt, 4 Taunt. 733; Perry v. Parker, 6 Ad. & E. 502); and had no reason to expect that it would be paid. But the acceptor's saying so is not sufficient proof (Prideaux v. Collier, 2 Stark. 57). If, at any time between the drawing of the bill and its becoming due the drawee had *some* effects of the drawer in his hands, though insufficient to pay the amount, or though the drawer has afterwards withdrawn such effects, there will be no excuse for *laches* in presenting for payment, &c. (Orr v. Maginnis, 7 East, 359). And, if the drawer of a bill, when presented for acceptance, have effects in the drawee's hands, though he is indebted to them in a much larger amount, and they, without his privity, have appropriated his effects in their hands to the satisfaction of their debt, he is discharged by the holder's *laches* (Blackman v. Doren, 2 Camp. 503). Nor is it essentially necessary that the drawee should have actual value from the drawer in hand; for circumstances may exist which would give a drawer good ground to consider he had a right to expect payment from the drawee (Ch. Bills, 208; Legg v. Thorpe, 16 East, 43; S. C. 3 Camp. 217, 334; Claridge v. Dalton, 4 M. & S. 228; Spooner v. Gardiner, Ry. & M. 84; 2 Esp. 515; 2 Ves. & Bea. 240). It is enough if the drawer had effects on the way to the drawee (Renken v. Hiller, 3 Camp. 217; 16 East, 43). Although no consideration passed between the payee and drawer, it is not an accommodation bill as to the latter, if there was a valuable consideration as between the payee and acceptor (Scott v. Lifford, 1 Camp. 246). It has been held, that where a bill has been drawn for the payee's accommodation, and the drawer had no effects in the drawee's hands, though the payee had, the drawer is not discharged by *laches* (Walwyn v. St. Quintin, 1 B. & P. 652; S. C. 2 Esp. 515; *sed quære*, see Ch. Bills, 200; and cases there cited; and see further, as to how a party guaranteeing a bill is discharged by *laches*, Ch. Bills, 203, 204, &c.).

If the acceptor cannot be found, so that no presentment can be made, this must be specially averred, and cannot be shown on issue joined upon presentment (Leeson v. Piggott, Bayl. B. 324).

When, however, the presentment is merely informal, and the want of strict compliance has occurred through the acceptor's fault, as when he had changed his residence, and the plt. had presented the bill to a servant at the late residence, there the averment of due presentment is supported (Buxton v. Jones, *supra*). So, where presentment is prevented from circumstances which constitute a legal excuse; thus, where the place of presentment is in the hands of the Queen's enemies (Patience v. Townley, 2 Sm. 224).

The bankruptcy or known insolvency of the drawee will constitute no excuse for not presenting for payment (see Russell v. Langstaffe, 2 Doug. 514; Esdaile v. Sowerby, 11 East, 114; Ex parte Wilson, 11 Ves. 412; 2 B. & P. 279; and see Camidge v. Allenby, 6 B. & C. 373; Beeching v. Gower, Holt, 313; Rohde v. Proctor, 4 B. & C. 523); nor will the circumstance of his being in prison (Haynes v. Birks, 3 B. & P. 601); nor will his death (Poth. Pl. 146). In general, in the case of country bank-notes payable on demand, although the bank has stopped payment, and been shut up, and declared that they will not pay any notes, yet a presentment for payment at the bank must be formally made, unless dispensed with (Bowes v. Howe, 5 Taunt. 30); but it may be dispensed with (see Ch. Bills, Addenda to p. 246, n.). The circumstance of the drawer having notice, before the

bill is due, that it will probably not be paid, and promising the holder that he will endeavour to provide effects, and see him again, will not excuse the neglect to *present the bill for payment to the drawee on the day [*524] the bill is due (Prideaux v. Collier, 2 Stark, 57); though it might excuse the notice of dishonour (Ib.; and see Hill v. Heap, Dow & Ry. N. P. 57; Phipson v. Kneller, 4 Camp. 285). The circumstance of the holder having received the bill very near the time of its becoming due, constitutes no excuse for presentment of it at maturity (Anderton v. Beck, 16 East, 248).

Proof of an acknowledgment by the drawer of his liability, or a promise by him to pay, will dispense with the proof of presentment (Croxon v. Worthen, 5 M. & W. 5). See *post*, 529, as to when such acknowledgment or promise will supersede the necessity of proving a notice of dishonour. The deft. may, by agreement, waive the necessity of a presentment (*post*, p. 532).

Proof by and to whom Presentment for Payment was made.] The presentment should in general be proved to have been made by the holder of the bill, &c., or some agent competent to give a legal receipt for the money (per Lord Kenyon, Coore v. Callaway, 1 Esp. 115). If the holder, at the time the bill becomes due, is dead, his executor, though he have not proved the will, must present it (Poth. Pl. 146; Molloy, b. 2, c. 10). A presentment by a person in possession of a bill payable to his own order is sufficient (10 Mod. 286).

The presentment must be in general to the person on whom it is drawn. But it is not necessary that the demand should be personal; it is sufficient to make it at the house of the acceptor (Brown v. McDermont, 5 Esp. 265, 266); or place appointed by him for payment (Giles v. Boune, 2 Chit. Rep. 300; Saunderson v. Judge, 2 H. Bl. 509); or at the place at which, by the acceptance, it is made payable (Wilmot v. Williams, 7 Man. & G. 1017; or, in some cases, to his agent; as, if the drawee of a bill go abroad, leaving an agent here, with power to accept bills, and he do so, it must be presented to the agent for payment if the drawee continue absent (Philips v. Astling, 2 Taunt. 206). If a bill be payable at a particular place, it is not necessary to present it at any other (Philpot v. Bryant, 3 C. & P. 244). If a note or bill is payable at a particular house, it should be there presented (Ambrose v. Hopwood, 2 Taunt. 61; Garnett v. Woodcock, *supra*; Bayl. B. 174). We have seen what acceptance of a bill renders it necessary to present it at a particular place, *ante*. Although the holder of a bill accepted payable at a banker's is not bound to present it there in order to charge the acceptor, yet a presentment there and refusal will be sufficient to charge the drawer (McIntosh v. Haydon, R. & M. 363). If the particular place be mentioned in the body of a note, a presentment there is necessary, even to charge the maker (Sanderson v. Bowes, Bayl. B. 218; 14 East, 500; Dickinson v. Bowes, 16 East, 110; Exon v. Russell, 4 M. & S. 505; Callaghan v. Aylett, 2 Camp. 551; Prior v. Mitchell, 4 Camp. 200; Williams v. Waring, 10 B. & C. 2; see Gibb v. Mather, 8 Bing. 214); and so, if it be printed on the note, by way of memorandum only (Ib.; Dickinson v. Bowes, 16 East, 110). But, where a particular house is mentioned in the note by way of marginal memorandum only, presentment at that house may not be necessary to charge the maker (Bayl. B. 219; Wild v. Rennards, 1 Camp. 425). If a banker's note be made payable in the country or in London, the holder may present it at either; and, if payment be refused at London, it is no defence to show, that, if payment had been demanded in the country, the note would have been paid (Beeching v.

Gower, Holt, 313). Where a bill or check is payable at a banker's, a presentment *to their clerk at the clearing-house is sufficient (Reynolds v. Chettle, 2 Camp. 596; 2 H. Bl. 509). And, if the banker [*525] is himself the holder, it is sufficient for him to see whether he has effects in his hands (Ib.). If the drawee has merely removed from the place in which the bill represents him to reside, it is incumbent on the holder to use every reasonable endeavour to find out whether he hath removed, and to present it at that place (Bateman v. Joseph, 2 Camp. 461; S. C. 12 East, 433; Stra. 1087). Under the general averment, that the bill was duly presented (without stating an acceptance), the plt. may prove a presentment at the place mentioned in the acceptance (Parks v. Edge, 1 C. & M. 429). The handwriting of the acceptor must be proved, if the presentment be at the place mentioned in the acceptance (Sedwick v. Gager, 5 C. & P. 199; see Smith v. Bellamy, 2 Stark. 228). Where the averment in a declaration on a bill drawn on P. P. at No. 6, Budge Row, was that the bill was presented *and shown* to P. P. for payment, and the evidence was that the holder went to No. 6, but the house was shut up, and no one there: held, that the proof was sufficient, for the words *and shown* are surplusage, and notice of dishonour may be given on the same day (Hine v. Allely, 4 B. & Ad. 624). If the bill be directed to the acceptor by a certain address and accepted generally, it is enough to present it to an inmate of the house at such address, though the acceptor have in the mean time removed (Burton v. Jones, 1 Man. & G. 83). But, if the drawee have absconded, or never did live at the place of address, that will be a sufficient excuse to the holder for not making further inquiries after him (Anon. 1 Ld. Raym. 743; Bayl. B. 216). If, on a presentment, it appear that the drawee or maker is dead, the holder should inquire after his personal representative, and, if he lives within a reasonable distance, present the bill or note to him (Bayl. B. 286; 521, *ante*). If there be no representative, payment should be demanded at the house of the deceased (Poth. Pl. 146; Mar. 134). The bill, unless paid, must not be left with the acceptor; and, if it be left, the presentment is not considered as made until the money is called for (Hayward v. England (Bank of), 1 Stra. 550; Russell v. Hankey, 6 T. R. 13).

Proof of Time of Presentment for Payment.] We have already seen at what time a presentment for acceptance should be proved to have been made (*ante*, p. 470), and much of what is there stated will apply here. The question as to the correct time for presentment is for the opinion of the court, and not of the jury (Bayl. B. 103; Ch. Bills, 262). The time of presentment for payment must depend on the time at which the bill is made payable. When a bill is payable at usance, or at a certain time after date or sight (Bayl. B. 248, n.), or after demand, it is not payable at the precise time mentioned in the bill, three days of grace being allowed; and presentment should, in such cases, be made on the last day of grace (Brown v. Harraden, 4 T. R. 141; Lefley v. Mills, *ib.* 170; Tassell v. Lewis, 1 Ld. Raym. 743; Bayl. B. 241). Bills due on a Sunday, Christmas-day (Tassell v. Lewis, *supra*), or on a Good Friday (39 & 40 Geo. III. c. 42), or on a fast-day (7 & 8 Geo. IV. c. 15, s. 2), are to be presented on the days previous. In bills payable on demand, no days of grace are allowed (Ch. Bills, 263). As to when bills fall due, see Ch. Bills, 263 to 276, *a.* A presentment before the bills fall due is a nullity (Wiffen v. Roberts, 1 Esp. 262). When a bill is payable on demand, the presentment must be made in a reasonable time after the receipt of it, in order to charge the drawer or indorser (Bayl. B. 229—239); and payment must be made on presentment. What is reasonable time seems not to be defined with any degree of cer-

tainty. *It is a question for the court (Ch. B. 270, &c.; *post*). If given in payment and payable in the place where it is given, it should be presented on the next morning; and if payable elsewhere, it should be sent to be presented by the next post (see Bayl. B. 237; Ward v. Evans, 2 Ld. Raym. 928; Williams v. Smith, 2 B. & Ad. 496; Warr v. Warren, Stra. 415; Rogers v. Langford, 1 Cr. & M. 637; see *ante*; Ch. Bills, 270, &c.).

Where a check drawn on a country banker, dated 19th March, was not presented until 6th April, and no cause was assigned for the delay, but the drawer had not sustained loss by the non-presentment at an earlier period, the drawer was held liable to be sued on the check (Serle v. Merton, 2 Moo. & R. 401). The plts. sold horses to the deft. on the 10th of March, 1840, and were paid by a check on the deft.'s bankers, which the plts. crossed to their own bankers, and paid in to them on the 11th of the same month. The deft.'s bankers did not use the clearing-house in Lombard Street, and accordingly the plts.' bankers presented that check to the deft.'s bankers on the 12th, whereas, otherwise, they would have presented it at the clearing-house on the 11th. The deft.'s bankers had stopped payment on the 12th. Held, that the plts.' bankers had acted in strict accordance with the rules of mercantile law, but the plts. themselves had been guilty of laches in not paying the check to their bankers on the 10th, if they received it within banking hours (Alexander v. Burchfield, 3 Sco. N. R. 555).

Three days of grace are also allowed on promissory notes (Brown v. Harraden, 4 T. R. 148). A promissory note payable by instalments is assignable within 3 & 4 Anne, c. 9, and the maker is entitled to days of grace upon the falling due of each instalment (Oridge v. Sherborne, 11 M. & W. 374).

A bill accepted for honour must be presented to the drawee for payment on the third day of grace (Hoare v. Cazenove, 16 East, 391; see Williams v. Germaine, 7 B. & C. 468). Where the deft. accepted for the honour of the drawer, "if regularly protested and refused when due;" held, in an action against the acceptor for honour, that by the special form of the acceptance a presentment for payment by the drawee in Liverpool, a refusal by him and protest there were necessary; and, therefore, that the bill was properly presented there on the day when the bill became due (Mitchell v. Baring, 10 B. & C. 4). In foreign bills, the time of presentment for payment is regulated by the law of the country where the bill is payable. In Hamburg, the holder is not bound to present the bill until the eleventh day after the time limited for payment, when such day is a post-day, or, if not, then upon the post-day immediately preceding (Bayl. B. 246, n.). But, in Lubeck and Bremen, or other places near Hamburg, which are in daily intercourse with it, the drawer need not present it until the eleventh day, although that be not a post-day, and although the bill be accepted payable in Hamburg (Goldsmith v. Bland, *ib.*). In France, the bill must be presented the very day it becomes due (Rothschild v. Currie, 1 Q. B. 43).

The holder of a check is bound to present it within reasonable time, and it is a question for a jury on an issue of due presentment whether this rule has been complied with (Seale v. Norton, 2 M. & R. 401); and if he comply with this rule, it must be presented in the course of the day succeeding that on which he received it from the drawer, whether he presents it himself, or through his bankers (Alexander v. Burchfield, 3 Sco. N. R. 555).

As to the *time of the day* when the presentment should be made, it must be a reasonable time before the expiration of the day the *bill falls [*527]. due. By the known custom of any place or trade, a bill must be

presented within limited hours, as, in the case of bankers, &c., before five o'clock, or the usual hour of their shutting up (see *Parker v. Gordon*, 7 East, 385; *Elford v. Teed*, 1 M. & S. 28; *Jameson v. Swinton*, 2 Taunt. 224; 2 Camp. 374; Ch. Bills, 277); unless the banker, or some person to represent him, be there at the time (*Garnett v. Woodcock*, 6 M. & S. 44). No inference is to be drawn from the circumstance of the bill being presented by a notary in the evening that it had been before duly presented within the banking hours (*Elford v. Teed*, 1 M. & S. 28). The presentment of a bill payable at the office of an attorney is sufficient, though made at eight o'clock in the evening in February (*Trigg v. Newnham*, 1 C. & P. 631; and see *Barclay v. Bailey*, 2 Camp. 527; 2 Taunt. 224; S. C. 2 Camp. 374; *Holt's N. P.* 476; *Morgan v. Davison*, 1 Stark. 114; *Trigg v. Newnham*, 10 Moo. 249; *Wilkins v. Jadis*, 2 B. & Ad. 188); it will suffice, if made to an authorized person (*Garnett v. Woodcock*, 1 Stark. 475; S. C. 6 M. & S. 44; see further, *ante*).

Proof of Notice of Dishonour and Protest.] A notice of dishonour ought to be proved to have been given, or, in general, the drawer or indorsers will be discharged from liability. What has been already stated as to the necessity of giving a notice of dishonour in the case of a non-acceptance, and what will excuse the want of it, or a want of presentment, will apply here (*ante*, et 473, seq.). When a bill has been dishonoured by a non-acceptance, and due notice thereof given, it is not absolutely necessary to give a notice of a dishonour by the non-payment of it when due (Ch. Bills, 309); and, after a regular notice of non-payment to the drawer, the engagement of the holder to present the bill again, and his doing so, but omitting to give notice of the second dishonour, will not prejudice his remedy against the drawer (*Forster v. Jurdison*, 16 East, 105). No proof of notice will be required, where the acceptor is also one of the drawers of the bill (*Posthouse v. Parker*, 1 Camp. 82). A memorandum made by the deft.'s wife, of the receipt of notice of dishonour (at the place from which the bill was dated, the deft. not having been resident there at the time) is admissible after the wife's death, to prove that the deft. had due notice of dishonour (*Wharton v. Wright*, 1 C. & K. 385). The maker of a check cannot insist upon want of notice of dishonour of it, unless he has suffered by such want of notice. Nor if W., for instance, profess to have paid money to H. that he may pay it to D., and if H. give D. his check which is afterwards dishonoured, can W. insist that D. gave him no notice, since he may bring an action against H. if the check have been dishonoured, and he had actually paid the money to H. as he represented (*Deverell v. Whitmarsh*, 5 Jur. 963). The question, whether the party who receives a check on a banker makes it his own by not presenting it in due time, so as to release the maker, does not arise, if, on the check being dishonoured, the various parties who are concerned in the matter are not entitled to notice of dishonour (*Ib.*).

A protest is necessary, in all cases where a notice of dishonour is necessary, to prove also a *protest* of a *foreign* bill (*Gale v. Walsh*, 5 T. R. 239); a mere noting of the bill, without proof of protest, will not be sufficient (*Rogers v. Stephens*, 2 T. R. 713; *Gale v. Walsh*, 5 T. R. 239; *Orr v. Magennis*, 7 East, 459). A foreign bill should be noted for non-acceptance or non payment on the day on which acceptance or payment is refused (*Leftley v. Mills*, 4 T. R. 174); but it would seem that the protest may be formally drawn *up at any future period, provided that, [*528] in the event of a suit, it be drawn up before the commencement of such suit (*Chaters v. Bell*, 4 Esp. 48; *Bayl.* 268). No protest need be proved on a foreign bill, where the drawer or indorser comes to England

previous to its dishonour, in which case a notice to him will be sufficient, for he has the means of making inquiry as to the protest (*Cromwell v. Hynson*, 2 Esp. 511; *Robins v. Gibson*, 1 M. & S. 288; S. C. 3 Camp. 334).

The protest is usually stated in the declaration, (*ante*, p. 477); if omitted, it would seem to be involved in the allegation of notice; when that can only be given through a protest, the plt. should therefore be prepared to prove protest on the issue of due notice (*Salomons v. Stavely*, Doug. 298). In giving notice of non-payment to the drawer of an Irish bill (which is foreign) resident there, it is sufficient to inform him that the bill has been protested, a copy need not be sent (*Goodman v. Harvey*, 4 Ad. & E. 870).

A promise made by the drawer to pay a foreign bill of exchange, although such promise be made conditionally, is evidence that protest of such bill has been made, and notice thereof given to him (*Campbell v. Webster*, 9 Jur. 992).

Proof of protest on a foreign bill may, however, be dispensed with in some cases, as, where there are no effects, &c. (*Legge v. Thorpe*, 2 Camp. 310; S. C. 12 East, 171); or by a subsequent promise, as, where the drawer, on being made acquainted with the dishonour of the bill, said, that his affairs were in a deranged state, but that he would be glad to pay it as soon as certain accounts with his agent were settled (*Gibbon v. Goggan*, 2 Camp. 188; *Greenway v. Hindley*, 4 Camp. 52; and see *infra*). In an action by payee against drawer on a bill alleged to be drawn "at St. Helena, to wit, at Westminster," and no averment of protest; on production of the bill, it was dated at St. Helena, and not stamped; it was objected as not being admissible as an inland bill, and there was no evidence of protest: held, that as there was evidence of a subsequent promise by the deft. to pay the amount of the bill, coupled with a letter written by the attorney offering terms of payment, it was a waiver of these objections although such offer was without prejudice (*Patterson v. Becher*, 6 Moo. 319). There is no occasion to prove a protest of an inland bill (*Windle v. Andrews*, 2 B. & A. 696); "though it may be made on the non-acceptance of an inland bill, if such bill is for the payment of 5*l.* or upwards, within a limited time after date, and the value is expressed therein to have been received, or after an acceptance written upon such a bill for its non-payment" (Bayl. B. 264); but a protest cannot properly be made on any other inland bills (*Leftley v. Mills*, 4 T. R. 170). And a protest is never necessary upon an inland bill, where it is for the payment of less than 20*l.*; and on such as are for the payment of more, though the 3 & 4 Anne, c. 9, s. 5, contain words which, *prima facie*, import, that a neglect to procure it would preclude the holder from recovering against the persons entitled to notice any special damages or costs occasioned by the non-acceptance or non-payment, and interest, yet it hath not, generally, that effect (Bayl. B. 265). Interest may, however, be recovered, without proof of protest (*Windle v. Andrews*, 2 B. & A. 696; 2 Stark. 425; see "INTEREST"). It seems to be undecided whether, if the protest of an inland bill be alleged, it is necessary that it should be proved (*Boulanger v. Talleyrand*, 2 Esp. 550).

The mere production of the protest, attested by a notary public, without proof of the signature or affixing of the seal, will, in the case of a bill payable and protested out of this country, be evidence of the dishonour of the bill (Anon. 12 Mod. 345; Holt, 297); and to it *all foreign [*529] courts give credit (*Molloy*, 281; *Da Costa v. Cole*, Skin. 272, pl. 1); or, if there be not any notary near the place, a protest purporting to have been made by an inhabitant in the presence of two witnesses, will suffice (Ib.); but such a mode of proving a protest made in this country will not suffice: in that case it must be proved by the notary who made it,

and by the subscribing witness, if any (*Chermer v. Noyes*, 4 Camp. 129; Ch. Bills, 405, 7th ed.; *post*, "PUBLIC DOCUMENTS"). A protest made in England is not evidence of the presentment here (*Chermer v. Noyes*, 4 Camp. 129).

By the 2 & 3 Will. IV. c. 98, reciting that doubts had arisen as to the place in which it is requisite to protest for non-payment bills of exchange which on presentment for acceptance to the drawee, or drawees, shall not have been accepted, &c., it is enacted that from and after the passing of that act, all bills of exchange wherein the drawer or drawers thereof shall have expressed that such bills of exchange are to be payable in any place other than the place by him or them mentioned to be the residence of the drawee or drawees thereof, and which shall not, on the presentment thereof, for acceptance be accepted, shall and may be, without further presentment to the drawee or drawees, protested for non-payment in the place in which such bills of exchange shall have been by the drawee or drawees expressed to be payable, unless the amount owing upon such bill of exchange shall have been paid to the holder or holders thereof on the day on which such bills of exchange would have become payable, had the same been duly accepted (see the case of *Mitchell v. Baring*, M. & M. 381).

If a notice of dishonour of a bill be posted by the holder in due time, he is not prejudiced if, through mistake or delay of the post-office, it be not delivered in due time (*Woodcock v. Houldsworth*, 16 M. & W. 124; 16 Law J. 14, Ex.; 11 Dowl. P.C. 575).

Semble, if the post marks of a letter be given in evidence, they ought to be proved, either by persons from the post-office, or by persons who are in the habit of receiving letters from that post-office (1b.).

On an issue joined on this plea, it appeared that a letter containing the notice was put into the post-office on the day on which the action was commenced, and, by the routine of the post-office, would reach the deft. between four and five o'clock of the afternoon of that day; no further evidence was given as to the time of notice. The offices of the court were open until five o'clock of the afternoon of the day in question. Held, that the plt. must fail, it lying on him to show that the right of action was complete before the suit was commenced (*Castrique v. Bernado*, 6 Q.B. 498).

Proof of Excuse for not adducing Proof of Notice or Protest.] When issue is joined on the want of effects in the hands of the drawee, plt. may show as a reason for his not giving notice to deft., or for not protesting a foreign bill, that the drawer had no effects in the hands of the drawee, whereby to satisfy the bill (*Bickerdike v. Dollman*, 6 T. R. 405; *Clegge v. Collin*, 3 B. & P. 239; see *ante*, p. 522), either at the time of drawing the bill, or when it became due (1b.; *Orr v. Magennis*, 7 East, 359). But, it is otherwise if the drawer had effects on the way to the drawee (*Bucker v. Hiller*, 16 East, 43; 3 Camp. 217; *Robins v. Gibson*, ib. 334; 1 M. & S. 188), or, if he had effects at the time the bill was drawn, though he had none when the bill was presented for acceptance, or subsequently (*Orr v. Magennis*, *supra*), or, if there were no effects at the time the bill was drawn or accepted, if there were when it became due (*Hammond v. Dufrene*, 3 Camp. 145; *Thackray v. Blackett*, 3 Camp. *164); and although the drawer be indebted to the drawee beyond the effects (*Blockan v. Doren*, 2 Camp. 503), or the effects. [*530] be less than the amount of the bill (*Thackray v. Blackett*, 3 Camp. 164; but see *Smith v. Thatcher*, 4 B. & A. 200); or where the drawer has reasonable grounds to expect that he shall have effects in the drawee's hands when the bill becomes due, and there is a running account, and a fluctuating balance between them (*Brown v. Maffey*, 15 East, 221). If the drawer had

no reasonable ground to expect that the bill will be honoured, he is not entitled to notice (*Legge v. Thorpe*, 12 East, 171; 2 Camp. 310; *France v. Lacy*, R. & M. 341). A drawer who has no effects in the hands of the drawee except that he has supplied him with goods upon credit, which credit does not expire until long after the bill would become due, is not discharged by want of notice (*Claridge v. Dalton*, 4 M. & S. 226). The fact of the indorser having effects in the hands of the drawee will not entitle the drawer to notice (*Walwyn v. St. Quintin*, 1 B. & P. 652; 2 Esp. 515). Where there were no effects, but previous to the delivery of the bill the drawer had given some acceptances of his, upon which the acceptor had raised money, part of which acceptances had been returned dishonoured, and others were outstanding: held, that the drawer was entitled to notice of dishonour by the acceptor (*Spooner v. Gardiner*, R. & M. 84). A bill was drawn by A. upon B., for the accommodation of C., who indorsed it for value to D.; neither A. nor C. had any effects in the hands of B.; the bill was dishonoured by B.: held, that the drawer was entitled to notice.

The drawer of an accommodation bill is not entitled to notice, because he can suffer no injury from the want of it (*Callot v. Haigh*, 3 Camp. 281). A bill drawn payable at the house of the drawer, must be presumed to be an accommodation bill, and the drawer is not entitled to notice of dishonour (*Sharp v. Baily*, 9 B. & C. 44; 4 M. & R. 4). The want of effects in the hands of an acceptor excuses the indorsee of an accommodation bill from presenting it for payment as well as giving notice of dishonour to the drawer (*Terry v. Parker*, 6 Ad. & E. 502). Where the drawer would have a remedy over against a third party as in the case of a bill drawn for the accommodation of an indorsee, a notice, and not an excuse for it, ought to be alleged and proved (*Cory v. Scott*, 3 B. & A. 619; *Norton v. Pickering*, *supra*). The drawer is entitled to notice although he know the bill will not be paid by the acceptor, if he have reason to expect it will be paid by any other person, or he have a remedy over against such person (*Lafitte v. Slat-ter*, 4 Moo. & P. 457; 6 Bing. 623; see *Brown v. Maffey*, 15 East, 216). Nothing but the want of effects will excuse the notice, it is not enough to show that the drawer has not been damnified (*Dennis v. Morrice*, 3 Esp. 158; and see *Van Wart v. Woolley*, 5 D. & R. 374; 3 B. & C. 439; and *Rogers v. Stephens*, 2 T. R. 713). Nor that there was an understanding between the drawee and drawer that the latter should provide for the bill (*Staples v. O'Kines*, 1 Esp. 332; *Nicholson v. Gouthie*, 2 H. Bl. 609).

In an action against the drawer, plt., by way of excuse for not giving notice of dishonour, averred that the deft. had no funds, &c., nor had he sustained any damage for want of notice. Deft. pleaded that he had sustained damage because the acceptor had promised him to provide for the bill: held, that it was not incumbent on the plt. to prove that the deft. had sustained no damage, and that it lay on deft. to show that he had (*Fitzgerald v. Williams*, 6 Bing. N. C. 68; 8 Sco. 271). When a declaration on a banker's check, alleged that that check had been presented for pay-
[*531] ment, that the bankers *had no effects of the deft., and that the deft. had not sustained damage by reason of not having had notice of dishonour: held, on general demurrer, that the declaration showed a sufficient *prima facie* excuse for not giving notice, and that if these particular facts rendered such excuse insufficient, they must be specially pleaded (*Kemble v. Mills*, 1 Dick. 22).

A. draws a note, payable to B., or order, which B. indorses, having given no value for it, and knowing that A. is insolvent; in an action by indorsee against B., it is not necessary to prove that the note was presented for pay-

ment to A. immediately when it became due, or that notice was given to B. of A.'s refusal to pay it (*De Berdt v. Atkinson*, 2 H. Bl. 336).

Plt. may prove, as an excuse for not giving notice, that he was ignorant of, and used due diligence to discover, the drawer's residence, but failed (*Phipson v. Kneller*, 1 Stark. 116; S. C. 4 Camp. 285; *Bateman v. Joseph*, 12 East, 433; *Baldwin v. Richardson*, 1 B. & C. 245; *Browning v. Kinnear*, Gow, 87; *Williams v. Germaine*, 7 B. & C. 488). The indorsee is bound to make inquiry for the address, promptly on the bill being dishonoured, if he mean to hold the drawer liable (*Chapcott v. Curlew*, 2 M. & R. 484). Merely inquiring at the house where a bill is payable, is not using due diligence for finding out an indorser (*Beveridge v. Burgis*, 3 Camp. 262; Bayl. B. 281). Inquiry should be made of some of the other parties to the bill, and of persons of the same name (*Ib.*); and if a party, when he passes a bill, declines saying where he lives, and undertakes to call upon the acceptor, to see if the bill is paid, he cannot complain of want of notice (*Phipson v. Kneller*, 4 Camp. 285). A mistake in directing a letter is no excuse (*Esdaile v. Sowerby*, 11 East, 113). Where a party cannot be discovered in the regular time, and afterwards is discovered, notice, it seems, should be given the next day after such discovery; and, as to what is evidence of notice not being given on that day, see 2 C. & P. 300; due diligence is a question for a jury (*Bateman v. Joseph*, 12 East, 433; 2 Camp. 461; *Hilton v. Shepherd*, 6 Camp. 14; *Diggers v. Browne*, 1 M. & R. 520; *Hewett v. Thompson*, *ib.* 543).

Calling on the last indorser, and last but one, the day after the bill becomes due, to know where the drawer lives, and on his not being in the way calling again the next day, and then giving the drawer notice, has been considered sufficient diligence (*Browning v. Kinnear*, Gow, 81). In one case it was considered sufficient on the dishonour of a promissory note to make inquiry at the drawee's for the residence of the payee (*Sturges v. Derrick*, Wight. 76). An attorney employed to discover the residence of a party to a bill, and discovering it, has, like a banker, a day to consult his employer, and it is sufficient if he forward the information to him on the next day (*Firth v. Thrush*, 8 B. & C. 387).

Proof of the sudden death or illness of the holder, or his agent, or other accident, will afford no excuse for not giving a regular notice; the notice in that case must be given as soon as possible after the impediment is incurred (*Turner v. Leach*, Ch. Bills, 212). Absence on account of the illness of the holder's wife, will not supersede the proof of regular notice (*Ib.*; but see *Hilton v. Shepherd*, 6 East, 15). The loss or destruction of an accepted bill affords no excuse for not giving due notice (*Poth. Pl.* 125; *Thackray v. Blackett*, 3 Camp. 164).

In case of bankruptcy or insolvency of the drawer or indorser, notice of the dishonour must be given to the bankrupt or his assignee (*Goldsmith v. Bland*, Bayl. B. 276, 284; 1 M. & S. 545). Where a bankrupt indorser's house continued open, and the messenger of the assignees [*532] was in it, it was considered that notice of the dishonour should have been left there (*Rhode v. Proctor*, 4 B. & C. 517; S. C. 6 D. & R. 610). Bankruptcy of the acceptor does not dispense with notice to the drawer (*Boulton v. Stubbs*, 18 Ves. jun. 21). The holder of a bill falling due and being dishonoured after the bankruptcy of the drawer, is bound to use due diligence in giving notice to the bankrupt or his assignees. Therefore, where the bankrupt's house continues open after his bankruptcy, the messenger and the bankrupt's wife or his clerk being in possession: held, that the holder was at least bound to leave notice at the bankrupt's house (*Ex parte Johnson*, 3 D. & C. 433), unless excused by want of effects in the drawee's hands (*Ib.*).

It is not settled whether, in the event of the bankruptcy of a party entitled to notice, the holder is bound to endeavour to find out the assignees at all events (Ch. Bills, 214).

Proof of regular notice in the usual time will be dispensed with, by proof that the day on which notice should have been given was a Sunday, Good Friday, or Christmas Day, or other day within the 7 & 8 Geo. IV. c. 15; or a public festival, on which the holder was strictly forbidden by his religion to attend to any secular affairs (*Lindo v. Mesworth*, 2 Camp. 602); or by proof that the political state of the country rendered it impossible to give the notice (*Patience v. Townley*, 2 Sm. 223).

Proof of an *acknowledgment* by the drawer, that the bill would not be paid, supersedes proof of notice of its dishonour (*Butt v. Levett*, 13 East, 213). Strict proof of notice may be dispensed with by an admission of liability, as by a promise to pay (*Hicks v. Beaufort* (Duke of), 4 Bing. N. C. 229). So, where the deft. declared his intention to pay, "and not to avail himself of the informality of the notice" (*Bownell v. Bonney*, 1 Q. B. 39). So, where the deft. was aware that the bill lay dishonoured, but objected to pay on the ground of fraud in the holder (*Wilkins v. Jadis*, 1 Moo. & R. 41). So, where the drawer wrote a letter, after the bill was due, stating that it would be paid "before the following term" (*Wood v. Brown*, 1 Stark. 217). Where the drawer who has had no notice, subsequently promises to pay the bill, it seems such promise does not admit the notice, but merely waives it (*Chapman v. Annett*, Car. & K. 552); and part payment of a bill by the drawer, after it has become due, furnishes a ground for presumption that notice has been given him (*Horford v. Wilson*, 1 Taunt. 12; *Vaughan v. Fuller*, Stra. 1246; *Sharp v. Bailey*, 9 B. & C. 44; Bayl. B. 234). Evidence of an agreement between a prior indorser and the deft., after the bill became due, that the former should take the money due to him upon the bill by instalments, was held to render it unnecessary to prove notice of the dishonour, as it established the deft.'s liability (*Gunson v. Metz*, 1 B. & C. 193; S. C. 2 D. & R. 334). A promise to pay the bill, if the holder would call again, dispenses with proof of notice (*Lundie v. Robertson*, 7 East, 231); but a mere offer of compromise will not be sufficient, without proof of notice (*Cuming v. French*, 2 Camp. 106, n.); nor a promise to pay, "if the party was bound to do so by law" (*Dennis v. Morrice*, 3 Esp. 158); nor an agreement between the parties not to put the bill in suit till certain estates were sold (*Free v. Hawkins*, 8 Taunt. 92; S. C. Holt, 550). But, where the drawer and indorser of a bill of exchange entered into a bond to pay the bill within one month after it became due, if it were not paid by the acceptor, it was held, no notice of dishonour was requisite (*Murray v. King*, 5 B. & A. 165; *Soward v. Palmer*, 2 Moo. 274). A promise to pay, after full notice of the default, sufficiently evinces that the party could not [*533] *have sued on the bill, and, consequently, that he cannot insist on want of notice, or of a neglect to present (*Rogers v. Stephens*, 2 T. R. 713). A payment or promise, without notice of the default, does not (*Blisard v. Hirst*, 5 Burr. 2670; *Goodall v. Dolley*, 1 T. R. 712; Bayl. B. 235; *Dickon v. Graham*, 1 C. & M. 725). An admission by the deft. (the drawer) of his liability, is *prima facie* evidence only, whence the jury may infer that he had due notice (*Bell v. Frankis*, 5 Sco. N. R. 460). Notice may be dispensed with and excused by a prior agreement on the part of the party entitled to it, that it shall not be necessary to give him notice. Thus, where the drawer stated to the holder, a few days before the bill became due, that he would call and see if it had been paid by the acceptor: held, that he had dispensed with notice (*Phipson v. Kneller*, 4 Camp. 285; see *Burgh v. Legge*, 5 M. & W. 418; *Brett v. Levett*, 13 East, 214; see

also *Hill v. Heap*, Dow. & Ry. N. P. 57; but see *Ex parte Bignold*, 1 Deac. 728; *Murray v. King*, 5 B. & A. 165; *Soward v. Palmer*, 8 Taunt. 277). When the drawer has countermanded payment, notice of dishonour to him is dispensed with, although it may be still necessary to present (*Hill v. Heap*, Dow. & Ry. N. P. 57; *Prideaux v. Collier*, 2 Stark. 57). Notice need not be given if the bill be on an insufficient stamp (*Cundy v. Marriott*, 1 B. & Ad. 699; see *Pimley v. Westly*, 2 Bing. N. C. 249; 2 Sco. 423). Where a bill is drawn by a firm upon one of the partners, notice to the drawers is unnecessary (*Porthouse v. Parker*, 1 Camp. 82; and see *Jacaud v. French*, 12 East, 317). Where the drawer of a foreign bill, on being told that it is dishonoured, says that his affairs are at that moment deranged, but that he would be glad to pay it as soon as his accounts with his agents were cleared, this admission will dispense with a proof of protest (*Gibbon v. Coggon*, 2 Camp. 188; *Greenway v. Hindly*, 4 Camp. 52). The promise, payment, or acknowledgment will be good though after action brought (*Hopley v. Dufresne*, 15 East, 275), and though made under a misapprehension of law (*Bilbie v. Lumley*, 2 East, 469); otherwise, if made under a misapprehension of fact (*Goodall v. Dolley*, 1 T. R. 712; *Blisard v. Hirst*, 5 Burr. 2672; *Williams v. Bartholomew*, 1 B. & P. 236; *Stevens v. Lynch*, 12 East, 38). A promise to pay will entirely dispense with proof of presentment or notice, and will cast on the deft. the necessity of proving that laches and that he was ignorant of it (*Taylor v. Jones*, 2 Camp. 105; *Stevens v. Lynch*, 12 East, 38); where it is only as to part of the sum, the plt. can only avail himself of it to that extent (*Fletcher v. Floggatt*, 2 C. & P. 569). It may be made by the attorney or his clerk (*Standage v. Creighton*, 5 C. & P. 406). A promise to pay, made by the drawer in expectation that a bill will be dishonoured, but before it is, will not dispense with notice (*Picken v. Graham*, 1 C. & M. 725). It is, however, only evidence from which a jury may infer that notice has been received (*Hicks v. Beaufort* (Duke of) *supra*; and see *Booth v. Jacobs*, 2 M. & M. 351; *Picken v. Graham*, *supra*; but see *Lundie v. Robertson*, 7 East, 231; *Haddock v. Barry*, ib. 236; *Anson v. Bayly*, B. N. P. 276; *Hopley v. Dufresne*, *supra*; *Norris v. Solomonson*, 4 Sco. 257; see *Brownell v. Bonney*, 1 Q. B. 39). Where the holder is excused by special circumstances from giving notice on the usual day, the common allegation of notice is still sufficient (*Firth v. Thrush*, 8 B. & C. 387). A person cannot waive the consequences of laches in respect of antecedent parties (*Roscow v. Hardy*, 12 East, 434; *Turner v. Leach*, 4 B. & A. 451; *Marsh v. Maxwell*, 2 Camp. 210, n.). No laches can be imputed to the crown, therefore where a bill is seized under an extent before it is due, and the officer neglect to give notice, the drawer and indorser will not be discharged (*West on *Extents*, 28). Although an excuse for notice must be specially alleged in the declaration, yet [*534] a subsequent waiver of notice by a promise to pay, need not (*Lundie v. Robertson*, 7 East, 231; *Gibbon v. Coggon*, 2 Camp. 188). A promise made by deft. at the time of his arrest, and when he was ignorant of the circumstances attending the dishonour, will not dispense with notice (*Rouse v. Redwood*, 1 Esp. 155; 4 Taunt. 93).

Proof of Mode of giving Notice of Dishonour.] No precise form of words need be used in giving a notice of dishonour. Proof of any form of notice will be sufficient, its object being to apprise the party that the holder intends to require payment from him (*Tindal v. Brown*, 1 T. R. 67); or even any act of the holder, signifying the refusal by the acceptor or drawee, will be sufficient. The notice, however, should be explicit, and show what the bill is, and that the acceptance or payment of it has been refused, and must not

be calculated in any way to mislead the party. A letter merely containing a demand of payment is not enough, it should either expressly or in effect state the presentment and dishonour (*Hartley v. Case*, 4 B. & C. 339; S. C. 6 D. & R. 505; *Burbidge v. Manners*, 3 Camp. 193). It is not sufficient, therefore, to state that "A bill for 683*l.*, drawn, &c., and bearing your indorsement, has been put into our hands by Mr. A., with directions to take legal measures for the recovery thereof, unless immediately paid" (*Sularte v. Palmer*, 7 Bing. 530; 1 N. R. 194; but see *Messenger v. Southey*, 1 M. & W. 81, per Tindal, C. J.). It will not suffice to state that the bill had not been paid when due (*Furze v. Sherwood*, 2 Q. B. 388). It must state that the bill has been presented to the acceptor (*Ib.*); it need not state that the holder looks to the party for payment (*Ib.*; *King v. Bickley*, 6 Jur. 582). Nor is a notice, stating the bill to have been drawn by the party, when, in fact, he was not the drawer, but only an indorser, sufficient (*Beauchamp v. Cash, Dow. & Ry.* N. P. 5).

The notice must convey to the mind of the party to whom it is addressed, by reasonable implication, that the bill was presented when due, that it was dishonoured, and that the party to whom notice is given will be held liable on it (*Messenger v. Southey*, *supra*; per Park, B., in *Lewis v. Gompertz*, *infra*; *Phillips v. Gould*, *infra*; see *King v. Bickley*, 6 Jur. 582; 2 Q. B. 419; *Furze v. Sharwood*, 2 Q. B. 388; *Miers v. Brown*, 11 M. & W. 372; 12 Law J., N. S. 290; *East v. Smith*, 16 Law J. 292, Q. B.; 2 C. B. 23). The following notice, therefore, has been held sufficient:—"The bill of exchange for 250*l.* drawn by S. R. on, and accepted by, C. S., and bearing your indorsement, has been presented for payment to the acceptor thereof, and returned dishonoured; and now lies overdue and unpaid with me, as above, of which I hereby give you notice" (*Lewis v. Gompertz*, 6 M. & W. 399; 4 Jur. 393). So, "D.'s acceptance for 200*l.*, drawn and indorsed by you, due 31st July, has been presented for payment, and returned, and now remains unpaid" (*Cooke v. French*, 10 Ad. & E. 131; 4 Jur. 433). So, "Your bill, due this day, has been returned, with charges, to which we request your immediate attention" (*Grugeon v. Smith*, 6 Ad. & E. 499). So, "I am desired by Mr. H. to give you notice, that a promissory note for 99*l.* 18*s.*, payable to your order two months after the date thereof, became due yesterday, and has been returned unpaid; and I have to request you will please remit the amount thereof, with 1*s.* 6*d.* noting, free of postage, by return of post" (*Hedger v. Stevenson*, 2 M. & W. 799; 1 Jur. 989. But see *Boulton v. Walsh*, 3 Bing. N. C. 688). So, the following [*535] parol *notice of dishonour:—"I called to tell Mr. B., that the bill for 37*l.* 10*s.* was presented at the banker's, is unpaid, and dishonoured, and I hope he will see and provide for it" (*Smith v. Boulton*, 1 H. & W. 3). The words, "Your note has been presented for payment," are unnecessary. It suffices to say, "Your note has been returned, dishonoured" (*Edmonds v. Cate*, 2 Jur. 183). The words, "returned," "dishonoured," and "came back with notarial charges," applied to a bill of exchange, imply that it has been presented, and refused payment (*Strange v. Price*, per Coleridge, J., *supra*). Notice by holder of a bill to the indorser, in these terms: "Messrs. H. are surprised to hear that Messrs. G.'s bill was returned to the holder unpaid," followed by a visit from the indorser to the holder on the same day, when he expressed his regret, and promised that he would write to the other parties, by whom, or by himself the bill should be paid; held sufficient to render him liable (*Houlditch v. Cauty*, 4 Bing. N. C. 411; 6 Sco. 209).

"I hereby give you notice, that a bill of exchange for 50*l.*, at three months after date, by A., upon, and accepted by B., and indorsed by you, lies at

—, dishonoured:" held, sufficient, though no intention be expressed of looking to the deft. for payment (*King v. Bickley*, 2 Q. B. 419; *Furze v. Sharwood*, 2 Q. B. 388; *Miers v. Brown*, 11 M. & W. 372; 12 Law J., N. S. 290).

"The draft upon C. for 50*l.*, due 3rd of March, is returned to us, unpaid, and if not taken up this day, proceedings will be taken against both you and him for the recovery thereof:" held sufficient (*Robson v. Curlewis*, 2 Q. B. 421; 3 Gal. & Dav. 378).

"A bill of 20*l.*, drawn by Ward, on Hunt, due yesterday, is unpaid, and the person at whose house it is made payable does not speak favourably of the acceptor's punctuality." "This is to give notice, that a bill drawn by you, and accepted by J. B. for 47*l.*, due July 19, 1835, is unpaid, and lies due at Mr. J. F.'s, Fleet Street. Yours, &c., J. F." Notice that the bill "lies due, and unpaid, at my house," holder's name and address subscribed, the notice in other respects like the preceding. "W. H.'s acceptance for 21*l.*, due on Saturday, is unpaid; he has promised to pay it in a week or ten days more." Held, sufficient notices (*Furze v. Sharwood*, *supra*).

A bill of exchange, indorsed in blank, was left by the indorsee at the office of R., an attorney, to be presented by him, which, on being done, was dishonoured. R. wrote to the drawer on the following day, describing the bill, and stating that it was dishonoured, and subscribed his name and residence: held, sufficient, though he did not state on whose behalf he applied, or where the bill was lying (*Woodthorpe v. Lawes*, 2 M. & W. 109; 2 Gale, 193; see *Rowlands v. Springett*, *infra*).

Any agent in the possession of the bill may give the notice, and it need not state at whose request it was given, nor who was the owner of the bill (*Woodthorpe v. Lawes*, 2 M. & W. 109; 3 Kent's Com. 108, cited *Harrison v. Roscoe*, 15 M. & W. 235; see *Newell v. Gill*, 6 C. & P. 367, *post*, p. 544). If the agent, through mistake, state it to have been given on behalf of a wrong party, this will not avoid the notice, but only place the party giving it in the same situation with respect to him to whom it was given, as if the representation relative to the person giving the notice were true (*Harrison v. Roscoe*, 10 Jur. 142). In an action by an indorsee and holder, against the drawer, it appeared that notice of dishonour had been sent to the deft. by the plt.'s attorney, in a letter, in which it was stated, through mistake, to be given on the part of a prior holder, who was not discharged by laches in the holder, and which notice *was in sufficient [*536] time to support an action by that party against the holder: held, that the plt. was entitled to avail himself of this notice (*Ib.*).

The only evidence of notice of dishonour was a conversation in which the witness said to the deft., "I think you ought to pay;" to which the deft. replied, "I have no other intention, and do not mean to avail myself of the notice of dishonour:" held to be evidence from which a jury might presume a due notice of dishonour (*Brownell v. Binney*, 1 Q. B. 39; 5 Jur. 6). In an action by indorsee against drawer, proof that the plt. on the day on which he himself received notice of dishonour from the holder, wrote, and sent a letter to the deft. and proof of notice to produce that letter, as containing notice of dishonour, and that the deft., when applied to for payment by the plt., objected that it had not been presented to the acceptors in due time; but did not object that he had not had notice of dishonour, are, on default to produce the letter, evidence that it contained regular notice of dishonour (*Curlewis v. Corfield*, 1 Q. B. 814; 6 Jur. 259).

A bill having been dishonoured, notice was given by the holder to the first indorsee, who, in due time, left at the residence of the drawer his own card and address, on the back of which was written, "Bill for 30*l.*, drawn

by S., on W., dishonoured; lies due, as on the other side." The bill was not lying there, but at the residence of the holder, who had other bill transactions with the drawer: held to be a sufficient notice of dishonour (*Rowlands v. Springett*, 14 M. & W. 7). Indorsees against indorser; the clerk of the plts. proved (a notice to produce having been given), that on the day when the bill became due, he wrote a letter to the deft., informing him, that "J. C.'s acceptance, due that day, was unpaid; and requesting his immediate attention to it:" held, a sufficient notice of dishonour (*Bailey v. Porter*, 14 M. & W. 44).

Notice of dishonour is not vitiated by a misdescription of the bill, which could not mislead the party receiving the notice in respect of the bill intended. Where, therefore, the notice of dishonour to the drawer described the bill correctly, as to the date, amount, and parties, but stated it to be payable at the London and Westminster Bank, and there was no evidence that the drawer had in fact been misled thereby: held, that the notice was sufficient (*Bromage v. Vaughan*, 16 Law J., N. S., Q. B. 10).

Indorsee against maker of a bill, the charges for noting, &c., being 6s. 6d., and there being no evidence of any other negotiable instrument between the parties, the following notice was held sufficient:—"We are instructed by H. S., the plt., to apply to you for payment of the undermentioned sum, and to acquaint you that unless the same, together with 5s., the costs of this application, be paid, &c., legal proceedings will be commenced against you to enforce payment thereof, without further application: 53l. 6s. 6d. due on your dishonoured note, dated 19th December last; 5s. cost of letter; 53l. 11s. 6d." (*Stockman v. Parr*, 12 Law J., N. S. 415; 7 Jur. 886; 11 M. & W. 809; 1 C. & K. 41).

Where, in an action by indorsee against drawer of a bill of exchange, the deft. had told a witness he expected to receive, by post, a notice of dishonour, and afterwards gave him a letter he received by post, and requested him to negotiate a renewal of the bill; and a letter, which had found its way to the plt.'s hands was not produced at the trial: held, the jury were warranted in finding that no notice of dishonour had been given (*Bell v. Frankis*, 4 M. & G. 446).

[*537] "I have received an intimation from B. and M. Bank, that *your draft on A. B. has been dishonoured, and have requested them to proceed in the same:" held sufficient, for "dishonour" implies presentment (*Shelton v. Braithwaite*, 7 M. & W. 436). It need not state that the bill has been presented (*Stocken v. Collin*, 9 C. & P. 648; 7 M. & W. 515).

Indorsee against drawer; evidence was given for the plt., that on the day after the dishonour, he wrote, and sent a letter to the deft., (an attorney), which was put into the letter box at deft.'s office, the office being closed; that notice had been served on deft. to produce a letter dated and sent to him on the above day, containing notice of the bill being dishonoured, which letter was not produced, and that, after the letter supposed to contain the notice of dishonour was delivered, the deft. told plt.'s attorney (in answer to a threat of legal proceedings) that the bill had not been presented in time, saying nothing as to notice of dishonour: held, evidence to go to the jury of a regular notice of dishonour (*Curlewis v. Corfield*, 1 Q. B. 814).

A party sent by the holder of a dishonoured bill, called at the drawer's house the day after it became due, and there saw his wife, and told her he had brought back the bill that had been dishonoured; she said she knew nothing about it, but would tell her husband of it when he came home; the party then went away, not leaving any written notice: held, sufficient notice of dishonour (*Housego v. Cowne*, 2 M. & W. 348).

"We beg to inform you, that your indorsement of J. C.'s acceptance of

40*l.* due the 17th of June, 1842, remains due, with interest and expenses, as also other bill; and to which we request your immediate attention;" held, sufficient (*Bailey v. Porter*, 14 M. & W. 44; 14 Law J., N. S. 244).

But the following letter is not sufficient notice of dishonour:—"This is to inform you, that the bill I took of you, 15*l.* 2*s.* 6*d.*, is not took up, and 4*s.* 6*d.* expense, and the money I must pay immediately. My son will be in London on Friday morning" (*Messenger v. Southey*, 1 Man. & G. 76; 1 Sco. N. R. 180); nor, "S. and Co. inform deft., that A. B.'s acceptance of 587*l.* is not paid; as indorser, the deft. is called upon to pay the money, which will be expected immediately" (*Strange v. Price*, 10 Ad. & E. 125; 3 Jur. 361). A letter, stating that a bill of exchange (describing it) "lies at my office due and unpaid" is not a good notice of dishonour; and *semble*, that it would not be sufficient even though the deft. himself treated it as a notice of dishonour (*Phillips v. Gould*, 8 C. & P. 355). The attorney of an indorsee who had received notice of dishonour, wrote to the drawer, as follows:—"I am requested to apply to you for payment of 35*l.* 9*s.* 4*d.*; the amount of an overdue acceptance drawn by you on and accepted by E. M., and to inform you, that unless the same be paid to me, with noting, interest, and five shillings for this application, before eleven o'clock to-morrow, proceedings will be taken, without further notice:" held, sufficient notice of dishonour (*Wathen v. Blackwell*, 6 Jur. 738).

It is not necessary that a copy of notice of protest should accompany notice of dishonour of a foreign bill (*Goodman v. Harvey*, 4 Ad. & E. 870; 6 M. & W. 372). But information of the protest should be sent (*Rogers v. Stephens*, 2 T. R. 713; *Gale v. Walsh*, 5 T. R. 239; *Brough v. Parkins*, 1 Ld. Raym. 993; *Cromwell v. Hynson*, 2 Esp. 511; *Robins v. Gibson*, 3 Camp. 334; 1 M. & S. 288).

"If a letter giving notice of dishonour, contain this passage:—"I did not know until within these few days where you were to be found," it is not to be taken as proving that notice was not given *on the next day after the residence of the party was discovered (*Kerby v. England*; [*538] 2 C. & P. 300). The deft. on being asked if he knew of the dishonour of the bill, said "Yes, I have had a very civil letter from Mr. G. (an indorser), and I will call and arrange it:" held, sufficient evidence of due notice of dishonour having been given (*Morris v. Solomonson*, 4 Sco. 257). The evidence of notice of dishonour was a statement made by the deft. (the drawer), in a conversation with a witness, in which he said, "I have several good defences to the action; in the first place the letter (containing notice) was not sent to me in time," and his statement was left to the jury as evidence of due notice of dishonour: held, that the jury was not warranted in presuming that due notice had been given (*Braithwaite v. Coleman*, 4 Nev. & M. 654; *Denman*, Lord, C. J., diss.). A letter written by the drawer to the holder of a bill, six days after the day on which the drawer should have received notice, and containing ambiguous expressions respecting the non-payment of the bill, was held to be properly left to the jury, as evidence from which they might or might not infer that notice had been given on the proper day (*Booth v. Jacob*, 3 Nev. & M. 351). The deft. traversed the allegation in the declaration of notice, which was in the usual form, and it was proved that the indorser received notice from plt. (who was indorsee), and that the indorser's clerk, and not plt. gave notice to the deft.: held, sufficient (*Newen v. Gill*, 8 C. & P. 367).

In an action against indorser of a bill of exchange, issue was joined as to notice of dishonour; it appeared that the letter containing the notice of dishonour was put into the post on the day on which the action was commenced, and by the routine of the post-office would reach the deft. between

four and five of the afternoon of that day. No further evidence was given as to the time of notice of dishonour; the offices of the court were open only until five in the afternoon of the day in question: held, that the plt. must fail, it lying on him to show that the right of action was complete before the suit was commenced (*Castrique v. Bernabo*, 6 Q. B. 497; 10 Jur. 130).

Upon a bill being dishonoured, A. paid the same for the honour of one of the indorsees resident abroad, and communicated with him in due course of post, before giving notice of dishonour to the drawer. In an action against the drawer of such bill, held, that the notice was given in sufficient time (*Goodall v. Polhill*, 9 Jur. 554; 1 C. B. 233). A party who guarantees the payment of a promissory note, if it be not paid at maturity by the maker, is not entitled to notice of dishonour of the note (*Walton v. Mascall*, 13 M. & W. 72).

It is not necessary to prove the notice to have been made in writing (*Crosse v. Smith*, 1 M. & S. 545). Personal notice is not absolutely necessary (*Ib.*). If a witness prove that he verbally told the drawer that his bill for 30*l.*, drawn on T., had come back dishonoured, and that he had produced the bill, and pointed out to the drawer the notary's mark upon it, this is sufficient notice of dishonour (*Phillips v. Gould*, 8 C. & P. 355). Personal service of a written notice is not necessary (*Housego v. Cowne*, 3 M. & W. 348). Proof of a reasonable endeavour on the part of the holder to give notice will be sufficient; as, by sending a person to the drawer's counting-house, who repeatedly knocked at the door, but failed in his object (*Ib.*; *Crosse v. Smith*, *supra*).

Proof of notice having been sent by the post will, at all times, be sufficient, if it appear to have been so sent the day after the dishonour of the bill (*Williams v. Smith*, 2 B. & A. 500; *Jameson v. Swinton*, 2 Taunt. 224; *Hilton v. Fairclough*, 2 Camp. 633; *Kufh v. Weston*, 3 Esp. 54); though proof of the letter containing the *notice having been received is [*539] not necessary (*Saunderson v. Judge*, 2 H. Bl. 509), if it be proved to have been put into the proper post-office, or sent by the two-penny post (*Ib.*; *Scott v. Lifford*, 9 East, 347; *S. C.* 1 Camp. 246; *Kufh v. Weston*, 3 Esp. 54; and see *Bell v. Frankis*, 11 Law J. 300, C. P.). And, in the case of foreign bills, the sending the notice by post has been held to be sufficient (*Saunderson v. Judge*, 2 H. Bl. 509; *Darbishire v. Parker*, 6 East, 3). It must appear that the letter conveying the notice was sent by the post in time to be delivered to the party within the period of the legal notice (*Smith v. Mullett*, 2 Camp. 208; *Hilton v. Fairclough*, *ib.*, 633; *Saunderson v. Judge*, 2 H. Bl. 509). It is enough for the plt. to show to the satisfaction of the jury that the letter containing the notice of dishonour, was posted at such time as, by the due and usual course of the post, it would be delivered on the proper day (*Stocken v. Collin*, 7 M. & W. 515). The post-office mark is not conclusive of the time when a letter was posted (*Ib.*). But if it be delayed in the office, so as not to reach its destination until afterwards, such delay in the office will not prejudice the party by whom the notice was intended to be given (*Dobree v. Eastwood*, 3 C. & P. 250). *Semble*, the delivery of a letter to the postman is a delivery to the post-office (*Pack v. Alexander*, 3 Moo. & S. 789; but see *Hawkins v. Rutt*, *Pea*. 187).

It is not *prima facie* evidence of a letter being sent by the post, that it was written by a merchant in his counting-house, and put upon a table for the purpose of being carried thence to the post-office; and that by the course of business in the counting-house, all letters deposited on this table were carried to the post-office by a porter (*Hetherington v. Kemp*, 4 Camp. 193; *Hawkes v. Salter*, 4 Bing. 715; see *Toovy v. Williams*, Moo. & M. 123; and see

Hagedorn v. Reed, 3 Camp. 379; 1 M. & S. 567). If the porter had been called, and he had said that, although he had no recollection of the letter in question, he invariably carried to the post-office all the letters found upon the table, that might have done (Ib.). The plt.'s clerk proved that he copied on the Monday, into a book kept for that purpose, a letter, given the notice of dishonour; and that, by the course of business at their house, all letters copied into that book were sent by the post in the evening of the day on which they were copied; but that he did not take the letter to the post, it being the duty of one of the other clerks: held, not sufficient evidence that the letter was sent (Hawkes v. Salter, 4 Bing. 715; 1 Moo. & P. 750).

Proof of the letter being left at deft.'s house will be sufficient (Stedman v. Gooch, 1 Esp. 5). If notice be sent by the post, the letter must not be too generally directed (Walter v. Haynes, 1 Ry. & M. 149). It has been held sufficient to direct the letter to the drawer similarly to the date of the bill; as, where it was dated Manchester, and the letter was so directed (Mann v. Moors, ib. 249; Clark v. Sharp, 3 M. & W. 166; Siggers v. Brown, 1 M. & R. 520). If the notice to the drawee arrive too late through misdirection, it is for the jury to say whether the holder used due diligence to discover the drawer's address (Ib.; Esdaile v. Sowerby, 11 East, 214). If the notice miscarry, through the indistinctness of the drawer's handwriting on the bill, he will not be discharged (Hewett v. Thomson, 1 M. & R. 543; see *post*).

The notice may also be sent by a private conveyance (Bancroft v. Hall, Holt, N. P. 476; Stocken v. Collin, 7 M. & W. 515; see Crosse v. Smith, *supra*; and see Smith v. Bland, Ch. Bills, 9th ed. 454). A message left at the house of a private person is also sufficient * (Housego v. Cowne, 2 M. & W. 348); or, where there is no post, sending it [*540] by an ordinary conveyance, as, by the first regular ship bound for the place where the notice is required to be given (Mullman v. D'Eguino, 2 H. Bl. 565; Darbshire v. Parker, 6 East, 7; 1 Sm. 195). And, in a case where a bill was drawn in Jamaica in favour of A., who remained there after its dishonour, proof that notice was left at his residence in England was held sufficient (Cromwell v. Hyson, 2 Esp. 511). Proof of a notice to one of several partners has been held sufficient to render the partnership liable (Porthouse v. Parker, 1 Camp. 82). Where the notice itself could not be produced, parol evidence of its contents has been admitted; and a notice to produce the notice of dishonour in the hands of the deft. does not seem necessary (Acland v. Pearce, 2 Camp. 601; Swain v. Lewis, 2 C. M. & R. 261; but see Lanauze v. Palmer, Moo. & M. 31; Langdon v. Hulls, 5 Esp. 156; Shaw v. Markham, Pea. 165). The notice may be proved by showing a copy of it, kept at the time it was sent (Kine v. Beaumont, 3 B. & B. 288; Roberts v. Bradshaw, 1 Stark. 28). Where notice to produce is required, see Lanauze v. Palmer, *supra*. And proof that duplicate notices of the dishonour of a bill were written, and that a letter was delivered to the deft. upon the dishonour of a bill, together with proof of notice to produce the letter so delivered, as containing notice of the dishonour, is evidence on default of production that deft. had notice (Roberts v. Bradshaw, *supra*; Curlew v. Corfield, 1 Q. B. 814). The *onus probandi* lies on the plt. (Lawson v. Sherwood, 1 Stark. 314).

Proof of Time when Notice given.] The general rule as to the time of giving notice is, that each party has a day for giving it; therefore, if the parties live in the same town, notice should be given the next day (Smith v. Mullett, 2 Camp. 208; Darbshire v. Parker, 6 East, 3). If different places, by the next day's post (Williams v. Smith, 2 B. & A. 497). The plt., indorsee of a note, the day after it had been dishonoured wrote to the deft.,

the payee and indorser, who lived in the same city, a letter containing a notice of dishonour, which letter was put into the twopenny post before eight p. m. on that day, but was not delivered till the day after, of which it bore the post mark, eight a. m. Held, that the notice was not in time (*Edmonds v. Cates*, 2 Jur. 183). It is sufficient if the notice be proved to have been put into a receiving house at such an hour as that, according to the course of the twopenny post, it would be delivered on the day on which the party would be entitled to it (*Hilton v. Fairclough*, 2 Camp. 633; *Smith v. Mullett*, 2 Camp. 208). And notice by a letter put into the twopenny post-office, after five o'clock in the afternoon of the day after that on which the party knew of the dishonour, was held insufficient (*Williams v. Smith*, *supra*). Where the holder lived at Holborn, and the indorser at Islington, a notice given by nine o'clock on the night of the day following the day on which the holder knew it, is reasonable notice (*Jameson v. Swinton*, 4 Bing. 715). The holder wrote a letter the day on which he received notice to the indorser, stating the fact, but it was not received until the following day: held, sufficient notice (*Poole v. Dicas*, 1 Sco. 600).

The time for giving notice of dishonour for non-payment or non-acceptance varies in different countries. In France it must be sent within fifteen days (*Rothschild v. Currie*, 1 Q. B. 43); whereas in England, as we have seen, the notice must be given the day after, or sent by the next [*541] post; and in countries where there is no custom it suffices to send the notice by a regular ship to the port where the party resides for whom the notice is intended, although by a more indirect course the letter might have arrived sooner (*Muilman v. D'Eguino*, 2 H. Bl. 565). A banker in this country, who holds a foreign bill for a correspondent abroad, is not bound to give notice to the last actual indorser, but may send notice to his customer, who must send notice to his indorser in the same way as if the banker were a holder for value (see *Daly v. Slatter*, 4 C. & P. 200).

A bill due on the 4th was presented for payment that day by the payee's bankers; on the 5th it was returned dishonoured to the payees, who in the course of the 6th, sent a letter to the drawer by the twopenny post: held, sufficient (*Scott v. Lifford*, 9 East, 347). Where a bill passed through the hands of five persons, all of whom lived in London or the neighbourhood, and the bill when due being dishonoured, the holder gave notice, on the same day, to the fifth indorser, and he, on the next day, to the fourth, and so in succession to the first: held, that due diligence had been used (*Hilton v. Shepherd*, 6 East, 14, n.). If there are several indorsers of a bill, and the last indorsee and holder resort in the first instance to the first of such indorsers, he is not entitled to as many days as there are indorsers in which to give notice of dishonour, but must give it within the same time in which he would have been obliged to have done it if he had resorted at first to his own immediate indorser (*Dobree v. Eastwood*, 3 C. & P. 250). And it is not enough that the drawer or indorser receives notice in as many days as there are subsequent indorsers, unless it be shown that each indorser gave notice after receiving it (*Marsh v. Maxwell*, 2 Camp. 210, n.). A bill was presented for payment at a banking-house in London, where it was made payable on the 25th, when it was dishonoured; but under a doubt whether the presentment was not made too early on that day, it was again presented shortly before five on the 26th, and again dishonoured; it was returned to the indorser in London on that day, and notice sent of the dishonour by post of the 27th into the country, where the indorser lived: held, that this was due diligence, and due notice of dishonour (*Langdale v. Trimmer*, 15 East, 291).

B., plt.'s agent at S., having occasion to remit money to the plt., paid the

amount into the deft.'s bank at S., and received a bill of exchange indorsed by deft., which he, B., indorsed, and transmitted to the plt. The bill fell due on Saturday, the 31st October, and was dishonoured; on that day the plt. wrote to B. a letter, which B. received on Monday, stating: "I have also to apprise you that the draft for 33*l.* 14*s.* due the 1st October (Sunday), has been duly presented this day, and returned dishonoured; probably it may be paid on Monday; it is drawn on P. and Co.; it will be proper to advise the drawers in case the acceptor do not remit." On the Wednesday following B. gave notice to the acceptor of the dishonour. Held, too late (*Miers v. Brown*, 11 M. & W. 372; 12 Law J., N. S. 290).

A., in London, to whose care a bill bearing the indorsement of B., at Bruges, had been referred "in case of need," paid it, *supra* protest for B.'s honour, and immediately gave B. notice, and sent the bill to him. B. indorsed the bill to A. and returned it to him by the next post, and A., on the same day, caused notice of dishonour to be given to the drawer. Held, that the notice was in time (*Goodall v. Polhill*, 1 C. B. 233; 9 Jur. 553). And a party receiving notice of dishonour need not give notice to the party above him, although he might easily give it, that day, and there is no post the day following (*Grill v. Jeremy*, 1 Moo. & M. 61). And he will be entitled to *the whole day, though the post by which he is to send it goes out within the day (*Bayl. B.* 270; *Brag v. Hadwen*, 5 Maule, 68). [*542] Notice of dishonour may be given immediately on the refusal to pay, without waiting to see whether the bill will be taken up in the course of the day (*Burbridge v. Manners*, 3 Camp. 193; *Ex parte Moline*, 19 Ves. 216; *Hume v. Peploe*, 8 East, 169; *Hine v. Allely*, 4 B. & Ad. 453, 624); unless the acceptor afterwards, and on the same day, pays the bill (*Hartley v. Case*, 1 C. & P. 556). Where the house was shut up, a notice of dishonour may be given to the drawers on the day of such dishonour, as in the case of an actual refusal to pay (*Hine v. Allely*, 4 B. & Ad. 624). Where the party receives notice on a Sunday, Good Friday, or Christmas-day, he is in the same situation as if it did not reach him until the next day (*Bray v. Hadwen*, 5 M. & S. 68; *Bayl. B.* 270; and see 7 & 8 Geo. IV. c. 15); or on a day of similar sanctity, according to the religion of the party bound to give notice; as, where notice was given to a Jewish indorser on the 8th, which was a great Jewish festival, it was held, that it was not necessary for him to give notice by the general post till the 9th (*Ib.*: *Lindo v. Unsworth*, 2 Camp. 602). Where the holder received notice of the dishonour on Sunday, notice given by him by the Tuesday's post was held to be sufficient (*Wright v. Shawcross*, 2 B. & A. 501). Where a bill was dishonoured on Saturday, and the post went out at half-past nine o'clock in the morning: held, sufficient to send a notice by Tuesday morning's post (*Hawkes v. Salter*, 4 Bing. 715). If the holder of a bill or note place it in the hands of his banker, the banker is only bound to give notice of its dishonour to his customer, in like manner as if he were himself the holder, and his customer were the party next entitled to notice (*Haynes v. Birks*, 3 B. & P. 599). Thus, notice sent by a London banker to a London customer the day after the dishonour is in time; and, if the customer communicate that notice the day following, that will be in time also (*Haynes v. Birks*, *supra*; *Bayl. B.* 222). And the customer has the like time to communicate such notice as if he had received it from a holder (*Ib.*; *Robson v. Bennett*, 2 Taunt. 388; *Langdale v. Trimmer*, 15 East, 291; *Bray v. Hawden*, 5 M. & S. 58). So, if the bill be deposited with an attorney or agent (*Firth v. Trush*, 8 B. & C. 387).

Where a bill is dishonoured abroad, notice by the first direct and regular mode of conveyance, whether it be an English or a foreign ship, is sufficient.

The holder is not bound to send such notice by the accidental though earlier conveyance of a foreign ship (*Mulman v. D'Eguino*, 2 H. Bl. 565). And it is not essential the notice should be sent by the post, where there is one; sending to an agent by a private conveyance, that he may give the notice, will be sufficient, if the agent give the notice, or take due steps for the purpose, without delay (per Bayley, J., *Bancroft v. Hall*, Holt, N. P. 476). *Quære*, at what time a notice must be given to an English indorser of a bill drawn upon and dishonoured by a party at Paris (*Rothschild v. Barnes*, 2 Jur. 1084). *Quære*, whether a custom can be established to vary the time for giving notice of dishonour, in such a case, both from the English rule and the French rule (*lb.*). Where a bill is accepted, payable abroad, by a foreign acceptor, it is enough to give the deft. such notice of dishonour and protest as the foreign law requires (*Rothschild v. Currie*, 1 Q. B. 43).

Though it has been disputed whether it is for the court or the jury to decide what is a reasonable time for giving notice (*Hilton v. Shepherd*, 6 East, 14, n.; *Hopes v. Alder*, *ib.* 16), it should seem that it is a question partly of fact and partly of law, and that the *jury are to find the [*543] facts, such as the distance at which the persons live from each other, the course of the post, &c.; but, when those facts are established, the reasonableness of the time becomes a question of law, and consequently to be determined by the court, and not by the jury (per Lord Mansfield, C. J., and Buller, J., in *Tindal v. Brown*, 1 T. R. 168; *infra*; *Metcalf v. Hal*, Bing. N. P. 275; see *Parker v. Gordon*, 7 East, 385). If the notice arrive too late through misdirection, it is for the jury to say whether the holder used due diligence to find the drawer's address (*Siggers v. Brown*, 1 Moo. & R. 520). If the delay arise from the bill having been sent to a wrong person, and the mistake arose from the indistinctness of the drawer's writing, he is not discharged (*Hewitt v. Thomson*, *ib.* 543). The notice of dishonour must be given before the action is commenced (*Castrique v. Bernabo*, 14 Law J., N. S. 3; 39 Jur. 130).

If a notice be sent by post on the day on which the party is to receive it, the onus is on the party sending it to prove affirmatively that the letter was put in in time to reach its destination that day, according to the course of the post (*Fowler v. Henden*, 4 Tyrw. 1002). The time consumed in making necessary inquiries, relative to the parties to the note, is not to be imputed as laches. Thus, where the plt. became acquainted with the dishonour on the 5th, and not knowing the parties, notice was not despatched to them until the 16th, the original indorser was still held liable (*Baldwin v. Richardson*, 2 D. & R. 285; 1 B. & C. 245); and the allegation of notice will be satisfied by showing that notice was given before action brought, although, from the fact of the parties not being to be found, it was not given at the proper time (*Harris v. Richardson*, 4 C. & P. 522).

The post marks in town or country are evidence that the letters on which they are were in the office whose mark is on them at the time of the dates of such marks (*Kent v. Lowen*, 1 Camp. 177; *Fletcher v. Braddyl*, 3 Stark. 64; *R. v. Plummer*, Russ. & R. C. C. 264; *Langdon v. Halls*, 5 Esp. 156; *R. v. Johnson*, 7 East, 65); but not conclusive (*Stocken v. Collin*, 7 M. & W. 515). The notice is usually sent to the place of business or residence of the party sought to be charged. If a party to a bill direct a notice to be sent to him when absent at a distance from his residence, so that more time will be occupied in the transmission to the parties than if it were sent to the ordinary place of residence, a notice to him at the appointed place will, it

seems, not only be a good notice against him, but also a good notice against prior parties (*Shelton v. Braithwaite*, 8 M. & W. 252).

Where laches is once incurred the drawer is discharged, though he receive notice at the time within which, had each person regularly transmitted notice to another, he would have received it (*Turner v. Leech*, 4 B. & Ad. 624; *Marsh v. Maxwell*, 2 Camp. 210, n.).

Proof as to by whom Notice was given.] It was formerly thought that the notice must be given by the holder of the bill (*Tindal v. Brown*, *supra*). But it seems now to be ruled, that the notice can only be given by some party to the bill or note, though not the actual holder thereof at the time (*Chapman v. Keane*, 3 Ad. & E. 193); but a notice by a stranger is not sufficient (*Stewart v. Kennett*, 2 Camp. 177). Notice by the first indorsee, who had received no notice from the second indorsee, is insufficient as between the second indorsee and drawee (*Ex parte Barclay*, 7 Ves. 597; but see *Stewart v. Kennett*, *supra*). *Aliter*, if the first indorser had himself *received notice (*Jamieson v. Swinton*, 2 Camp. 372; 2 [*544] Taunt. 224; *Wilson v. Swaby*, 1 Stark. 54). But a notice from the holder, or any other party to the bill, will enure to the benefit of every other party who stands between the person giving the notice and the person to whom it is given (*Wilson v. Swaby*, *supra*). Therefore, a notice from the last indorser to the drawer will operate as a notice from each indorser, and if the payee have duly received notice, a notice by him to the drawer will be sufficient, and will be an equivalent to a notice from each indorser and the holder to the drawer (*Bayl. B.* 251). A notice of dishonour from the acceptor suffices (*Shaw v. Croft*, Ch. Bills, 9th ed. 494; *Selw.* 9th ed. 332; *Rosher v. Kieran*, 4 Camp. 87; *sed quære*, see *Byles*, 217). Where, a few days before a bill became due, the acceptor informed the drawer he would be unable to pay it, and told him he must take it up, and gave him part of the amount to assist him to do so, and the latter promised to take up the bill accordingly; it was held, in an action by the indorser against the drawer, the latter might nevertheless set up, as a defence, that the bill was not duly presented, and the want of notice of dishonour; but that the sum paid him by the acceptor was money had and received to the plt.'s use (*Baker v. Birch*, 3 Camp. 107). Where a negotiable instrument is indorsed to a branch bank, which transmits it to another branch, which indorses it to the head bank in London, each branch is a distinct holder for the purpose of giving a notice of dishonour (*Clode v. Bayley*, 7 Jur. 1092; 12 M. & W. 51; 13 Law J., N. S. 17).

A notice from an intermediate party may, in pleading, be described as a notice from the plt. (*Newen v. Gill*, 8 C. & P. 367).

A notice by an agent, as the plt.'s attorney, or his banker, who holds the bill, in his own name, although he does not state on whose behalf it is given, is good (*Woodthorpe v. Lawes*, 2 M. & W. 109). A notice given by a party to the bill in the name of the indorser, but without his authority, is sufficient (*Rogerson v. Hare*, 1 Jur. 1). The deft. drew his bill on Maclean, who accepted it; the deft. indorsed to Day, and Day to the plt. The bill falling due on a Sunday, the plt.'s son presented it on the Saturday to the acceptor, and he refused to pay. The plt.'s son went and told Day and his foreman; on the same day the foreman told the deft. of the dishonour; on the Sunday, Day also told him of it: held, that there was no sufficient notice, there being no sufficient intimation from an authorized person that the deft. would be looked to for payment; *semble*, that a tradesman's foreman is not to be presumed to have authority to give a notice of dishonour for his master: *semble*, also, that a simple statement of dishonour, made by the holder of the bill,

might be good notice, although it would not be sufficient if made by another party (*East v. Smith*, 16 Law J. 292, Q. B.).

The holder of a bill of exchange may take advantage of a notice of dishonour given by any party who is himself liable to be sued upon the bill, and would on paying it be entitled to reimbursement, provided that such notice were given in sufficient time to maintain the action if that party were suing on the bill (*Harrison v. Ruscoe*, 10 Jur. 142).

Proof as to whom Notice of Dishonour was given.] The notice of dishonour, when necessary, must be proved to have been given to all the parties to whom the holder of the bill means to resort for payment (*Brown v. Maffey*, 15 East, 316; Bayl. B. 251). Where the deft. is a bankrupt, [*545] notice should be given to him before the *choice of assignees, and after such choice, to them (see *Ex parte Moline*, 19 Ves. 216). Where he had become bankrupt and absconded, but his house was in possession of a messenger, and no notice was given to the drawer, left at his house, or given to the assignees, the drawer's estate was held discharged (*Rohde v. Proctor*, 4 B. & C. 517); the notice should have been left at the bankrupt's house, and with the messenger in possession (*Ex parte Johnson*, 3 Deac. & Ch. 433; 1 Mont. & Ayr. 622). If the party be dead, notice should be given to his executors or administrators (Ch. Bills, 295, 5th ed.; Byles, 220); and it is expedient, though not, in general, absolutely necessary, to give notice to a person who has guaranteed the payment of the bill (*ante*, p. 215; Bayl. B. 287). Where a person not a party to the bill guarantees the payment by the acceptor he is not entitled to notice of dishonour, and a plea therefore, by him, that he had no notice of non-payment, was held to contain no answer to the action, and the plts. were entitled to judgment *non obstante veredicto* (*Hitchcock v. Humfry*, 5 M. & G. 559; 6 Sco. N. R. 540). When the party entitled to notice is abroad at the time of the dishonour, if he have a place of residence in England, it will be sufficient to leave notice of non-acceptance at that place; and a demand of acceptance or payment from his wife or servant would, in such case, be regular (*Cromwell v. Hunson*, 2 Esp. 511, 512; *Housego v. Cowne*, 2 M. & W. 348). Where the drawers are in partnership, a notice to one is notice to all (*Porthouse v. Parker*, 1 Camp. 82; *Bignold v. Waterhouse*, 1 M. & S. 259). Where a substituted bill has been dishonoured, and the plt. sues on the first, he need not prove notice of dishonour of the substituted bill (*Bishop v. Rowe*, 3 M. & S. 362).

Formerly promissory notes were not negotiable instruments; but, by the statute 3 & 4 Anne, c. 9, s. 1, such instruments are capable of being indorsed or assigned, and foreign notes are within this act, and are negotiable in this country, as well as inland bills (*Bentley v. Northhouse*, Moo. & M. 66; and see *Pollard v. Herries*, 3 B. & P. 335; *Milne v. Graham*, 1 B. & C. 192; *Houret v. Morris*, 3 Camp. 303; *Splitgerber v. Kohn*, 1 Stark. 125). But they must be made transferable on the face of them; they must be expressed to be payable to some person, or order, or bearer (*Grant v. Vaughan*, 2 Burr. 31); but without these words they may be sued on by the payee (*Smith v. Kendall*, 6 T. R. 123; *R. v. Box*, 6 Taunt. 325); and notes made in this country are held to be transferable in a foreign country (*De la Chaumette v. England* (Bank of), 2 B. & A. 383).

Proof under Common Counts.] As to what the plt. will be at liberty to prove under the common counts, to entitle him to a verdict, see *ante*, p. 495. Where the deft., knowing the plt. to be the indorsee of a bill which was due, promised him to pay it, it was held, that the plt. might recover on an account stated (*Oliver v. Dovatt*, 2 Moo. & R. 230).

INDORSEE AGAINST INDORSER, WHO IS NOT DRAWER.

The plt.'s proofs in this action will, for the most part, be similar to those required in an action against the drawer, who is also indorser; as to which, see *ante*, p. 518, *et seq.* He must prove, if traversed, the signature of the deft., those indorsements between that of the deft. and the plt. shown in the declaration, the presentment *to the drawee and the dishonour, and notice of dishonour to the deft. (Rosc. Ev. 222). [*546]

Proof of Drawing.] This is unnecessary, as the indorsement admits the handwriting of the drawer, and deft. cannot even show it is a forgery (Lambert v. Pack, 1 Salk. 127; Lambert v. Dukes, 1 Ld. Raym. 443; Free v. Hawkings, Holt, N. P. 550).

Proof of Acceptance.] This is unnecessary, even though it be stated in declaration (see *ante*, p. 503, *et seq.*; Tanner v. Bean, 4 B. & C. 312); unless in an action on a bill, payable after sight, and even there evidence that the acceptance was on the bill when the deft. delivered it to his indorsee will dispense with proof of it.

Proof of Indorsements.] The handwriting of all indorsements prior to the deft.'s is admitted by his indorsement (Lambert v. Pack, 1 Salk. 127; Lambert v. Dukes, *supra*; Critchlow v. Parry, 2 Camp. 182; Chaters v. Bell, 4 Esp. 210); and they need not be proved, although forged, and stated in the declaration (*ib.*). It admits the ability and signature of all antecedent indorsements (Bayl. B. 366; Critchlow v. Parry, *supra*). Under a plea, denying the indorsement, if the bill appear to be altered on the face of it, the plt. is not bound to explain the alteration (Sibley v. Fisher, 7 Ad. & E. 444).

Proof of Presentment, and Notice of Dishonour.] What has been already said on this head, in an action against the drawer, will be, for the most part, here applicable (see *ante*, p. 519, *et seq.*). It is not necessary to prove any presentment to or demand upon the drawer (Heylin v. Adamson, 2 Burr. 669, 675; Bromley v. Frasier, 1 Stra. 441). It is no excuse for not giving notice to the indorser, that the acceptor had no effects of the drawer (Wilks v. Jacks, Pea. 202). An indorser, who gave no consideration for the bill, and knows that the drawer has no effects in the drawee's hands, is not entitled to notice of dishonour (Sisson v. Tomlinson, 1 Selw. N. P. 346). Where a bill was drawn for the accommodation of a remote indorsee, and the names of all the prior parties were lent to him, it was holden, in an action against one of those parties, an indorser, that the latter was entitled to notice of dishonour; because, upon paying it, he would be entitled to sue such indorsee for repayment (Brown v. Maffey, 15 East, 216). The indorser, without consideration (but without fraud), of a bill, the drawer and acceptor of which are fictitious persons, is entitled to notice (Leach v. Hewett, 4 Taunt. 731). Notice need not be given to the indorser of a note not negotiable (Plimley v. Westley, 2 Bing. N. C. 249; 2 Sco. 423). Proof of a payment of part, or a promise to pay after full notice of the laches of the holder, dispenses with the proof of a due presentment, protest, and notice, as it admits all these facts, as well as the right of the holder to sue (Taylor v. Jones, 2 Camp. 105; Wilks v. Jacks, *supra*); like in an action against the drawer (*ante*, p. 519, n.); and see as to what promise is sufficient, *ante*, p. 528. It has, however, been considered, that although a *drawer* of a bill may, by circumstances, *impliedly* waive his right of defence, founded on the laches of the holder, yet it must be proved that an *indorser* has *expressly* waived it (Bor-

radaille v. Lowe, 4 Taunt. 93; Ch. Bills, 239). A promise not made to the plt., but to another person, who was holder of the bill at the time, will be sufficient (Potter v. Rayworth, 13 East, 418); and, in these cases, it is to be left to the jury to say whether, under *the circumstances, the deft. [*547] had notice, at the time of his promise or application, that there had been laches in the presentment, &c. (Hopley v. Dufresne, 13 East, 275; Horford v. Wilson, 1 Taunt. 15). It seems that, at all events, plt. must prove a demand on the acceptor (5 Esp. 265). The following letter from the indorser has been held not to waive the want of notice:—"I cannot think of remitting till I receive the draft; therefore, if you think proper, you may return it to T. and Co., if you think me unsafe" (4 Taunt. 93).

Proof under Common Counts.] As to what plt. may prove under the common counts, to entitle him to a verdict, see *ante*, p. 495. An indorsement is *prima facie* evidence of money lent by the indorsee to his immediate indorser (Bayl. B. 288). But where the indorser told his indorsee, just before presentment, that the bill would not be paid, that notice need not be sent to him, and that he would send the money on a future day: held, no evidence on an account stated, there being no debt due from the indorser at the time of the promise, nor any proof of liability on the bill (Burgh v. Legge, 5 M. & W. 418).

ACCOMMODATION ACCEPTOR AGAINST DRAWER.

If put in issue, the handwriting of the deft., as drawer, must be proved, as also the payment by the plt., or some special damage arising from his being obliged to pay the bill, as costs of imprisonment, &c. (Chilton v. Wiffen, 3 Wils. 12; Hopley v. Dufresne, 13 East, 275). But, to entitle him to recover special damage, there must be a special count, stating it (13 East, 169). Plt. must also prove the want of consideration (Vere v. Lewis, 3 T. R. 183). Proof of a receipt at the back of the bill, in the handwriting of the party entitled to demand payment, will be sufficient evidence of the acceptor's having paid the bill (Pfiel v. Van Battenberg, 2 Camp. 439). A general receipt on the back of the bill, will be sufficient *prima facie* evidence of payment (Scholey v. Walsby, Pea. 25). But, if the bill be produced from the custody of the acceptor, it will not be *prima facie* evidence of payment, unless it be also proved to have been in circulation after it had been accepted (Ch. Bills, 410, n. a). Nor is payment to be presumed from a receipt indorsed on the bill, unless it be shown to be in the handwriting of a person entitled to demand payment (2 Camp. 439). There is no occasion to prove the *actual* payment of costs, as the plt.'s liability, by having incurred them, is sufficient (Bullock v. Loyd, 2 C. & P. 119). In an action by bankers, to recover the amount of a bill of exchange, accepted by the deft., payable at their house, and paid by them after it was indorsed, they are bound to prove the indorsement by the payee and the deft.'s acceptance, and their payment (Foster v. Clements, 2 Camp. 17; see *post*, "INDEMNITY," "GUARANTEE").

It has been already observed the deft. must, since the New Rules (H. T. 4 Will. IV.), specially traverse some matter of fact alleged in the declaration; as, for instance, the making, accepting, indorsing, &c., or plead some matter in confession and avoidance, the pleas of *non assumpsit* and *nunquam indebitatus* being now inadmissible, in actions on bills or notes: when, however, the action is brought by an executor on a bill or note pay

able to his testator, laying a promise to the executor, such promise may still be put in issue by a plea of *non assumpsit*; but, in this case, the *action is not brought on the bill alone, but on a promise implied [*548] by it (*Timmis v. Platt*, 2 M. & W. 720; *Rolleston v. Dixon*, 2 D. & L. 892; see *ante*, "*Plea*").

Where a count in a declaration stated that the deft. made his promissory note, and thereby promised to pay the bearer 500*l.* two months after date, and deft. delivered the same to plt., who was, and still is, the bearer thereof; plea that deft. made a certain instrument, whereby he promised to pay to the order of him, the deft., 500*l.*, as alleged in the first count; without this, that he made any other promissory note, whereby he promised to pay the bearer the sum of money mentioned in the second count, as in that alleged. Held, bad on demurrer, as amounting to an argumentative denial of the deft.'s having made the note (*Flight v. Maclean*, 16 M. & W. 51).

Form of Plea traversing the Acceptance.

Special traverse of the acceptance. †

In the Q. B. (or C. P., or Ex. of P.) On the day of A. D. 1850.

Drawer } The said deft., by A. B. his attorney as to the said first count of the said
ats. } declaration says that he did not accept the said bill in that count mentioned
Acceptor. } in manner and form as the plt. has in the said count in that behalf alleged
and of this the deft. puts himself upon the country, &c. (*An appropriate plea must be added if there be other counts in the declaration; where those counts are simple indebitatus counts the following may answer.*)

And as to the residue (or as to the said second and fourth counts, *as the case may be*) of the said declaration the deft. says that he did not promise (or, *if in debt*, "that he never was indebted to the plt.") in manner and form as the plt. has therein (or in the said second and fourth counts) alleged; and of this he puts himself upon the country, &c. (*If there be any other defence to the third or any other count, plead it; if not, include them all in this plea.*)

Notes on the above Plea.

By R. G. H. T. 4 Will. IV. r. 1, every pleading shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date. When a plea is delivered; bearing date on a former day, contrary to this rule, it is an irregularity, but not a nullity (*Hodson v. Pennell*, 4 M. & W. 373). If the declaration contain counts besides that on the bill of exchange, care must be taken to plead to them. In *Putney v. Swan*, 2 M. & W. 72, the declaration contained a second count on an account stated; the deft. merely denied his acceptance of the bill, taking no notice of the second count, and it was held that the plea was bad on special demurrer. Care must also be taken to confine the special plea to the count on the bill of exchange (see *Worley v. Harrison*, 3 Ad. & E. 689; *Hughes v. Poole*, 6 Man. & G. 271; 6 Sco. N. R. 957); and then the general issue or other plea to the common counts; for, if deft. plead *non assumpsit* to the whole declaration, and he be under terms to plead issuably, the plt. may sign judgment on the whole declaration (*Sewell v. Dale*, 8 Dowl. 309), or he may sign judgment as to the count on the bill or note, and enter a *nolle prosequi* as to the money counts, if founded on the same cause of action as the bill or note (*Fraser v. Newton*, 8 Dowl. 773; *see [*549] also *Donaldson v. Thompson*, 6 M. & W. 316; 8 Dowl. 209; and see *Kelly v. Villebois*, 3 Jur. 1172; *Parratt v. Goddard*, 9 M. & W. 458).

If the deft. be not under terms to plead issuably, the plea of *non assumpsit* to a count on a bill or note is demurable (*Donaldson v. Thompson, supra*; *Morse v. James*, 11 M. & W. 831). It seems it is not a nullity, though it might be set aside, and the deft. be ordered to plead another plea with costs (*Arch. Pr.* 8th ed. 226). To an action on a promissory note, with a count for goods sold and delivered, the deft., being under terms to plead issuably, pleaded to the first count, without, in words, confining the plea to that count, as follows: "That the said deft. did not indorse the said bill, &c., in manner and form as in the said first count alleged;" and pleaded *non assumpsit* to the last count: held, that the first plea was not a plea to the whole declaration (*Bousfield v. Edge*, 9 Law T. 229, Ex.).

Where the deft. pleads only to the first count and the plt. has a verdict, the deft. cannot take advantage of his own mispleading in arrest of judgment (*Harvey v. Richards*, 1 H. Bl. 644). If the general issue be pleaded to a count on a bill and another defence be set up by the plea, there being no rule to plead several matters, the plt. may sign judgment (*Hockley v. Sutton*, 2 Dowl. 700). If issue be joined on *non assumpsit* to a bill, the facts from which the promise to pay it are implied, such as the acceptance, are put in issue, and may be given in evidence (*Hay v. Fisher*, 2 M. & W. 728; *Finlayson v. Mackenzie*, 3 Bing. N. C. 824; 6 Dowl. 71). In *assumpsit* on a bill of exchange by indorsee against acceptor, the deft. pleaded *non assumpsit*: held, that the cause could not be tried on this plea, and the jury being sworn, the plt. took a verdict for the amount of the bill and interest, without adducing any evidence, and without putting in the bill (*Neale v. Proctor*, 2 C. & K. 556, per Alderson). Where the deft. pleads *non assumpsit* to the whole of a declaration, consisting of a count on a bill of exchange and money counts, the plt. cannot sign judgment generally. And the court will not allow him to amend the judgment, by confining it to the count on the bill, and entering a *nolle prosequi* on the other counts (*Edison v. Pigram*, 16 M. & W. 137; 4 D. & L. 277; 16 Law J. 33, Ex.; 10 Jur. 1490). Where, to an action on a promissory note, the deft. pleaded the general issue by stat. 5 & 6 Vict. c. 122; held, that, notwithstanding the new rules prohibiting the plea of the general issue in cases of bills of exchange and promissory notes, as the statute directed the general issue to be pleaded in all cases where that statute was to be given in evidence, it might be pleaded to an action on a promissory note given in violation of that statute (*Weeks v. Argent*, 9 Law T. 129, Ex.). Plea by E., one of three persons sued as acceptors of a bill of exchange, that before and at the time, &c., the defts. were partners, upon the terms that neither of them should, without the consent of the others, accept any bill of exchange in the name of the firm, otherwise than for the *bona fide* debts or liabilities of the firm; and that the said bill was accepted by the other defts. in the name of the firm without the consent of the deft. E., and in fraud of him, and in violation of the said terms of partnership, and was delivered by the other defts. to the plt. for money owing to the plt. from one of them, and not for any debt or liability of the firm, of all which the plt. had notice at the time of the delivery of the bill to him; and that there was never any value or consideration, except as aforesaid, for the acceptance of the bill, or for the payment thereof by the deft. E.; and that he held and now holds the same without

[*550] value or consideration, concluding with *a verification: held, on special demurrer, a bad plea, as being an argumentative denial of the acceptance (*Grout v. Enthoven*, 17 Law J. 70, Ex.).

The acceptor cannot traverse the drawing of the bill, his acceptance admits the handwriting of the drawer, and the estoppel may be replied (*Saunderson v. Coleman*, 11 Law J. 270, C. P.; see *Porthouse v. Parker*, 1

Camp. 682; *Gilmore v. Hague*, 4 Dowl. 303; *Pitt v. Chappelow*, 8 M. & W. 616; even though the drawer's name be forged (*Smith v. Chester*, 1 T. R. 655, per Buller, J.); yet he may deny the drawer's indorsement in an action by the indorsee against him (*Smith v. Chester*, 1 T. R. 654), even where the acceptance was written on a blank stamp, and the name of a perfect stranger to the acceptor was inserted as drawer and first indorser whilst in blank, and the body of the bill was afterwards filled in by some other person (*Schultz v. Astley*, 2 Bing. N. C. 544). Where, however, the agent of a joint-stock company, for and on account of the company, draws a bill upon the directors, and in an action by the payee or indorsee it is sought to recover the amount against a member of the company, who did not actually accept it, he may traverse the drawing and acceptance, if he wish to dispute their authority (*Bult v. Morrell*, 12 Ad. & E. 745). Where there is a special acceptance, and the declaration avers a presentment at the place, the deft. may of course traverse it; for unless the bill be presented there, he is not liable.

If a bill purport to be drawn by several persons, as constituting a firm in trade, the acceptor by his acceptance admits that there is such a firm, and he will not be permitted to deny it (*Bass v. Clive*, 4 M. & S. 13). In an action by a *bona fide* indorsee against the acceptor of a bill of exchange, the deft. is estopped from pleading that the drawer and first indorser was an uncertificated bankrupt when the acceptance was given (*Braithwaite v. Gardiner*, 8 Q. B. 473).

A bill of exchange was drawn upon the plt., and accepted by his wife in her name, she having authority to accept for him: held, that the plt. was liable on the bill as acceptor. If a principal authorizes an agent to accept a bill, such principal is liable as acceptor, though wrongly described by his agent in the acceptance (*Lindus v. Bradwell*, 12 Jur. 230; 17 Law J. 121, C. P.).

Evidence for Defendant.

The above plea merely denies the acceptance of the bill as set out in the declaration. But, under it, the deft. may show a material variance between the bill and the declaration (see *Whitwell v. Bennett*, 3 B. & P. 559; *Hutchinson v. Piper*, 4 Taunt. 110; *Adams v. Bateson*, 1 Bing. 110; *Kearney v. King*, 3 B. & A. 301; *Higgins v. Nichols*, 7 Dowl. 551; see further, "*Variance*," *ante*, p. 491; but the judge would amend the record at nisi prius, see 9 Geo. IV. c. 15). So, that the acceptance is a forgery (*Griffith v. Payne*, 11 Ad. & E. 131; see "*FORGERY*," p. 572). So, that a material alteration has been made in the bill without his consent, or which may prevent it from being given in evidence for want of a new stamp (see "*ALTERATION*"). So, any defect in the stamp upon the bill (*Howard v. Smith*, 6 Sco. 438; "*STAMP*," p. 559). So, if the instrument when produced appear not to be in law a bill of exchange (see *Little v. Slackford*, 1 Moo. & M. 171, n. a). It must be an order, and not a mere request to constitute it a bill (*Little v. Slackford*, 1 Moo. & M. 171; *Crowfoot v. Gurney*, 2 Moo. & S. 473); to pay money only (see *Martin v. Chauntry*, 2 *Stra. 1271); and for a sum certain (*Smith v. Nightingale*, 2 Stark. [*551] 375); but writing "pound" in the singular number, or omitting it altogether, will not vitiate the bill (*Bayl. B. 12*; *Phipps v. Tanner*, 5 C. & P. 488). The payment must not be made to depend upon a contingency (*Bayl. B. 16*; *Palmer v. Pratt*, 2 Bing. 125). Where made payable at a certain time after a man's death, it is no contingency (*Cooke v. Colehan*, 2 Stra. 1217; *Willes*, 393). So, it must not be made payable out of a particular fund (*Banbury v. Lissett*, 2 Stra. 1211; see *Pierson v. Dunlop*, Cowp. 57; *Ralli v. Sarell*, Dow. & Ry. N. P. 33). To pay "when an

infant shall come of age, to wit, on the 12th of June, 1750," is sufficiently certain (*Goss v. Nelson*, 1 Burr. 226); an order to pay so much a month out of the drawer's growing subsistence is not a bill (*Jocelin v. Laserre*, Fort. 281); nor is an order to pay "out of the money in your hands belonging to the proprietors of the D. mines, being part of the consideration money for the purchase of the manor of W. B." (*Jenny v. Herle*, 2 Ld. Raym. 1361); nor "out of my half-pay which will become due on the 1st January" (*Stevens v. Hill*, 5 Esp. 247); nor "out of the fifth payment when it shall become due, and shall be allowed by R." (*Haydock v. Lynch*, 2 Ld. Raym. 1563); nor "on the sale of produce immediately when sold of W. Hart, St. Alban's, Herts, &c." (*Hill v. Halford*, 3 B. & P. 413); nor "out of S.'s money as soon as you shall receive it" (*Daukes v. Doleraine* (Lord), 2 Bl. R. 782). Where a bill is payable otherwise than to bearer, it must name some payee with certainty (*Bayl. B. 35*; *ib. 36*; *Blankenhaden v. Blundell*, 2 B. & Ad. 417). If a bill be written in pencil, it will be sufficient (*Geary v. Physic*, 5 B. & C. 234). A drawer may address a bill to himself, but then it is rather a note than a bill (*Bayl. B. 8*); the drawer's name must be to the bill, whether written before or after it is drawn is immaterial (*Collis v. Emsett*, 1 H. Bl. 313; *Schultz v. Ashley*, 2 Bing. N. C. 544).

As between the original parties to a bill, a written agreement on a distinct paper to renew the bill, or to qualify the liability of the maker or acceptor, is a good defence (*Bowerbank v. Monteiro*, 4 Taunt. 844; *Carr v. Stephens*, 9 B. & C. 738).

It is no defence to an action on a bill, that at the time it was drawn or accepted the drawer agreed by parol to renew it when due (*Hoar v. Graham*, 3 Camp. 57; see *Innes v. Munro*, 17 Law J. 71, Ex.); nor that payment should not be demanded until after a particular event (*Moseley v. Hanford*, 10 B. & C. 729; *Woodbridge v. Spooner*, 3 B. & A. 233; *Free v. Hawkins*, 8 Taunt. 92; *Adams v. Wordley*, 1 M. & W. 374; *Foster v. Jolly*, 1 C. M. & R. 703; *Richards v. Thomas*, *ib. 772*). So, it is no defence that on dishonour the drawer paid the amount to the payee, and without the payee's indorsement commenced the action (*Parminter v. Symons*, in error, 1 Wils. 185; 2 Bro. P. C. 43); or that after taking it up he passed it to the plt. (*Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 4 Bing. 390).

In an action by indorsees against acceptor, some of the defts. pleaded that they did not accept. It was proved that all the defts. were partners, and that one of them who had suffered judgment by default, had accepted the bill in the name of the firm in fraud of the partnership, and not for partnership purposes: held, that such proof without evidence of knowledge on the part of the plt., did not, under this issue, oblige plt. to prove the circumstances under which the bill was indorsed to him (*Musgrave v. Drake*, 5 Q. B. 185).

If the plt. succeed in proving the acceptance (see *ante*, p. 503), the drawing, but not the indorsements, will be admitted (*Brind v. Hampshire*, 1 M. & W. 371). If, therefore, the deft. deny the **drawing*, plt. may [*552] reply the acceptance by way of estoppel (*Saunderson v. Colman*, 4 Man. & G. 209); or, it seems, demur (*ib. 225*; and see *Beeman v. Duck*, 11 M. & W. 251; *Armani v. Castrique*, 13 M. & W. 443). The deft. will succeed on this plea if it turn out that he was only indorser (*Gwinnett v. Herbert*, 5 Ad. & E. 436); it is not necessary in the first instance to prove the identity of deft. with the party who accepted the bill (*Roden v. Ryde*, 4 Q. B. 626; *Sewell v. Evans*, *ib.*; see *ante*, p. 518).

No one can be liable as acceptor unless he were the person to whom the bill was addressed, or an acceptor for honour (*Polhill v. Walter*, 2 B. & Ad.

114; Jackson v. Hudson, 2 Camp. 447). John Hart drew a bill payable to himself, or order, addressed to John Hart; C. wrote across this, "Accepted, H. J. C.:" held, that C. could not be sued as acceptor of a bill of exchange directed to him (Davis v. Clarke, 5 Q. B. 16).

A plea by an indorser that he did not make or draw, held a nullity (Allen v. Walker, 2 M. & W. 317).

Plea traversing the Making.

[Commencement, *as ante*, p. 548.] Says that he did not make the said bill of exchange (or note, or order,) in that count mentioned in manner and form as the plt. has in the said count in that behalf alleged; and of this the deft. puts himself upon the country, &c. (if other counts, add pleas).

Notes on Plea, and Evidence in support of it.

* Since the R. G. H. T. 4 Will. IV. r. 2, this plea must be specially pleaded, and under it deft. may avail himself of any of the defences which may be offered in evidence under the plea of *non accepit*; thus, that the instrument is not in law a bill of exchange, or promissory note, or check, or order for the payment of money; that there is a variance between the declaration and proof; that the instrument has been altered; that it was drawn by an agent or partner without authority (see p. 550, et seq.). The declaration stated, the deft. made his promissory note, and thereby promised to pay the bearer 500*l.* two months after date; that deft. delivered the same to plt., who was and still is the bearer thereof. Plea, that deft. made a certain instrument, whereby he promised to pay to the order of him, the deft. 500*l.*, as alleged in the declaration; without this, that he made any other promissory note whereby he promised to pay the bearer the sum of money mentioned in the declaration as in that count alleged. Held, bad, on demurrer, as amounting to an argumentative denial of deft.'s having made the note (Flight v. Maclean, 16 M. & W. 51). If the declaration allege that a note was made to the plt. in a certain capacity, in which the plt. does not sue, a plea denying that he was such manager is an argumentative denial of the making (Robertson v. Steward, 1 Man. & G. 512). But he cannot give in evidence that he was of imbecile mind at the time when he made the note (Harrison v. Richardson, 1 M. & R. 504); nor any parol agreement to control in any manner the effect of the contract as appearing upon the face of the note (Foster v. Jolly, 1 C. M. & R. 703). But if the action be on a banker's check, he may prove that the check in question was issued at a greater distance than ten miles from the bank on which it is drawn (Field v. Woods, 7 Ad. & E. 114). And where a check was drawn within ten miles of the bank on which it was drawn, but was discounted at one at a greater distance, the holder could not recover upon it without a stamp (Waters v. Brogden, 1 Y. & J. 457). So it may be shown, under this traverse, that the check was post-dated *(M'Dowall v. Lyster, 2 M. & W. 52); in which case the check requires a stamp to make it [*553] available in evidence (Serle v. Norton, 9 M. & W. 309; see "STAMP," *post*, p. 559).

The deft. pleaded that he did not make the note in question; when it was produced in evidence it was in the following form:—"On demand, I promise to pay J. S. 50*l.*, in consideration of foregoing and forbearing an action in the Queen's Bench, for damages, ascertained by consent to amount to that sum, by reason of the injury sustained by plt.'s wife in respect of my liability for non-repair of a footway:" held, that the instrument appeared to be made

on an executed consideration, and was a valid promissory note (Shenton v. James, 5 Q. B. 199).

Payee against the makers of a promissory note. Plea, by deft. Ayres, that she did not make the note. It appeared that Seymour and Ayres carried on business in partnership in that name, and Seymour signed a promissory note, "Thos. Seymour and Sarah Ayres." Held, a sufficient signature in the name of the firm, and binding upon Ayres (Norton v. Seymour, 16 Law J., N. S., C. P. 100). *Seem*, if A. and B. carry on business in the name of B. and Co., a signature by A., with the true names of the partners, A. and B., will be binding on B. (Ib., per Maule, J., see "*Parties*," *ante*, 450).

A promissory note being made payable to the wife and not reduced into possession by the husband in his lifetime, in an action brought by the executors of the husband upon the note, deft. may plead that he did not make the note, also that the note was made payable to the wife, and that the husband did not in his lifetime reduce the same into possession (Howard v. Oakes, 6 Law T. 397, Ex.).

It is a variance, under this plea, if the objection be taken at the trial, that the note was payable at a particular place, and there is no such statement in the declaration (Trinder v. Smedley, 1 H. & W. 164).

Plea traversing Presentment.

[*Commencement as ante*, p. 548.] Says that the bill (or promissory note, or order), in that count mentioned, was not presented to the said J. K. in manner and form as the plt. has in the said count in that behalf alleged; and of this the deft. puts himself upon the country, &c. (*add other pleas if necessary*).

Notes on Plea, and Evidence in Support of it.

This must also, by R. G. H. T. 4 Will. IV. r. 2, be specially pleaded (see *ante*, p. 483).

When the presentment is traversed, the plt. must prove it, and that the drawee refused to accept it, or that he offered to accept it in such a manner as did not comply with the tenor of the bill (Clark v. Roper, 5 Esp. 175, see p. 553). But it is competent to the plt. to prove it by an admission, and a promise to pay by instalments is such an admission, for it is *prima facie* evidence that all the requisites for rendering the deft. liable on the note have been complied with (Croxon v. Worthen, 5 M. & W. 5; 3 Jur. 290; and see Hopley v. Dufresne, 5 East, 275, on this subject; see further, *post*, p. 637). It is only requisite to present for acceptance bills drawn after sight (Bayl. B. 224).

The allegation of presentment to the drawee is proved by presentment at the place where the bill was made payable (Wilmot v. Williams, 7 Man. & G. 1017).

The holder of a check is, in general, bound to present it for pay-
[*554] ment *not later than the day following that on which he receives it, whether the presentment is made by himself or through his bankers (Alexander v. Birchfield, 7 Man. & G. 1061); but the time for presentment may be extended by the assent of the drawer, express or implied (Ib.; see *ante*, p. 546).

Plea traversing Notice of Dishonour.

[*Commencement as ante*, p. 548.] Says that he had not due notice of the non-payment of (if the action be brought on non-acceptance say, that J. K. refused to accept) the said bill in that count mentioned in manner and form as the plt. hath in the said count alleged; and of this the deft. puts himself upon the country, &c.

Notes on Plea and Evidence in Support of it.

Since the R. G. H. T. 4 Will. IV. r. 2, this defence must be specially pleaded, and cannot be given in evidence under the general issue.

The indorsee declared against the indorser with a count for goods sold, and deft. pleaded to the first count, that there was no notice of dishonour; and to the count for goods sold, *non assumpsit* except as to 5*l.* 17*s.*, as to which, payment into court; in the particulars, plt. gave credit for the bill in the first count, and the deft. was also debited with it, as having been returned dishonoured, and plt. having failed to prove notice of dishonour, but having proved goods sold to the amount of 53*l.* 3*s.*, it was holden that the deft. could not under *non assumpsit* prove that no notice of dishonour had been given (*Green v. Smithies*, 1 Q. B. 796; 4 Gal. & Dav. 395).

Where the deft. pleaded that he had not notice from the plt., and it appeared the plt. gave notice to his indorser, and he gave the notice to the deft., this was holden sufficient (*Newen v. Gill*, 8 C. & P. 367).

In an action on a bill averring dishonour by the acceptor, and notice thereof to the deft., a plea that the deft. had not notice of the dishonour on the day the bill became due, is bad as tendering an immaterial traverse (*Stericker v. Barker*, 9 M. & W. 321; 6 Jur. 154).

A declaration alleged that T. made his bill of exchange, and thereby required G. and Co. to pay to the order of the deft. 200*l.*; that the deft. indorsed the bill to the plt.; that G. and Co. did not pay it, although it had been duly presented to them for payment, of which the deft. had notice: plea, that after the indorsement of the bill by the deft. to the plt., and before it became due, the plt. being the holder and owner of the bill, indorsed it to some person unknown, who then presented it to G. and Co. for acceptance; that they refused to accept it; and that although a reasonable time for the deft. to have had notice of the said presentment and dishonour had elapsed after the said presentment and dishonour, and before the deft. had the notice in the declaration mentioned, yet that the deft. had not due notice of the said presentment and dishonour, to which plt. replied *de injuriâ*. Held, a good answer on motion to enter judgment for the plt. *non obstante veredicto*, inasmuch as it displaced the only title of the plt. alleged therein, viz., his title by indorsement from the deft. (*Bartlett v. Benson*, 3 D. & L. 274; 15 Law J. 23, Exch.; 14 M. & W. 783). *Semble*, it would have been a departure to have replied that the person unknown indorsed the bill to the plt. for value, and that the plt. had no notice of dishonour by non-acceptance (*Ib.*).

The holder of a check is not bound to give notice of dishonour to the drawer, if he do not mean to sue him; he need only give notice

*to the party whom he intends to sue (*Beckford v. Ridge*, 2 Camp. [*555] 537).

That due notice was given, or that deft. subsequently promised payment, or acknowledged liability, must be proved by plt. to defeat this plea. See what is a good notice, *ante*, p. 527, *et seq.*

A notice of dishonour was in these words:—"Sir, I am the holder of a bill drawn by you on, &c., for, &c., which became due, &c., and is unpaid; and I have to state that unless the same is paid to me immediately, I shall proceed against you, without delay, for the amount. Amount of bill, 98*l.* 15*s.*; noting, 5*s.*; total 99*l.*" Held, a good notice of dishonour (*Armstrong v. Christiani*, 10 Law T. 418, C. P.).

Where the holder of a bill presented it for acceptance, and it was refused, and instead of giving notice of dishonour, he indorsed the bill to another for valuable consideration, without notice of its having been presented, and such indorser again presented it, and it was refused, and he gave notice

thereof to the drawer: held, that want of notice of the first refusal was no answer to the action; that although between the party presenting the bill, or having notice of its non-acceptance, notice must be given to the drawer to make him liable, yet this operates only as a personal discharge of the drawer against the party failing to give the necessary notice, but does not affect the right of an innocent indorser for value, and without notice of the previous default (*Dunn v. O'Keefe*, in error, 5 M. & S. 282).

Foreign Bills.] Where a bill of exchange was drawn in England, upon and accepted by a firm in Paris, at three months after date, payable to the deft. resident in this country, and by him indorsed to the plts., also resident in England; the plts. sued the deft. on non-payment, alleging the non-payment, protest, and notice of dishonour to the deft., and the deft. pleaded that he had no due notice of dishonour in manner and form, &c.; and it appeared that the bill was due on a Sunday, not reckoning days of grace, which the law of France does not allow, by which law the bill should be presented for payment on the Saturday, and, if not, it should be protested, and the protest registered at a certain office; the bill was presented on the Saturday, was not paid, and was protested on the Monday, but being a holiday, the office was closed before it could be registered; on Tuesday, it was left for that purpose at the office, but was not registered or returned until too late for that day's post, to send it to London, but on Wednesday the bill and protest were remitted to the plts., and reached them on Friday, on which day it would regularly have reached them if days of grace were allowed, and that plts. immediately gave notice to the deft.; it was proved that by the French law fifteen days were allowed for giving notice of dishonour even where both parties are resident in France; the court said that if notice were to be given without delay, as required by the law of England, still it could not be given until after the protest was registered, and there was a sufficient excuse for not giving the notice sooner; and they held, that by the law of France the notice of non-payment was parcel of the contract, and to be regulated by the law of the place of contract, and not merely an incident to the remedy at law for the breach of it, and regulated by the *lex loci fori*, in which this remedy is sought, and that as the notice was given in time according to the French law, it was in time (*Rothschild v. Currie*, 1 Q. B. 43). When a foreign law differs from that of this country, the party insisting on the difference must prove the foreign law (*Brown v. Gracey*, Dow. & Ry. N. P. 41).

[*556]

** Traverse of Indorsement.*

[*Commencement as ante*, p. 548.] The deft. by — his attorney as to the said (*first*) count of the said declaration says that the said G. H. did not indorse the said bill of exchange, in that count mentioned, to the plt. (*or, if any intermediate indorsement be disputed, say, said J. M., as the case may be*), in manner and form as the plt. has in the said count alleged; and of this the deft. puts himself upon the country, &c. (*If other counts, add pleas.*)

Notes on Plea, and Evidence in Support of it.

Since the R. G. H. T. 4 Will. IV. r. 2, this plea must be specially pleaded. There is no difference between a traverse in the above form and a traverse of an indorsement to a particular indorser (*Waters v. Thanet* (Lord), 7 Dowl. 251). A traverse of the indorsement denies not only the signature,

but also the delivery, with the intention of transferring the bill (*Marston v. Allen*, 3 M. & W. 494; *Steele v. Harmer*, 14 M. & W. 844; see *Hayes v. Caulfield*, 5 Q. B. 81, *ante*, p. 517, see p. 558). But this only applies where the facts negative an indorsement between other parties to the bill than the plt., and not where the indorsement is from the last indorser to the plt. (*Hayes v. Caulfield*, *supra*). Where bills of exchange are delivered to A. B. by the drawer, with the drawer's name written on the back, upon the condition that such delivery shall transfer to A. B. no property in the bills, unless A. B. does a particular thing, which he fails to do, such a delivery does not amount to an indorsement of the bills (*Bell (P. O.) v. Lord Ingestre*, 11 Law T. 200, Q. B.). H. indorsed a promissory note, but did not deliver it. After the death of H. his executor delivered the note to the plt. Held, that the plt. had no title to sue on the note (*Bromage v. Lloyd*, 1 Ex. 32; 5 D. & L. 128, Ex.). Under the plea that the deft. did not indorse a bill of exchange, he may give evidence to show that the bill bearing the indorsements of the drawer, of A. B., and of himself, was returned into A. B.'s hands by an arrangement between A. B. and the deft., the deft.'s name being left upon it by mistake, and that the plt. took the bill from A. B. with notice of these facts (*Boydell v. Eckstein*, 7 Law T. 261). If a bill be indorsed by an agent in the name of a firm, the authority of the agent to make the indorsement may, under this plea, be questioned (*Fearn v. Filica*, 8 Sco. N. R. 241; 7 M. & Gr. 513; 11 Law J., N. S. 15). Under this plea it may be shown that the bill was indorsed and delivered to the plt. only as agent of a third party, who has dissented from the plt.'s suing on the bill (*Adams v. Jones*, 12 Ad. & E. 455; see *Marston v. Allen*, 12 Ad. & E. 455; *Wood v. Connop*, 5 Q. B. 294): although the indorsement will be presumed from the fact of the bill being in the hands of one claiming through the indorsement, the deft. may nevertheless show that whilst it was in the hands of the indorser or his principal, a third party having no right whatever to the bill took it and indorsed it, the plt. having then a knowledge of the fraud (*Marston v. Allen*, *supra*). For the proofs in support of this issue, see *ante*, p. 515. Where the bill is drawn in the name of a fictitious person, payable to his own order, as the indorsement cannot be proved, it suffices to show that the drawer's name and indorsement are in the same handwriting (*Cooper v. Mayer*, 10 B. & C. 468).

Where a bill of exchange indorsed in blank is afterwards indorsed specially, this subsequent special indorsement cannot restrain the negotiability of the instrument. A presentment for payment by any indorsee, or person claiming under him, is sufficient, and need not be by a person claiming under the special indorser (*Walker v. McDonnell*, 11 Law [*557] T. 207, Ex.).

Indorsement after the bill is due is no plea in bar, unless the validity of the bill in the hands of the indorser can be impeached, or a defence be shown which would be a good one to an action by the holders of the bill at the time when it became due (*Brown v. Davies*, 3 T. R. 80; *Hubbard v. Jackson*, 4 Bing. 390; *Gomez Serra v. Berkeley*, 1 Wils. 46). In such cases the bill is always taken subject to its equities (*Taylor v. Mather*, 3 T. R. 83, n.; see *Bounsell v. Harrison*, 1 M. & W. 611; *Goodman v. Harvey*, 4 Ad. & E. 870). So, that the bill was accepted for the accommodation of the indorser, and indorsed by him after it became due, is no defence (*Sturtevant v. Ford*, 4 Man. & G. 101). The acceptor pleaded that the bill was an accommodation bill, and was given to the plt.'s indorser for the purpose of being discounted for the deft., and that it was indorsed to him before it was due and without notice of the premises, without this, that it was indorsed to him after it became due: the court held, that it lay upon the deft. to prove that the bill was due

when indorsed (*Lewis v. Parker*, 4 Ad. & E. 838). And where the replication stated that the bill was not indorsed after it became due, but was indorsed to, and taken and received by the plt. before it became due, it was holden to be sufficient for the plt. to put in the bill, and that he need not give evidence that the bill was indorsed to him before it became due (*Parkins v. Moon*, 7 C. & P. 408). Assumpsit on a bill drawn by W. on, and accepted by the defts., payable to the order of W. six months after date, and indorsed by W. to the plt.: plea, that after the defts. accepted the bill, and before it became due and before it was indorsed to the plt., W. waived the acceptance of the bill, and exonerated and discharged the defts. from the same, and from the payment of the bill, and that no person gave or received any consideration for the indorsement. Another plea stated, in conclusion, that the bill was indorsed to the plt. after it became due. Held, bad on special demurrer, for not showing that W. was the holder at the time of the alleged waiver by him (*Steele v. Harmer*, 14 M. & W. 831). A plea, which stated that the drawer indorsed to one of the defts. (the acceptor) with the intention of divesting himself of all title to it, and that such acceptor delivered it to the plt., which was the indorsement mentioned in the declaration, was held bad, as amounting to an argumentative traverse of such indorsement; but, it seems it would have been good, if it had alleged that the indorsement to such acceptor was in blank, so that he might have transferred it, by delivery, to the plt. (Ib.).

The indorser can only traverse his own indorsement and those of any subsequent indorsers, for his own indorsement admits all those antecedent to his (*Lambert v. Pack*, 1 Ld. Raym. 443; *Salk*. 127). And where the deft. admitted that the indorsement was in his handwriting, he was not permitted to show that it was a forgery (*Cooper v. Le Blanc*, 2 Stra. 1051; *Leach v. Buchannon*). But on a traverse of the indorsement of any other person, the admission of his handwriting will be no evidence against the deft. (*Hemmings v. Robinson*, Barn. 436). Where the indorser pleaded that he did not make or draw the bill, the court held that the plt. could not treat the plea as a nullity, and sign judgment (*Allen v. Walker*, 2 M. & W. 317).

The deft. pleaded that the bill was indorsed by him in blank, and by him delivered to C., for the special purpose that C. should get it discounted for deft., and for no other purpose; that the deft. received no other consideration from C.; that C. got the bill discounted by plt. and W. jointly, who [*558] delivered the money, being their joint *money, to C., as the consideration for the delivery of the bill to them by C.; that C. delivered the bill to them jointly, and not to plt. solely, or with the intention of giving him a separate right of action; that the deft. received no consideration from the plt. solely, and that the only consideration received by the deft. and C., or either of them, was the said joint discount: held, bad on general demurrer (*Wood v. Connop*, 5 Q. B. 292).

In an action against the acceptor of a bill of exchange indorsed by A., the drawer and payee, to B., by B. to C., by C. to plt., who appeared to be a *bona fide* holder, the deft., on a plea that A. did not indorse to B., cannot offer evidence that A. delivered the bill to B. for a specific purpose, and not to be negotiated, and that B. fraudulently negotiated it (*Hayes v. Caulfield*, 5 Q. B. 81).

Action by indorsee against acceptor. The declaration alleged, that Newman indorsed to Harrison, who indorsed to Herbert, who indorsed to plt. Plea, that Harrison did not indorse to Herbert. In order to prove this issue, a letter was put in, signed by Harrison, authorizing his name to be indorsed on the bill, and stating that he would pay the amount of the bill, if dishonoured, when due. The letter was stamped as an agreement. Held,

that it required a letter or power of attorney stamp (*Walker v. Remmett*, 10 Jur. 380).

A bill of exchange purporting to be drawn by B. and W. (a really existing firm, payable to their order, and to be indorsed by them, was negotiated by the acceptor with that indorsement upon it. The drawing and indorsement were forgeries. Held, that if the bill were accepted and negotiated by the acceptor with knowledge of the forgery, he was estopped to deny the indorsement as well as the drawing by B. and W. But, *semble*, where the name of the real party as the drawer is forged, a party who accepted the bill in ignorance of the forgery is estopped to deny the drawing only, but not the indorsement, although in the same handwriting (*Beeman v. Duck*, 11 M. & W. 251).

Where a declaration against the drawer of a bill alleges that A. made the bill and indorsed it to deft., the latter is not estopped by his indorsement to deny these allegations, although it is very strong evidence of them (*Armani v. Castrique*, 13 M. & W. 443).

A., in a letter to B., enclosed a bill drawn on B., and another bill drawn by C. on D., for the same amount. Before the letter arrived B. absconded, leaving a letter for E., authorizing him in B.'s name to indorse any bills which might be remitted to B., and to deliver such bills to F., or to negotiate them and deliver the proceeds to F., against any liability F. might be under for B.'s account. Held, that the authority only applied to bills remitted to B. *as his own property*, and that the bill drawn upon D., and which D. accepted, was not such a bill, and therefore that an indorsement thereof by E., in the name of B. gave no right of action to G., an innocent holder, against D., the acceptor (*Fearn v. Filica*, 8 Sco. N. R. 241; 11 Law J., N. S. 15). *Semble*, if B. had himself indorsed the bill, an innocent holder might have sued upon it (*Ib.*).

On trial of an issue joined on this plea in assumpsit against several defts., as indorsers, it was found, by special verdict, that A. and M. were partners, and became embarrassed, and that by deed of composition all their effects were assigned to defts., in trust, to continue the trade in the name of M., who alone was employed to carry it on; that it was so carried on, and that M. conducted a separate trade on his own account, in the name of M.; that he, after having ceased to carry on his separate trade, indorsed the bills in the name of M., and discounted them, and entered the indorsement

*and discounts in books kept by him, as such agent, which defts. [*559] had opportunities of examining; that he placed the proceeds of his credit at his banker's, and used his credit there by drawing indiscriminately for the purpose of the trade carried on by him, as agent, and for his own private purposes; that the parties with whom the bills were discounted, and of whom plt. was one, were parties with whom bills used to be discounted by the partnership of A. and M.; and that the plt. had also been accustomed to lend M. money for the purposes of his private business; held, that defts. were shown to be indorsers (*Furze v. Sharwood*, 2 Q. B. 388).

A witness stated that he took the bill to the deft., who accepted and indorsed it in the presence of the witness, and then delivered it to him to hold for the plt.: held, evidence to go to the jury of an indorsement to the plt. (*Bluett v. Middleton*, 7 Jur. 561).

We have already considered the evidence required on the traverse of other facts alleged in the declaration, *ante*.

If there be any variance in the statement of the bill, and plt. cannot resort to the common counts, he will be nonsuited: as to such variance, see *ante*, p. 491; as to what may be given in evidence under the common counts, *ante*, p. 481, 295, *et seq.*

Stamp.] By the stat. 43 Geo. III. c. 127, s. 6, if a stamp be of a proper denomination it shall not be ineffectual from its being of a greater value than the stamp acts require. By the 55 Geo. III. c. 184, s. 10, all instruments for or upon which any stamp or stamps shall have been used of an improper denomination, or rate, or duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall be deemed valid and effectual in law, except in cases where the stamp or stamps used on such instruments shall have been specifically appropriated to any other instrument by having its name on the face of it (Rosc. Ev. 156). Where it was on a deed stamp, the bill could not be given in evidence (*Manning v. Livie*, Bayl. B. 107, n. a).

It is, therefore, an unusual ground of defence, that the bill has not a proper stamp, according to the table of stamps under 55 Geo. III. c. 184, and care should be taken to make the objection before the bill has been received in evidence (see *Foss v. Wagner*, 7 Ad. & E. 116, n.) Where there is no stamp or, being a stamp, it is a wrong one, such evidence is admissible under a traverse of the drawing, acceptance, or indorsing (*Dawson v. Macdonald*, 2 M. & W. 26; *McDowall v. Lyster*, 2 M. & W. 52; *Field v. Woods*, 7 Ad. & E. 114; see *Sibley v. Fisher*, 7 Ad. & E. 444).

It is no defence to an action at the suit of an indorsee of a bill or note that it was not stamped at the time of making, if it have a proper stamp when produced at the trial (*Wright v. Riley*, Pea. 173. But see *Green v. Davies*, 6 D. & R. 306; 4 B. & C. 235). So, in an action on a banker's check, it is competent to the deft. to show, under a traverse of the making, that it was post-dated (*Field v. Woods*, 7 Ad. & E. 114). It is not necessary to plead it specially. It seems a special plea would not be demurable (see *Hayward v. Smith*, 4 Bing. N. C. 684). Where a bill was accepted for the accommodation of the drawer, who paid it when it became due, but again indorsed it to another person, who sued the acceptor upon it, it was holden that the re-issuing of the bill, without a fresh stamp, might be specially pleaded (*Lazarus v. Cowie*, 11 Law J. 310, Q. B.; 2 G. & Dav. 487; 6 Jur. 854). A party paying an accommodation bill, after maturity, on

behalf of the acceptor, may bring an action against the drawer, [*560] without having the bill re-stamped *(*Thomas v. Fenton*, 2 C. B. 58).

In assessing damages on a writ of inquiry in an action on a bill, no objection can be made to the stamp on the bill (*Watson v. Glover*, 12 Law J. 184, C. P.; 7 Jur. 68). A bill payable two months after date is properly stamped with a duty imposed on bills payable two months after date, although it be issued before the day on which it bears date (*Williamson v. Garrett*, 2 Nev. & M. 49; *nom.* *Williams v. Jarrett*, 5 B. & Ad. 32). The value of a stamp on a bill under 55 Geo. III. c. 184, sched. 1, tit. "Bills of Exchange," depends on the date on the face of the bill (*Peacock v. Murrell*, 2 Stark. 558; see *Upstone v. Marchant*, 2 B. & C. 10).

A note payable to bearer generally, is in law payable on demand (*White-lock v. Underwood*, 2 B. & C. 157). A note promising "to pay to W., or bearer, the sum of 40*l.*, with interest," requires a five shilling stamp (*Ib.*). A note for 1*l.*, payable to A. B., on demand, is a note payable to bearer on demand, and requires a two-shilling stamp (*Keates v. Whieldon*, 8 B. & C. 7; see *Dixon v. Chambers*, *infra*). A note payable to A. B. generally, is not one payable to bearer on demand, and re-issuable within the first class of notes described in 55 Geo. III. c. 184, sched. part 1; but a note payable otherwise than to bearer on demand (not re-issuable), within class 2, and therefore such a note for 100*l.* requires a stamp for three shillings and sixpence only (*Cheetham v. Butler*, 5 B. & Ad. 837; 2 Nev. & M. 463). A note, whereby B. promised to pay on demand 20*l.*, with lawful interest, until

payment, is not a note payable to bearer on demand (*Dixon v. Chambers*, 1 C. M. & R. 845; 5 Tyrw. 502; wherein *Keates v. Whieldon*, *supra*, is said to be overruled). The reservation of interest is not to be considered an addition to the sum advanced, so as to require a larger stamp (*Pruessing v. Ing*, 4 B. & Ad. 204). A note for 200*l.* with interest reserved, from a day prior to the date, requires a stamp applicable to a note for 200*l.* only (*Wills v. Noot*, 4 Tyrw. 726). A note payable to A. B. or order, on demand, is within the second class of notes mentioned in the schedule, being a note payable in another manner than to bearer on demand, and not exceeding two months after date (*Moyser v. Whittaker*, 9 B. & C. 409; *Ex parte Robinson*, 1 Deac. & Ch. 275). A note payable to A. B. or order, on demand, is subject only to a stamp of three shillings and sixpence (*Armitage v. Berry*, 5 Bing. 501; 3 Moo. & P. 211). It is distinguishable from a note payable to bearer on demand, which may be re-issued after payment (*Ib.*). A note for 11*l.* 10*s.* made payable on demand to the bearer, with interest for value received, requires a two-shilling stamp (*East v. ———*, 2 M. & R. 8). A note payable two months after sight, requires a stamp as for a note payable more than sixty days after sight, or two months after date; as the two months begin to run, not from the day of the date, but on the presentment for sight (*Sturdy v. Henderson*, 4 B. & A. 592). *Semble*, a note stamped as an agreement, with a stamp of equal value to the proper note stamp, is admissible in evidence, unless it be shown that it was stamped after it was written (*Wheatley v. Williams*, 1 M. & W. 532; 2 Gale, 140). A note payable at two months after date, to the maker's own order, for the sum of £ ; and bearing a four shillings and sixpenny stamp, is properly stamped (*Hooper v. Williams*, 12 Jur. 270, Ex.). By 31 Geo. III. c. 25, s. 19, a bill or note not duly stamped cannot be pleaded or given in evidence, or admitted in any court to be good or available for any purpose; it cannot be looked at by the jury (*Jardine v. Payne*, 1 B. & Ad. 663). Though a note has not the proper stamp, so that it cannot be given in evidence, the plt. may go into evidence of the debt for which it was given (*Wilson v. Kennedy*, 1 Esp. 245; **Brown v. Watts*, 1 Taunt, 353; *Wilson* [*561] v. *Vyser*, 4 Taunt. 288; *Alves v. Hodges*, 7 T. R. 241). Although a note without a stamp cannot be received in evidence as a security, or to prove the loan of money, it may be looked at by the jury with a view to ascertain a collateral fact (*Gregory v. Fraser*, 3 Camp. 454).

In debt the deft. pleaded payment. The plt. gave, in evidence in chief, a document purporting that the deft. admitted the debt, but that it had been paid by a bill of exchange: held, that the unstamped bill was admissible in evidence for the plt. to negative the alleged payment (*Smart v. Nokes*, 6 Man. & G. 911).

A promissory note contained the following sentence:—"And I have lodged with Mr. Thorn the counterpart leases granted by me to A. B., C. D., &c., as a collateral security for the 500*l.*" (the amount of the note and interest). Held, that it did not require any other than the issued note stamp (*Fancourt v. Thorn*, 9 Law T. 256).

The following have been held to be promissory notes:—"John Mason, 14 February, 1836, borrowed of M. A. M., his sister, the sum of 14*l.* in cash, as per loan, in promise of payment of which I am truly thankful for; it shall never be forgotten by me, John Mason, your affectionate brother" (*Ellis v. Mason*, 7 Dowl. P. C. 593). So, "I O U 20*l.*, to be paid on 22nd inst., W. Brooks" (*Brooks v. Elkins*, 2 M. & W. 74). So, "Gentlemen, I have received the imperfect book, which, together with the cash overpaid in the settlement of your account, amounts to 8017*l.*, which sum I will pay you within two years from this date. I am, &c., Thos. Williams" (*Wheatley v.*

Williams, 1 M. & W. 533). But the following, "I, R. J. M., owe Mrs. E. the sum of 6*l.*, to be paid by instalments, for rent—Signed, R. J. M."—has been held not to be a promissory note, as no time was stipulated for the payment of the instalments (*Moffat v. Edwards*, C. & M. 16). A paper signed by the deft. was in the following form: "I O U 85*l.*, to be paid May 5th:" held, that this was a promissory note, and required a stamp (*Waithman v. Elsee*, 1 C. & K. 35).

Where the plt. deposited with the deft. a sum of 500*l.*, for the purpose of a speculation in foreign stock, and the deft. signed the following memorandum:—"Bristol, August 14, 1843. Memorandum. Mr. S. has this day deposited with me 500*l.*, on the sale of 10,300*l.* 3*l.* per cent. Spanish, to be returned on demand:" held, that this was not a promissory note, and did not require a stamp as such (*Sibree v. Tripp*, 15 M. & W. 23; 15 Law J. 318, Ex.). So, the following instrument:—"Drury v. Vaughan; in consideration of W. D. not taking any further proceedings in the above action, I hereby undertake with the said W. D., that I will pay him 375*l.* every quarter of a year from this day until the whole of the principal money now due from Messrs. J. and T. Vaughan to Mr. D., 26*l.* 1*s.*, with lawful interest, be paid and satisfied, the first of such quarterly payments to become due on the 30th of October next. It is understood that this undertaking is not to be a release or discharge of the note signed by Messrs. V. to the said W. D., on, &c., but as an additional security for the abovementioned amount now due on such note, with the interest" (*Drury v. Macauley*, 16 M. & W. 146; 16 Law J. 31, Ex.; 1 N. P. C. 587). J. M. by indenture, assigned to the plt. a ninth part of his share in the residue of the estate of T. H. deceased. By an order of the 29th of July, 1842, made in Chancery, of *Powell v. Norwood*, the Vice-Chancellor ordered the defts. in that suit to retain 250*l.* being part of the produce of J. M.'s share of the residuary estate of T. H. to be paid to such person as the present deft. and J. M. should jointly direct. It was afterwards agreed between the parties that 50*l.* to be considered as part of the sum of *250*l.* should be paid by the deft. to [*562] the solicitors for J. M. and the plt. An action having been brought to recover this sum of 50*l.* the plt. tendered in evidence the following document:—"To the executors of T. H. deceased. (*Powell v. Norwood*.) Gentlemen,—We do hereby authorize and require you to pay to Mr. George Powell, or his order, the sum of 250*l.* being the amount directed by the order of the 29th of July last, to be paid to our order. We are, gentlemen, your very obedient servants, J. M. Dec. 16th, 1842." This document was signed by J. M. only, and was unstamped: held (*Rolfe, B. dissente*), that it was not a bill of exchange, and that it was admissible in evidence without a stamp (*Russell v. Powell*, 14 M. & W. 418).

A receipt for interest on the back of a note without a stamp, and which cannot, therefore, be given in evidence, is evidence to go to the jury, from which they may presume that from the payment of so much for interest, there was a principal sum in proportion due (*Manley v. Peel*, 5 Esp. 121). When fraud has been committed, by giving a check on a banker which the party knows will not be honoured, the check, though otherwise inadmissible for want of a stamp, may be given in evidence to prove the fraud (*Keable v. Payne*, 8 Ad. & E. 555).

An instrument by which a party promises to pay a certain sum of money, and also such other sums as by reference to his books he owed to another, requires an agreement stamp (*Smith v. Nightingale*, 2 Stark. 375). So, a bill of exchange expressing the terms of an agreement between a landlord and an incoming tenant, requires a similar stamp (*Nicholson v. Smith*, 3 Stark. 128). The 55 Geo. III. c. 184, sched. 1, enacts, that orders for the

payment of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed, are to be placed on the same footing as bills of exchange; therefore, a letter written from A. to B., requesting him to pay C. and Co., or their order, 600*l.* out of the first proceeds of a stock of gunpowder then in the hands of B., and charge the same to the account of A., although followed by a subsequent correspondence between the parties, was held to require a stamp, as an order for the payment of money within that act, and consequently that an agreement stamp affixed on payment of a penalty was improper (*Butts v. Swann*, 4 Moo. 484; 2 B. & B. 78). Where C. was directed, by a letter from B., to pay out of the proceeds of his goods, then unsold, in his, C.'s hands, a certain sum of money to D., which C. consented to do by letter to B., (which letter was stamped with an agreement stamp,) and these letters being given in evidence to prove that the money was paid by the order of B.: it was holden, that they did not amount to an agreement between B. and C.; that the stamp was improper, and that the order itself should have been stamped as being an order for the payment of money out of a fund, which might or might not be available within the meaning of the statute (*Firbank v. Bell*, 1 B. & A. 36). The consignor of goods sent to the consignee the following order: "Please to pay to M., on account of G. and Co., the proceeds of a shipment of twelve bales of goods, value about 2000*l.*, consigned by me to you." The consignee, in a letter by way of answer, agreed to do so. Held, that neither of these two instruments required such a stamp as is imposed on bills, drafts, or orders for the payment of money (*Jones v. Simpson*, 2 B. & C. 318). Where B. drew a check at the place of his residence, four miles from Llanelly, on unstamped paper, dated at Llanelly, upon a banker there, and delivered it to his farming bailiff to give to C., in whose favour it had been drawn, and the bailiff discounted it with *A., a banker at Carmarthen, twelve miles from Llanelly, and five days after the drawer had stopped payment, A. [*563] not having presented the check: held, not admissible in evidence, because void for want of a stamp (*Waters v. Brogden*, 1 Y. & J. 457).

Where a note, payable on demand, has been indorsed for the accommodation of the maker, in order to be deposited with his creditor to secure a debt due, if the maker of the note pay the debt, and the bill be re-delivered to him, it is no longer negotiable; where, therefore, J. H. and H. being indebted to B. in 200*l.*, B. demanded security for the debt, J. H. and H. thereupon requested the debt. to indorse, for their accommodation, a promissory note to be drawn by them, in order to deposit the same with B., by way of security for their debt, the debt. accordingly indorsed a note so drawn for 200*l.*; for that purpose, and for no other intent whatsoever; and J. H. and H. delivered it to B., and afterwards J. H. and H. paid their debt to B., who thereupon re-delivered the note to them; the debt. being subsequently sued by a *bona fide* indorser, to whom the note had been indorsed by J. H. alone: held, on general demurrer, that a plea, setting out the above facts, showed that the note had been satisfied, and that having got back into the hands of the parties ultimately liable, it was no longer issuable under the stamp act, 55 Geo. III. c. 184, s. 19, (*Bartrum v. Caddy*, 1 Ad. & E. 275; 1 P. & D. 207).

Where a joint and several note for securing the repayment of a loan, was signed by one, and some days after by the other party, it was held not to require an additional stamp, if the last signature had been put before the money was paid, or if the party last signing promised to sign before the advance, although he had not signed until afterwards (*Ex parte White*, 3 Deac. & Ch. 366; see *Clerk v. Blackstock*, Holt, 474).

Payment by an accommodation drawer is equivalent to payment by an acceptor; a bill re-issued after such payment is therefore, in law, a new bill, and requires a fresh stamp (*Lazarus v. Cowie*, 3 Ad. & E. 459); and the defence is available by plea (*Ib.*).

An unstamped bill, drawn in England, but purporting to be drawn abroad, came into the hands of an indorsee for value without notice, who brought an action upon it against the acceptor: held, that the indorsee could not recover, as the acceptor was not estopped from showing that the bill was void for want of a stamp, although cognizant of this fact when he made the acceptance (*Steadman v. Duhamel*, 14 Law J., N. S. 270). A party who admits his handwriting to a bill of exchange, under R. G. 4 Will. IV. r. 20, is not thereby precluded from objecting to the sufficiency of the stamp (*Vane v. Wittington*, 2 Dowl. N. S. 757; 7 Jur. 95).

The admissibility of a bill in evidence, which purports to be a foreign one, and which is objected to on the ground of its being an inland one, and not bearing a sufficient stamp, is a question for the judge and not for the jury (*Bartlett v. Smith*. 11 M. & W. 483; 7 Jur. 448). A bill drawn in England upon a person abroad, but accepted by him payable in England, is an inland bill, and requires a stamp as such (*Amner v. Clarke*, 2 C. M. & R. 468; 5 Tyrw. 942). A bill of exchange must, in the absence of a presumption to the contrary, be taken to have been drawn on the day on which it bears date (*Anderson v. Weston*, 8 Sco. 583).

A bill, or note, made abroad, must be stamped according to the law of the country where it is made (*Alves v. Hodgson*, 7 T. R. 241; *Phil. Ev.* 488). Deft. must, however, prove that a stamp was necessary by the law of such country; and, for this purpose, an authenticated copy of the law of [*564] such country ought to be produced (*Ib.*; **Buchanan v. Rucker*, 1 Camp. 65); and no English stamp is, in the case of such foreign bill, necessary. And a bill sketched and accepted here, and transmitted to a person abroad for his signature as drawer, is a foreign bill, and does not require an English stamp (*Boehm v. Campbell*, Gow, 56). And, where a bill was drawn in Ireland, and blanks left for the date, sum, time when payable, and the name of the drawee, and transmitted to England, where it was completed and negotiated, it was held, that this was to be considered as a bill of exchange, from the time of signing and indorsing it in Ireland, and that an English stamp was not necessary (*Snaith v. Mingay*, 1 M. & S. 87). So, where a bill of exchange was drawn in Jamaica, upon a stamp of that island, with a blank for the payee's name, and transmitted to England, where a *bona fide* holder filled in his own name as payee, it was considered that no English stamp was necessary (*Crutchley v. Mann*, 5 Taunt. 529; S. C. 1 Marsh. 29). But, if a bill, however, be drawn in England, though dated abroad, it cannot be enforced here without an English stamp (*Jordaine v. Lashbrooke*, 7 T. R. 601; *Abraham v. Dubois*, 4 Camp. 269).

In an action by the payee against the drawer of a bill, the declaration stated that the latter drew it "at St. Helena, to wit, at Westminster," and did not aver a protest either for non-acceptance or non-payment; on the production of the bill it was dated at St. Helena, and not stamped; on an objection that it was inadmissible as an inland bill for want of such stamp, and that plt. had given no evidence of a protest: held, that as there was evidence of a subsequent promise by the deft. to pay the amount of the bill, coupled with a letter written by his attorney offering terms for payment, it was a waiver of these objections, although the offer was made without prejudice (*Patterson v. Becher*, 6 Moo. 319). A bill was drawn by A., resident abroad, upon B., resident in England. In an action thereon, the plt. proved that it was seen abroad immediately after the date of it: held, that it was

not necessary, in order to show that it was a foreign bill, also to prove that the bill was then in an unaccepted state (*Dempilliers v. Holden*, 2 H. & W. 394). If an action be brought on a bill not having an English stamp, and purporting to be drawn at Paris, the deft. will be entitled to a verdict, if it appear from the evidence that the plt. must have been in England on the day on which it purports to have been drawn. But it will be sufficient to enable the plt. to recover if the bill were drawn at a place in France nearer to England than Paris, though it be dated as from there (*Biré v. Moreau*, 2 C. & P. 376; 4 Bing. 57). Where a bill is actually drawn abroad, it cannot by implication of law be deemed to require a stamp within the meaning of the statute (*Holdsworth v. Hunter*, 10 B. & C. 449). Where the deft. relies upon the want of a stamp on a bill purporting to be drawn abroad, but in fact in England, he ought to give evidence of this before the bill is allowed to be read in evidence (*Bartlett v. Smith*, 12 Law J. 287, Exch.). It will be insufficient merely to prove that the drawer was in England at the time the bill bears date, but the fact must be established by more positive evidence (*Abraham v. Dubois*, 4 Camp. 269; but see *Biré v. Moreau*, *infra*). Payment of money into court upon a count on a bill, waives the objection as to the stamp (*Israel v. Benjamin*, 3 Camp. 40).

Where the die of a bill of exchange stamp was discontinued, under the provisions of 3 & 4 Will. IV. c. 97, after a certain day, before which day an acceptance was written on paper stamped with the old die, but the bill was not drawn until after the day: held, that the bill could not be said to be in existence until it was drawn, and could not be received in evidence (*Abraham v. Skinner*, 12 Ad. & E. 763). *This objection must be taken under a traverse of the acceptance, it cannot be specially [*565] pleaded (*Dawson v. Macdonald*, 2 M. & W. 26).

A check having upon it, in print, the words "Dorchester Old Bank, established 1786," *prima facie* specifies the date of the place where it was drawn, within 9 Geo. IV. c. 49, s. 15, and therefore does not require a stamp (*Strickland v. Mansfield*, 10 Jur. 289).

What Alteration of a Bill requires a New Stamp.] Where a material alteration has been made in the bill, but the bill is declared on in its original form, deft. may rely upon the variance between the bill declared on and that produced in evidence (see "*Variance*," p. 491). Where the bill is declared on in its altered form, it depends upon the plea on the record, whether the deft. can insist upon the alteration as vitiating the bill. Under *non acceptit* he may show that the alteration is such as to render a new stamp necessary (*Cock v. Coxwell*, 2 C. M. & R. 291; *Calvert v. Baker*, 4 M. & W. 407; and see the observations of Parke, B., on this case, in *Mason v. Bradley*, 11 M. & W. 594; *Davidson v. Cooper*, ib. 787; and *Parry v. Davidson*, 13 M. & W. 780; in all other cases it would seem that the alteration must be specially pleaded (*Sweeting v. Halse*, 9 B. & C. 365; *Hemming v. Trenery*, 9 Ad. & E. 926; *Mason v. Bradley*; *Davidson v. Cooper*; *Parry v. Davidson*, *supra*; and see *Gould v. Combs*, 1 C. B. 543; 14 Law J., N. S. 175; 9 Jur. 494). B., C., D., and E. gave a joint and several promissory note to A. for 200*l.* and interest, to secure a loan to B. Upon the death of E., B. obtained the note from A. to procure the signature of an additional party; and, in order to secure its return, B. & C. signed the following document:—"I O Mr. A. the sum of 200*l.* for value received." B. returned the note to A. with F.'s name added; but the I O U was not given up. The alteration all parties assented to. *Quære*, whether the addition of a fifth name was such a material alteration as to avoid the note (Ib.). Assuming it to be so: held, in an action by A. against B., that inasmuch as the note was free from objection

at the time the I O U was given (that is, before the alteration), it was admissible in evidence in support of a count upon an account stated by the I O U (Ib.).

For the form of a plea of *non accepit*, see *ante*, p. 548.

Special Plea of Alteration.

Commence, as ante, p. 548.] And for a further plea as to the said (*first*) count of the said declaration, the deft. saith, that the said supposed bill of exchange at the time of the making of the same, and at the time of the acceptance thereof by the deft., bore date, to wit, the first day of August, in the year of our Lord, 1846; and the deft. further saith, that after the said making and acceptance thereof, and after the same was completely issued and negotiated, to wit, by the deft. as acceptor, as aforesaid, and before the said indorsement thereof, to wit, on (&c.), the said A. B., without the consent of the deft., altered and changed the said bill in a material part thereof, to wit, the date, by obliterating and erasing the said date of the first day of August, A. D. 1846, and by inserting instead thereof the date of the said — day of — A. D. —, as and for the true date of the said supposed bill; and the deft. further saith, that the said supposed bill of exchange was not so altered as aforesaid, to correct any mistake made in the drawing thereof, or in the original intention of the parties thereto, or any of them (*verification. Add plea to other counts, if any. Signature.*)

Notes on Plea, and Evidence in Support of it.

Assumpsit, by indorsee against acceptor; plea, that before the bill became due, and whilst it was “in full force and effect,” the date of [*566] *it was altered by the drawer, whereby it became void: held, that the plea was bad, because it did not allege that the alteration was made after the acceptance (*Langton v. Lazarus*, 5 M. & W. 629). To a declaration by the payee against the makers of a promissory note, for the payment of 145*l.* 4*s.* on or before the 15th of April, 1845, the defts. pleaded that by the said note, at the time of the making, the defts. promised to pay the sum therein mentioned, without specifying any time for the payment; that after the note was made and issued, and was complete, and delivered to the plt., the note was, by the defts.’ consent, but without the same being restamped, altered by the plt. in a material part, by making the same to be payable, on or before the 15th of April, 1845, and by the insertion of the words “and to be paid on or before the 15th of April, 1845.” Replication, that before and at the time of making, issuing, completing, and delivering the note to the plt., and before the said alteration was made, it was meant and intended by the plt. and the defts., that the note should be payable on or before the 15th of April, 1845, and that the words so inserted in the note should be inserted therein, but by the mistake of the plt. and the defts., the note was made and issued, and was complete and delivered to the plt., without specifying any time of payment; that the alteration was made with the intent and purpose of correcting the mistake, and making the note payable according to the intention of the plt. and the defts., within a reasonable time and before negotiation. Rejoinder, that *before* and at the time of the making, issuing, and completing of the note, and before the alteration, it was not intended by the plt. and the defts. that the note should be made payable on or before the 15th day of April, 1845. Held, on demurrer, first, that the rejoinder was bad, as taking too large a traverse by putting in issue the meaning of the parties “before” as well as “at” the time of making the note; secondly, that the plea afforded no answer to the declaration, as the stamp laws authorized the stamping of certain notes before the trial, and the plea did not negative all possibility of this being one of those cases. *Seemle*, that the replication was bad, in not showing that the promissory note was not an instrument binding upon the parties before the alteration. *Quere*, whether the stamp laws can be pleaded in bar of an action on a promissory

note or bill of exchange; but that, at all events, they can be only so pleaded in cases where the instrument cannot be made good by being stamped before the trial (*Bradley v. Bardsley*, 15 Law. J. 115, Ex.).

Quere, whether the addition of another maker of a promissory note is a sufficient material alteration to avoid the note as against a prior maker (*Gould v. Combs*, 9 Jur. 494; 1 C. B. 543; see *Clarke v. Blackstock*, Holt, N. P. 474; *Cotten v. Simpson*, 8 Ad. & E. 136).

But on a foreign bill of exchange, drawn in, but payable out of, Great Britain, if drawn singly, and not in a set, the same duty is payable as on an inland bill of the same amount and tenor. As to foreign bills drawn *in sets*, according to the custom of merchants, see the tables under 55 Geo. III. c. 184; as to the sums payable for every bill of each set, Bayl. B. 29.

A bill properly stamped, and put into circulation, and afterwards taken up by the drawer, may be circulated again without a fresh stamp, as it continues negotiable till it has been paid or discharged by the acceptor (per Lord Ellenborough, *Callow v. Lawrence*, 3 M. & S. 97).

In a joint and several promissory note, by three persons, after two of the makers had signed, the third, before he signed, caused the words "on account of club, held at Mr. D. Duffield's," to be *introduced [*567] after "value received:" held, that as the note was not complete until the third maker had signed it, the alteration did not render a fresh stamp necessary (*Wright v. Inshaw*, 1 Dowl. N. S. 802; 6 Jur. 857).

Where A. indorsed a bill for the accommodation of B., the date of which was afterwards altered without A.'s knowledge or consent; after the bill became due, A., on being pressed by C., the holder, gave him his note for the amount of the bill; the bill was shown to him at the time, but he did not recollect the original date of the bill: held, in an action by C. against A., that these facts constituted a good plea, and that it was no answer to say that A. had the means of knowing the alteration, of which ordinary care would have enabled him to have availed himself (*Bell v. Jardine*, 11 Law J. 195).

If a complete bill be altered in a material point after negotiation, or after it is due, though before negotiation, a fresh stamp is necessary (*Bowman v. Nichol*, 1 Esp. 81; 5 T. R. 537); and, though with the consent of all parties, if it has once issued (*Wilson v. Justice*, cited Bayl. B. 118; 2 Peak. Ad. Ca. 96; *Bowman v. Nichol*, *infra*; *Kennerly v. Nash*, 1 Stark. 452; *Walton v. Hastings*, 4 Camp. 223; *Outhwaite v. Luntley*, ib. 179; *Trapp v. Spearman*, 3 Esp. 57; *Butler v. Taylor*, 15 East, 412). An alteration, though by a mere stranger, will vitiate the bill (*Master v. Miller*, 4 T. R. 320; 2 H. Bl. 141). An alteration in the date, with assent of the acceptor, before negotiation by the drawer, is not such a re-issuing as to render a new stamp necessary (*Ley Kariff v. Ashford*, 12 Moo. 281). If a bill be drawn on a proper stamp, dated 2d September, payable 21 days after date, and it be afterwards altered, and made payable 51 days after date; and on 30th September is again altered to 21 days after date, and the date is brought forward to 14th September: held, that this requires a new stamp, although the alterations are made with consent of the acceptor before the bill is negotiated (*Bowman v. Nichol*, 5 T. R. 537). An accommodation bill, altered in its date before negotiation, with consent of the parties, does not require a new stamp; and, therefore, if it be in the hands of a *bona fide* holder for a valuable consideration, the acceptor, who had assented to such alteration before the bill became due, cannot avail himself of such an objection (*Downes v. Richardson*, 5 B. & A. 674; Bayl. B. 124).

Where, after the bill has been accepted and before it is delivered to the drawer, an alteration is made by a third party in the date, it is for the jury

to say, judging from all the circumstances, whether such third party made the alteration with the acceptor's consent or as his agent, and in either case the acceptor will be liable (*Whitefield v. Collingwood*, 1 C. & K. 325, *Coltman*). A bill altered in date after acceptance, but before it was put into the indorsee's hands, was held good (*Johnson v. Garnett*, 2 Ch. R. 122). An alteration of the date after acceptance, accelerating the payment, vitiates the bill, and no action can be brought upon it, even by an innocent holder for valuable consideration (*Master v. Miller*, *supra*). But though altered by drawer after acceptance, with the consent of payee, but without the actual assent of the acceptor, and which alteration makes the bill payable 21 days later, yet the acceptor is liable, if it appear to be an accommodation bill, and the acceptor have agreed to accept any bill drawn by the drawer, which is strong presumptive evidence that the latter was sufficiently the agent of the acceptor to make the alteration (*Johnson v. Gibb*, 2 Ch. R. 123). A bill which, after delivery by the drawer to the payee, is post-dated by the son of the payee, at the acceptor's request, without any communication [*568] from the drawer, is *void (*Walton v. Hastings*, 2 Ch. R. 121, *ante*, p. 567). And, *semble*, if the drawer had assented, a new stamp would have been necessary (*Ib.*). A bill drawn on the first of August, at two months, by A. on B., payable to the order of the drawer, and accepted and re-delivered by B. as a security for a debt, and kept by A. for 21 days, cannot be altered in its legal effect by bringing forward the date to the 21st, without a new stamp, though by the consent of the acceptor, and before indorsement and delivery to a third person; the alteration not being made to correct a mistake in the original form of the bill, which was drawn conformably to the original intentions of the parties, and available in that form (*Bathe v. Taylor*, 15 East, 412; and see *Cole v. Perkin*, 12 East, 471).

Where a bill indorsed by the drawer was left with the drawee, who without consent of the drawer altered the date from the 5th to 15th of March, before he accepted it: held, the alteration rendered the bill void (*Outhwaite v. Luntley*, 4 Camp. 179). Nor would the consent justify the alteration with a view to the stamp laws after the bill had been negotiated (*Ib.*).

A bill of exchange was drawn in Paris for cent.-vingt.-quatre livres sterling et deux pence upon, and was accepted by B. in London, for 122*l.* 0*s.* 2*d.*, and returned without altering the words in the body of the bill. When produced at the trial, the word "quatre" had a line drawn through it, and it was altered to make it conformable with the acceptance: held, that the alteration did not vacate the bill, inasmuch as it appeared to have been made with the consent of the acceptor, and in accordance with the original intention of the parties; that the bill might be declared upon as a bill drawn for the sum for which it was accepted; and that it lay upon the party objecting to the want of a stamp to show that the alteration was made in England (*Hamelin v. Bruck*, 10 Jur. 1094, Q. B.; 15 Law J. 243, Q. B.; 1 N. P. C. 439).

So, a mistake in the date may be corrected (*Bayl. B. 119*; *Jacobs v. Hart*, 2 Stark. 45; *Kennerley v. Nash*, 1 Stark. 452; *Walton v. Hastings*, *ib.* 215). And, where a bill had been dated by mistake 1822 instead of 1823, and the agent of the drawer and acceptor, to whom it had been given to be delivered to the indorsee, without their knowledge or consent, corrected the mistake, it was held that such alteration did not vacate the bill (*Brutt v. Picard*, R. & M. 37; see *Hutchins v. Scott*, 2 M. & W. 809). Inserting a mere memorandum, to say where a bill is to be payable, if it give a right direction, does not require a new stamp (*Trapp v. Spearman*, 3 Esp. 57).

The holder of a bill for 18*l.*, which had been dishonoured, agreed to take 8*l.* in cash, and another bill for the balance, from the drawer, and a bill was accordingly drawn upon the same acceptor for that amount; while in the

hands of the drawer, the acceptor altered the date, without the knowledge of the drawer; held, that the latter bill being a nullity, the first was not discharged, and that the drawer was liable upon it (*Sloman v. Cox*, 1 C. M. & R. 471). If, on presentment for acceptance, the drawee alter the bill as to the time of payment, and accept it so altered, he vitiates the bill as against the drawer and indorsers; but, if the holder acquiesce in such alteration, it is a good bill as between him and the acceptor (*Paten v. Winter*, 1 Taunt. 420), and he cannot maintain an action against the acceptor for thereby destroying the bill (lb.). Indorsee against acceptor of a bill, which had been altered by inserting in the place of "sight," after the acceptance, the word "date," in which form it had been originally drawn: held, that the acceptor being thereby discharged, the plt. could not recover at all, for, as the deft. was *liable only by virtue of the instrument, that being [*569] vitiated, his liability was at an end (*Long v. Moore*, 5 Esp. 155).

An alteration in the rate of interest to be paid on the bill will render a new stamp necessary (*Sutton v. Tanner*, 7 B. & C. 416); or inserting words, rendering a bill or note (*Kershaw v. Cox*, 3 Esp. 246) negotiable, which was not so originally, will make a fresh stamp necessary. But if the alteration be merely to correct a mistake, and in furtherance of the original intent of the parties, as inserting the words "or order" in a bill intended to be negotiable, it will not require a new stamp (*Cox v. Kershaw*, 3 Esp. 246; see *Knill v. Williams*, *infra*; *Brutt v. Picard*, Ry. & M. 37; *Attwood v. Griffin*, ib. 425; *Jacobs v. Hart*, 6 M. & S. 142; *Byrom v. Thompson*, 11 Ad. & E. 31; *Bradly v. Bardsley*, *ante*, p. 566). Or inserting words in a bill or note, originally expressed to be for value received, generally stating such value to have been received on a particular account (*Knill v. Williams*, 10 East, 431), is a material alteration, and makes a new stamp necessary. And, where the drawer of a bill of exchange accepted generally, since 1 & 2 Geo. IV. c. 78, added the words "*payable at Ransom and Co., bankers, London*," without the knowledge of the acceptor, and then indorsed it for valuable consideration, the bill being over due, and the indorsee privy to the alteration, it was held that the alteration was in a material part of the bill, as the right of an indorsee to sue his indorser would, according to the altered bill, be complete, upon default made at the banker's, and notice thereof; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such non-payment (*Macintosh v. Haydon*, 1 R. & M. 362; see 1 Camp. 82, n.). But, in an action by payee against acceptor, it appeared that the bill had originally been accepted by the deft. payable at his own house in King's Road, Chelsea; but, six weeks after the delivery of the bill to the plt., the deft. at the request of the plt. altered the description by making it payable at Bland's, Great Surrey Street, Blackfriars: held, that this alteration was immaterial (*Walter v. Cutley*, 2 C. & M. 151; *Desbrowe v. Witherby*, 1 M. & R. 438; 6 C. & P. 758; *Taylor v. Moseley*, ib. 437).

The introduction of words which do not affect the responsibility of the parties, after the bill has been accepted, is immaterial (*Marson v. Petit*, 1 Camp. 82, n.); therefore, where the bill was addressed Messrs. J. C. and Co., and the words "and Co." were struck out, and the word "and" inserted so as to make the address "Messrs. J. and Co., and it did not appear when the alteration was made: held, immaterial, though made after acceptance, as it did not vary the liability of the parties (*Farquhar v. Southey*, Moo. & M. 14; 2 C. & P. 749).

In an action by the indorsee against the acceptor, the bill appeared, on inspection, to have been altered in amount, and after the acceptance were the words "at Cockburn's," which were not in the deft.'s handwriting, and

there was no evidence as to when or by whom they were made; held, that it was for the jury to say, under the circumstances, whether the bill had been altered after acceptance, and that, if they thought it had, the plt. could not recover (*Taylor v. Moseley*, 6 C. & P. 273). A bill drawn by A., payable to his own order, and accepted by B. generally, was altered with the consent of B. while it continued in the hands of A., by the addition of a particular place of payment to the acceptance, this alteration does not vitiate the bill so as to prevent the acceptor from being liable upon it (*Stevens v. Lloyd*, Moo. & M. 292). But where to a similar acceptance, the drawer adds the words "payable *at Mr. B.'s, Chiswell Street," without [*570] the consent or knowledge of the acceptor: held, a material alteration, and that it discharged the acceptor (*Cowie v. Hallsall*, 4 B. & A. 197; decided after *Rowe v. Young*, 2 B. & B. 165). Where, in an accommodation bill payable to bearer after acceptance, the words "or order" are added, the bill does not require a fresh stamp (*Atwood v. Griffin*, 2 C. & P. 368; *Kershaw v. Cox*, 2 Esp. 246; *Byrom v. Thompson*, 3 P. & D. 71; 11 Ad. & E. 31). Where the drawer of a bill accepted payable at B. and Co.'s, after keeping it three or four years, indorsed it to plt., erasing the name of B. and Co., and substituting E. and Co., without the knowledge of the acceptor, B. and Co. having failed since the acceptance: held, that plt. could not recover against the acceptor (*Tidmarsh v. Grover*, 1 M. & S. 735). Where a note, after several years, was altered by consent of the parties, after several years' payment of interest from 3 to 2½ per cent.: held, that it was void, but was still evidence of the terms of the original loan (*Sutton v. Toomer*, 7 B. & C. 416).

Where a joint note, signed by the directors of a joint-stock company, was afterwards altered by the defts. into a joint and several note without the knowledge or authority of the directors, of whom the deft. was one, and in answer to a letter from the holders, informing the deft. of the dishonour of the joint and several note of himself and the other directors who were parties to it, he said that this letter should have his earliest attention: held, that this did not amount to an assent to the alteration of the note by the deft., and that he was not bound thereby (*Perring v. Hone*, 12 Moo. 135; 4 Bing. 28). If the holder of two joint and several notes of A. and B., one of which only is due, receives from A. a sum exceeding the amount of the note which is due, and exceeding A.'s moiety of the two sums for which he is liable on both notes, and gives up the note which is due, and erases A.'s name from the other note, A. is discharged, and B. also (*Nicholson v. Revell*, 6 Nev. & M. 192; 4 Ad. & E. 671). A. and B., having made their joint and several promissory note to secure the debt of A., C. afterwards added his name to it: held, that the addition of C.'s name was not such an alteration as rendered the note void against A. and B., and that therefore A. was entitled to recover from B. the amount which he had paid on account of it (*Cotten v. Simpson*, 8 Ad. & E. 136; 3 Nev. & P. 248).

An alteration of a bill or note, so as to make a new stamp necessary, is not material until it is in the hands of some one who is entitled to claim payment, even though it is accepted and indorsed (*Downes v. Richardson*, 5 B. & A. 674; 1 D. & R. 332; *Ley Kariff v. Ashford*, 12 Moo. 231; *Webster v. Maddocks*, 3 Camp. 1). One, having made and signed a promissory note, handed it to a third person, the payee being present; but, before it was given to the payee, it was altered by consent of all parties: held, that this giving it to the third person was not an issuing of it, and that it did not require a new stamp (*Sherrington v. Jermyn*, 3 C. & P. 374). An alteration, before the bill is complete, by being signed by all parties (*Wright v.*

Inshaw, 1 Dowl. N. S. 802); or by being accepted (Kennerly v. Nash, *supra*); or before negotiation (Cardwell v. Martin, *supra*); or if altered in respect of a place where it is to be payable (Walter v. Cubley, 2 C. & M. 151; Trapp v. Spearman, 3 Esp. 57; Stevens v. Lloyd, Moo. & M. 292), does not require a new stamp, and in such cases the acceptor will be liable.

In the absence of evidence to the contrary, a bill of exchange must be taken to have been issued at the time it bears date (Anderson v. Weston, 6 Bing. N. C. 296; 4 Jur. 105). "A bill is *prima facie* to be *considered as issued, as soon as it is passed away by the drawer or [*571] maker (Walton v. Hastings, 4 Camp. 223; 1 Stark. 215), or accepted by the drawee" (Bayl. B. 123; Tidmarsh v. Grover, 1 M. & S. 735). An exchange of acceptances is a sufficient negotiation to render a new stamp necessary (Cardwell v. Martin, 1 Camp. 79, 180 b, 5; 9 East, 190); and so is the delivery to the drawer of a bill drawn for his accommodation, and payable to his own order (Calvert v. Roberts, 3 Camp. 342). And the alteration of a bill by the drawee, after it has been drawn and indorsed, and before it is accepted, postponing the time of payment, renders the bill void (Outhwaite v. Luntley, 4 Camp. 180). But an accommodation bill is not issued so as to make an alteration fatal, until it is in the hands of a person entitled to treat it as a security available in law (Downes v. Richardson, 5 B. & A. 674). An accommodation bill, payable to the drawer's own order, cannot be altered after acceptance, and an attempt to negotiate it, though before it is actually negotiated (Calvert v. Roberts, 3 Camp. 343). Where the alteration is from a note to a bill before negotiation, it does not require a fresh stamp (Webber v. Maddocks, 3 Camp. 61; Taylor v. Moseley, 6 C. & P. 273; see Semple v. Colt, 8 Law J. 155, Ex.; Henman v. Dickinson, 5 Bing. 183; Falmouth (Earl) v. Roberts, 9 M. & W. 471; Knight v. Clements, 8 Ad. & E. 215). A bill altered before negotiation, without the consent of the acceptor, may be enforced against him, if he assent to the alteration (Downes v. Richardson, 5 B. & A. 674; Kennerly v. Nash, 1 Stark. 452; Jacobs v. Hart, 2 Stark. 45); otherwise plt. will be nonsuited (Knight v. Clements, 8 Ad. & E. 215).

Where the alteration is apparent on the face of the bill, on its production in evidence it lies on the holder to prove that the alteration in the bill was made before negotiation (Johnson v. Marlborough (Duke of), 2 Stark. 313; Knight v. Clements, 8 Ad. & E. 215; Bishop v. Chambre, Moo. & M. 116). It lies on him to give some evidence to explain it (Clifford v. Parker, 2 M. & G. 890). But not if there be no plea in denial (Sibley v. Fisher, 7 Ad. & E. 444). But proof that it was in the drawer's hands after it was accepted, will be *prima facie* evidence for that purpose (Johnson v. Marlborough (Duke of), *supra*); and where the attestation is visible, it cannot be left to the jury to say on the mere inspection, without further evidence, whether it was made at or after the original making of the bill (Knight v. Clements, 8 Ad. & E. 215; Bishop v. Chambre, Moo. & M. 116), there explained.

In an action by indorsee against indorser, the pleas denied the indorsements, presentment at maturity, and due notice of dishonour, and alleged the want of consideration; at the trial, the bill appeared on the face of it to have been altered from 15th to the 10th December: held, that under the circumstances the plt. was not bound to explain the alteration of the bill, because the making of the bill was admitted on the record (Sibley v. Fisher, 7 Ad. & E. 444; 2 Nev. & P. 430). In an action against the acceptor, the deft. traversed the acceptance; it appeared in evidence, that a space, which was originally left between the word "accepted" and the acceptor's

name, had been filled up, in the handwriting of a third party, with the name of the place of payment; but it appeared that the deft. was not in the habit of writing acceptances in this manner, and that, when applied to, he promised payment in a month: held, that the acceptance had been sufficiently proved, and that it was not incumbent on the plt. to give further evidence to show that the addition to the acceptance had been made with the consent of the deft. (*Semple v. Cole*, 3 Jur. 268). Where the defence is that the [*572] bill has *been altered, deft. cannot go into evidence to show that other bills have been altered (*Thompson v. Mozely*, 5 C. & P. 501). On the day before an acceptance became due the name of the acceptor was erased and a renewed bill was indorsed on the back, but no new stamp was affixed: held, that the jury could not look at the indorsement for the purpose of ascertaining whether the acceptance was struck out with the drawer's assent (*Sweeting v. Halse*, 9 B. & C. 365).

The plt. may recover on a count for the original consideration, although he vitiate the bill, by altering it himself (*Atkinson v. Hawden*, 4 Nev. & M. 409; 2 Ad. & E. 626); even though guilty of laches in presenting it for payment (*Wilson v. Vysar*, 4 Taunt. 228); or in not giving notice of dishonour to his indorser (*Cundey v. Marriott*, 1 B. & A. 696). A promise to pay the bill, coupled with a denial of liability on it, is not evidence of an account stated (*Calvert v. Baker*, 4 M. & W. 417), where a note had been altered without a new stamp: held, evidence of the terms on which the money had been originally lent (*Sutton v. Toomer*, 7 B. & C. 416). When the plt. had paid interest on an altered note, this was held to be evidence of an alteration by his consent (*Carriss v. Tattersall*, 2 M. & G. 890).

The objection must be made before the paper is read in evidence (*Fors v. Wagner*, 7 Ad. E. 116; 2 Stark. Ev. 293, 1st ed.); but where the objection does not appear except upon extrinsic evidence, as when a check is post-dated, the objection may be made after it is read (*Field v. Woods*, 7 Ad. & E. 114; 6 Dowl. P. C. 23; 2 Nev. & P. 117; 1 Jur. 496; see *Hayward v. Smith*, 4 Bing. N. C. 684; 6 Sco. 438; *Dawson v. Macdonald*, 2 M. & W. 26; 2 Gale, 215). If unstamped, it cannot be used in evidence (*Ib.*).

Where the deft. has pleaded merely in confession and avoidance, he must give notice to produce the bill, otherwise the plt. cannot be compelled to produce it at the trial, nor to go into secondary evidence of its contents (*Gooder v. Armour*, 3 Q. B. 956; *Lawrence v. Clerk*, 15 Law J. 40, Ex.; 3 D. & L. 87); unless on a plea impeaching the bill on the ground of alteration (*Barker v. Malcolm*, 7 M. & W. 101).

A protest must be stamped (*Sel. N. P. 312*).

Forgery.] The deft. may show, under a plea traversing the making, acceptance, &c., that his name had been forged (*Griffiths v. Payne*, 11 Ad. & E. 131). But he cannot be permitted to prove for the purpose that other bills, with forged signatures of the deft., had been in the hands of the deft. and circulated by him (*Ib.*). A bill, purporting to be drawn by B. and W., payable to their order, and to be indorsed by them, was negotiated by the acceptor with that indorsement upon it; the drawing and indorsement were forgeries: held, that if the bill were accepted and negotiated by the acceptor, with knowledge of the forgery, he was estopped to deny the indorsement as well as the drawing by B. and W. (*Beeman v. Duck*, 11 M. & W. 251). *Semble*, where the name of the real party as the drawer is forged, a party who accepts the bill in ignorance of the forgery is estopped to deny the drawing only, but not the indorsement, though in the same handwriting (*Ib.*). The forgery must be proved with the same strictness as upon an indictment (*Griffiths v. Payne*, *supra*). The deft. may show that the acceptance is not

his handwriting, by witnesses who have seen him write, or who have corresponded with him but have not seen him write (*Gould v. Jones*, 1 Bl. R. 384). But the evidence of one who was made acquainted with the handwriting for the purposes of the action will not be sufficient (*Stranger v. Searle*, 1 Esp. 15); nor will the evidence of one skilled in detecting forgeries do (*Clermont v. *Tullidge*, 4 C. & P. 2). The plt. may give in evidence bills whose acceptances are confessedly in the deft.'s handwriting, in order that the jury may compare them (*Allesbrooke v. Roache*, Peak. Ad. Ca. 27).

W. accepted certain bills of exchange in the name, but without the authority, of his brother J., which were dishonoured when due, W. was apprehended on a charge of forgery, and whilst in custody the holders of these bills apply to J. for payment of them: held, that the written acknowledgment by J. (after the bills had been dishonoured) that he was responsible for the bills, and also that he engaged to pay them in case his brother should fail to do so, was not sufficient to make him liable upon the bills, no antecedent authority having been given to W. to accept the bills, and the subsequent acknowledgment of liability being made to screen his brother from the charge of forgery (*Ex parte Edwards*, 5 Jur. 706).

Qualification of Liability by contemporaneous Agreement.] The deft. made a promissory note, payable on demand, to the plts., as executors of A. B.; and at the time the note was given a deed was executed, reciting that the plts. had agreed, with the consent of the residuary legatees, who were parties to the deed, to invest the residue of A. B.'s estate in certain securities, of which the note was one, until the said residue should be divisible, under the trusts of A. B.'s will. To an action on the note, brought before the residue was divisible, the deft. pleaded, that, by a contemporaneous agreement in writing, it was agreed that the note should not be payable until the residue was divisible. The replication traversed the making the agreement: held, that the allegation of the contemporaneous agreement was proved by the deed (*Webb v. Spicer*, 18 Law J. 143, Q. B.). The deed in question was not executed by the plts.; but they had acted under it, and it was in their custody, and produced by them at the trial: held, that they were bound by it, and that it was an answer to the action (*Ib.*).

Incapacity of Party.] A bill cannot properly be made or indorsed by, nor can it be properly addressed to, any person incapable of making himself responsible for the payment; nor can they be properly made payable or indorsed to any person incapable of suing. Therefore, it is a good ground of defence for the deft. to show that he was an infant, whether he be sued as maker or indorser of a bill, if it be in the course of trade (*Williams v. Harrison*, Carth. 160; 3 Salk. 197); but not if it were drawn, indorsed, or accepted for necessities (*Williamson v. Watts*, 1 Camp. 552; but see *Truman v. Hurst*, 1 T. R. 40). Whether a promissory note given by an infant, for necessities, be valid, either at the suit of the original payee or his indorsee has never yet been expressly decided, but it should seem it is not (*Ib.*). In the United States it has been held to be void (*Sevansey v. Vander Keydon*, 10 Johns. Rep. 33; *Nightingale v. Whittington*, 15 Mass. Rep. 272). So in the French law (*Pardessus*, 2459; *Byles*, 44; *Jones v. Darch*, *supra*; *Jeune v. Ward*, 1 B. & A. 653).

And, if an infant draw a bill to his own order, and indorse it, and the drawee accept, the acceptance will bind the drawee, and he will be compellable to pay the indorsee: because, by accepting, he precludes himself from disputing the competence of the drawer (*Taylor v. Croker*, 4 Esp. 187; *Bayl.*

B. 46). But it is an unsettled point whether an infant first indorsee can, by such indorsement, give currency to a bill of exchange, so as to entitle the holder to sue on it; though, indeed, in a case where the acceptor knew the payee and indorsee was an infant, the court held him liable (*Jones v. Darch*, 4 Pri. 300). As an infant is capable of suing, he may be payee or indorsee; and an objection to his infancy, when he sues as such, will be unavailable (*Teed v. Elworthy*, 14 East, 210; *Warwick v. Bruce*, 2 M. & S. 205; 6 Taunt. 118). Infancy of a payee is no answer in an action by the indorsee of a bill of exchange against the drawer (*Grey v. Cooper*, 3 Doug. 65; 1 Selw. N.P. 301). A person of full age, who accepts a bill drawn on him while he was an infant, is liable on the bill (*Stevens v. Jackson*, 4 Camp. 164; 6 Taunt. 106). But, although the infant be not liable himself, he can give a good title to an indorsee (*Taylor v. Croke*, *supra*; see *Dayton v. Dale*, 2 B. & C. 299, 302; *Grey v. Cooper*, *supra*). The drawing, indorsing, or accepting a bill by an infant is not void, but only voidable; therefore, his ratification, after he comes of age, will be binding on him (*Bayl. B. 46*; *Gibbs v. Merrill*, 3 Taunt. 307; 2 B. & C. 824; 4 D. & R. 545; *Taylor v. Croker*, 4 Esp. 187; *Hunt v. Massey*, 5 B. & Ad. 902). Oral evidence may supply the defect in the written ratification as to the name, date, and the [*574] person *to whom it is addressed (*Hartly v. Wharton*, 11 Ad. & E. 934; *post*, "*Infancy*"). The declaration stated that the plt. drew his bill of exchange, to wit, on the 16th of February, 1846, which the deft. afterwards accepted, to wit, on the day and year aforesaid. The plea stated that the deft. accepted the said bill whilst he was an infant, being at the time of its acceptance without a date; that the plt. afterwards altered the bill, by writing a date thereon; and that there never was any license or ratification given by the deft. to such alteration after he attained the age of twenty-one years; verification: held, that the plea was good, and that it disclosed only a single defence—infancy (*Harrison v. Cosgreave*, 16 Law J., N.S., C.P. 198).

A declaration by an indorser against the acceptor of a bill of exchange stated that the bill was drawn on the 20th of September, 1847, payable four months after date; and that the deft. then accepted the said bill. Plea, infancy of the deft. It was proved that the deft. became of full age on the 24th of December, 1847: held, that this was no evidence of the deft.'s being an infant at the time of his accepting the bill (*Harrison v. Clifton*, 17 Law J. 233, Exch.).

Lunacy.] The maker of a promissory note, sued by an indorsee, may plead that the indorsee was a lunatic at the time of the indorsement, and that there was no consideration for such indorsement (*Alcock v. Alcock*, 3 Man. & G. 268).

Coverture may be pleaded as in other cases, see p. 7. But since the R. G. H. T. 4 Will. IV. r. 3, it must be specially pleaded.

This is a sufficient ground of defence; as, a married woman cannot be a party to a bill of exchange, so as to make herself liable in a court of law, although she be living from her husband, and have a separate maintenance secured to her by deed (*Marshall v. Ruttan*, 8 T. R. 545); and, though she live apart from her husband, in a state of adultery, and there exist a valid divorce, *a mensâ et thoro* (*Lewis v. Lee*, 3 B. & C. 291). In *Jones v. Lewis*, 7 Taunt. 54, an application was refused to discharge out of custody a married woman, who had been arrested as the drawer of a bill of exchange. And a *feme covert*, sole trader, in London, is not liable to be sued as such, in the courts at Westminster (*Beard v. Webb*, 2 B. & P. 93). Where a

husband, however, has been abroad, and not heard of for seven years, the wife will be liable, as it shall be presumed he is dead (2 Camp. 113, 273). Or, if an alien husband never has been in this country, and his wife reside here, and contract debts, she is responsible (Kay v. Pienne (Duchess of), 3 Camp. 124; Sutton v. Bussman, 10 Bing. 139). But, if he has once resided in the country, the *animus revertendi* will be presumed, unless the contrary appear, and she will not be responsible (Sutton v. Bussman, 3 Camp. 124). If the husband be transported, and is not returned to this kingdom, whether or not the term of his transportation be expired, the wife is liable (Carrol v. Blencowe, 4 Esp. 27; Sparrow v. Carruthers, 1 T. R. 7; 2 Bla. R. 2197; see Derry v. Mazarine (Duchess of), Ld. Raym. 147). Where the husband was sentenced to transportation, but was confined for the term in the hulks at Portsmouth: held, that a bill accepted by the wife, who carried on business, in her own name, for the benefit of her family, constituted a good petitioning-creditor's debt (Ex parte Franks, 7 Bing. 762). Though it has been held, that, if a *feme covert* give a promissory note, and after the death of her husband promise to pay it, in consideration of forbearance, such promise is void (Lloyd v. Lee, 1 Stra. 94; Littlefield v. Shee, 2 B. & Ad. 811); yet, if the wife had a separate estate secured to her at the time she gave the note, the promise may be enforced at law (Lee v. Muggeridge, 5 Taunt. 36; see *post*, "COVERTURE").

Did not make—Husband and Wife.] To an action by the executors of J. M., deceased, on a promissory note payable to him in his lifetime, the deft. pleaded that the note was made payable to E. M., then the wife of J. M., and in her name, with the consent of her husband, and not otherwise, and that he did not in her lifetime, she having died in the lifetime of her husband, do any act to reduce the note into possession, nor did he ever reduce it into possession. Verification: held good in substance, but bad in form, as amounting to *non fecit* (Howard v. Oakes, 3 Exch. 136; 18 Law J. 485, Exch.).

The coverture of the plt. is also a good defence (Connor v. Martin, 3 Wils. 5; McNeilage v. Holloway, 1 B. & Al. 218); but, as the husband may maintain the action, it can only be by plea in abatement (Burrough v. Mole, 10 B. & C. 558). So, it is a good plea that the first indorser, at the time of the indorsement, was a married *woman (Barlow v. Bishop, [*575] 1 East, 432); but a promise to pay it by the deft. will raise a presumption that the wife had her husband's authority to indorse it (Cotes v. Davis, 1 Camp. 485); and it may be replied in the following manner:—

Form of Plea of Coverture.

[*Commencement as ante*, p. 548.] That the said S. E., the supposed drawer (payee and indorser) of the said bill of exchange, before and at the time of the said supposed drawing (acceptance and indorsement) thereof, was, and from thence hitherto hath been, the wife, and married to one male person of the name of J. E., who then was, and from thence hitherto hath been, and still is, the husband of the said S. E., and that the husband of the said S. E., before and at the time of the said drawing (accepting and indorsing) of the said bill, and before and at the time of the commencement of this suit, was and still is living (*verify, &c. Signature.*)

Replication.

[*Commencement as post*, p. 579.] That the said S. E., at the time of her drawing and indorsing the said bill of exchange, did draw and indorse the same as the agent and by the authority of the said J. E. her said husband (*verification, &c.*).

(see Prince v. Brunattie, 1 Bing. N. C. 485; Prestwick v. Marshall, 7 Bing. 565; Scarpellini v. Atcheson, 7 Q. B. 864).

Notes on Plea, and Evidence in Support of it.

Payee against the maker of a promissory note. Plea, that the plt. was the wife of one F. G., and that the only consideration for the making of the note was the loan of £——, the money of the said F. G., which was advanced by the plt. to the deft. without his authority; that the plt. took, and always held, and still holds, the same without the authority of the said F. G.; and that the plt. never had any property or right to the said note, or to receive payment thereof: held, an informal plea of coverture, and therefore a bad plea in bar (*Guyard v. Sutton*, 10 Jur. 459; 3 C. & B. 153).

To an action by the payee of a note against the maker, the deft. pleaded that the plt., at the time of making the said promissory note, was the wife of J. S.; and that, while plt. was so the wife of J. S., he elected to take and have the said note in his marital right, and then caused the plt. to indorse, and she, by his authority, did then indorse the said note; and that J. S. then delivered the said note so indorsed by plt. to W. F.; that afterwards, and after the note became due, and before action, J. S. died, and afterwards, and before action, the note came into possession of plt. by delivery of W. F.: held, on special demurrer, that the plea did not show with sufficient certainty that the note was reduced into possession by the husband, so as to prevent the cause of action from surviving to the plt. (*Scarpellini v. Atcheson*, 9 Jur. 827; 7 Q. B. 864). *Quære*, whether the plea was bad for duplicity (*Id.*).

Indorsee against maker of a promissory note, payable to J. S., or order. The deft. pleaded that the note was given as a collateral security for a bill drawn by deft. upon J. S., and that it was agreed between the deft. and payee that the note should not be negotiated, and that the deft. had paid the bill to the holder, with notice of the premises to the plt. before indorsement of the note by him. Replication *de injuriâ*: *semble*, upon special demurrer, that the replication was good (*Gibbons v. Mottram*, 6 Man. & G. 692).

Want of Consideration.] Where the drawer has drawn a bill upon the acceptor for his own benefit, the acceptor may resist any action brought upon the bill, on the ground that he had no consideration for his acceptance; and natural love and affection, or gratitude, to *the drawer, or any of [*576] his family, are not, in law, a good consideration for his acceptance (see *Holliday v. Atkinson*). The deft. therefore may, in all cases when sustainable, plead the want of consideration.

Indorsee against acceptor. Plea, that there was no consideration for the acceptance; that the bill was delivered by deft. to S. for the special purpose of being taken care of by him for the deft.; and that S. in violation of good faith, and contrary to the special purpose, fraudulently negotiated the bill with the plt.; and that the plt., at the time of the delivery to him, had notice of the premises, and well knew that S. had no authority to part with the bill on his own account, and that there was no consideration given for the indorsement to the plt. Held bad for duplicity (*Leaf v. Robson*, 13 M. & W. 651).

Form of Plea of want of Consideration.

[*Commencement, as ante*, 548.] The deft., by —— his attorney, as to the first count of the declaration, saith, that he accepted the said bill for the accommodation of the plt. [*if by indorsee, say*, of the said —— (the drawer,)] and that there was never any value or consideration for the said acceptance, or for the deft. paying the amount of the said bill, or any part thereof [*if by indorsee, say*, and the deft. further saith, that there never was any value or consideration for the said indorsement of the said bill by the said —— (the

drawer) to the plt., or to the said —, *the first indorser; if several, any consideration for such indorsements]* and the plt. always held, and now holds the same, without value or consideration, and this the deft. is ready to verify, &c. (*Add plea to the common counts, ante, 548; add pleas to other counts, if any, as ante, 548; and signature.*)

Notes on Plea, and Evidence in Support of it.

Since R. G. H. T. 4 Will. IV. r. 3, drawing, indorsing, accepting, &c., bills or notes, by way of *accommodation*, must be specially pleaded. "*Accommodation*," in this rule, must be taken in its popular mercantile sense, and as synonymous to "without consideration" (3 Ch. Pl. 151, n. f). The want of consideration must be specially pleaded (*Passenger v. Brooks*, 7 C. & P. 110; 1 Sco. 560; 1 Bing. N. C. 587). Where the defence is "want of consideration," the deft., whether he be maker, acceptor, or indorser, must show, affirmatively, under what circumstances, or upon what terms, or for what purpose the instrument was given; that is, he must show the facts from which the absence of consideration would appear (*Mills v. Oddy*, 2 C. M. & R. 103; as that it was an accommodation bill (see *Easton v. Pratchett, supra*); that it was accepted for the *accommodation* of the plt. is valid (*Thompson v. Chubley*, 3 C. M. & R. 212). It is not sufficient to state, generally, that the deft. received no consideration for the bill or note (*Stoughton v. Kilmorey* (Lord), 2 C. M. & R. 72; *Trinder v. Smedley*, 3 Ad. & E. 522; 2 Nev. & M. 138; *Graham v. Pitman*, ib. 521; 5 M. & W. 37; *Reynolds v. Ivimey*, 3 Dowl. 453; *French v. Archer*, ib. 130; *Low v. Chifney*, 1 Sco. 95; 1 Bing. N. C. 267; *Bramah v. Roberts*, ib. 469). A plea, alleging the want of consideration simply, is bad on special demurrer, though good after verdict (*Easton v. Pratchett*, 3 Dowl. 473; 2 C. M. & R. 542; S. C. in error, 4 Dowl. 549; *Stoughton v. Kilmorey* (Lord), *supra*; *Stephens v. Underwood*, 4 Bing. N. C. 656; *Trinder v. Smedley, supra*; see *Graham v. Pitman*, 3 Ad. & E. 521). To an action by indorsee against acceptor, a plea merely denying consideration for the *deft.'s acceptance* was held bad on general demurrer; it must appear that plt. took without consideration (*Reynolds v. Ivimey, supra*; *French v. Archer, supra*; *Low v. Chifney, supra*). A plea showing that a bill was given for an existing judgment-debt was held bad, as not negating consideration; besides it showed *that there was an existing debt on account of which the note was made, and [*577] the giving of the note was evidence of an agreement by the plt. to suspend his remedy upon the judgment, which was a sufficient consideration for the note (*Baker v. Walker*, 3 D. & L. 46; 14 M. & W. 465). Where the indorsee is the plt., it must be shown that *he* took without consideration, or the plea will be bad on special demurrer (*Reynolds v. Ivimey, supra*). It is not sufficient to show only the *acceptance* to have been without value (*Low v. Chifney, supra*; *French v. Archer, supra*; *Lacey v. Forester*, 2 C. M. & R. 59; 3 Dowl. 668; *Noel v. Boyd*, 4 Dowl. 415; *Bramah v. Roberts*, 1 Bing. N. C. 409, 469); but aided after verdict: value should be negated as well as consideration (*Graham v. Pitman, supra*; *Trinder v. Smedley, supra*).

It is no answer to an action against the acceptor, to say that the bill has been indorsed to the plt., or any intermediate party, for his accommodation, without also showing that the bill was accepted for the accommodation of the drawer (*Whitaker v. Edmunds*, 1 Ad. & E. 638).

It is no answer to an action on a promissory note, that it was given on account of an attorney's bill not delivered pursuant to 6 & 7 Will. IV. c. 73, before action brought (*Jeffreys v. Evans*, 14 M. & W. 210; 3 D. & L. 52).

To an action on a bill of exchange the deft. pleaded a plea of want of

consideration, concluding with a verification; the plt., instead of replying by taking issue on the plea, merely added a *similiter*. After a verdict for the plt., the court held that the record was imperfect, and that there must be a re-pleader; but, to save expense, the plt. was allowed to amend on payment of costs (*Wordsworth v. Brown*, 3 Dowl. P. C. 698).

To an action by the payee against the makers of a promissory note, a plea that there was no consideration for the note, and that it was made subject to the condition that the defts. should not be called upon to pay the same if they were not able, but that it should be renewed, is bad, and on affidavit that it was false, the court set it aside (*Mitford v. Finden*, 8 M. & W. 511; 5 Jur. 681). An averment, that the bill was indorsed to the plt. after it became due, is insufficient. It must be shown that the plt. took it without value, or that the bill was indorsed to the plt. after it became due, contrary to agreement (*Sturtevant v. Ford*, 4 Man. & G. 101; 4 Sco. 668; *Stein v. Yglesias*, 3 D. 252). An averment that the plt. took the bill after it was due, with notice of the deft.'s want of consideration, would not raise a sufficient defence (*Lazarus v. Cowie*, 2 Gal. & Dav. 489). It seems that a plea to a declaration against acceptor of a bill, indorsed by the drawer to the plt.; that the deft. accepted it on account of a debt due from him to the drawer, and that the drawer indorsed it in blank, and delivered it to the plt., as agent for R., in order that the plt. should deliver it in payment of a debt due from the drawer to R.; that the plt. gave no consideration for it, and wrongfully retained it in breach of his duty as R.'s agent; that R. claimed to be entitled, and dissented from plt.'s suing; is bad, on special demurrer, for not expressly admitting the indorsement to the plt., and as an argumentative traverse of the indorsement; but that, as it is a constructive denial of the indorsement to the plt., it is good after verdict (*Adams v. Jones*, 12 Ad. & E. 455). To an action of debt by payee, against one or two makers of a joint and several promissory note, the deft. pleaded that he signed as surety only, and that he never had any value or consideration for the note. Replication that he had value and consideration: demurrer, for that the plea had

shown no consideration, or at least one that would not *support debt. [*578] Judgment for plt. (*Sison v. Ridman*, 3 Man. & G. 816). Where, in an action against two defts. as acceptors of a bill drawn on them by the plt., one of the defts.'s, C., pleaded partnership with his co-deft., who had accepted the bill in fraud of the partnership, and that he, C., had received no consideration for it, of all which the plt., at the time of drawing and accepting, had notice: held, that as the plea alleged notice to the plt. at the very time when the bill was accepted, the implied authority of his co-partner to bind C. by the acceptance did not exist as to the particular bill, and that the plea contained no confession of the acceptance in fact, and was therefore bad as an argumentative traverse of the acceptance by C. alleged in the declaration (*Jones v. Corbett*, 2 Gal. & Dav. 308). Where a frivolous plea of want of consideration in an action by the indorsee against the drawer is pleaded, the court will set aside the plea, and give the plt. leave to sign judgment (*Emmanuel v. Randall*, 8 Dowl. 238). A plea by some of several defts., sued as acceptors, that the bill was accepted without consideration, and for special purposes, and was fraudulently indorsed to the plt., he having notice of the premises, was holden good, but it would be bad for want of the averment of notice (*Bramah v. Roberts*, 1 Bing. N. C. 469). So, in an action by payee against drawer, a general plea of no consideration is aided after verdict (*Mills v. Oddy*, *supra*).

Where A., being possessed of a bill payable to herself, indorsed it, and it was also indorsed by her son, B.; A. then gave it to C. to get it discounted for her, but instead of so doing he kept it, for a debt due from the indorser

to him, and when the bill was due he sued the acceptor; the action was held not maintainable, and he was nonsuited (*Delauny v. Mitchell*, 1 Stürk. 439; see *Eden v. Turtle*, 12 Law J. 11, Exch.; and *Basan v. Arnold*, 6 M. & W. 559). Where to an action by second endorsee against acceptor, the deft. pleaded first, in effect that he accepted the bill for the accommodation of B., who delivered it to the plt. to discount; secondly, that after the bill was indorsed to the plt., and before the commencement of the suit, the plt. indorsed the bill to a person unknown, and the deft. then became, and still is, liable to pay the amount of the bill to the third person to whom it is indorsed, and who is the owner thereof. Replication to the first plea, *de injuriâ*; to the second, that at the time of the commencement of the suit, the plt. was, and still is, the holder, &c.; without this, that any other person is the holder thereof. Held, *de injuriâ* a good replication, and that that to the last plea was bad on special demurrer, as the traverse was too large, and put in issue the plt.'s being the holder of the bill, not only at the commencement of the suit, but also at the time of the plea pleaded, which was immaterial. Where a man gives another a bill to get discounted for him, which is done, and the money is paid to the party's own use, this is no answer to an action by a third party, unless it be shown that the plt. was implicated in the fraud (*Jacob v. Hungate*, 1 M. & R. 445; see *Paterson v. Hardacre*, 4 Taunt. 114).

Where the deft. pleaded that the check was drawn for the accommodation of C., and that there never was any consideration for it, and that there never was any consideration for the transfer of it from C. to the plts. Replication, *de injuriâ*. It was proved that the plts. were trustees of a joint-stock bank, who had appointed one R. as their agent for one of their branches, of which C. was a customer, and had overdrawn his account. An inspector was sent once a year to each of the branches, to examine the accounts, and in order to conceal the real state of C.'s account, R. and he agreed that before the day for inspecting the accounts the check in question should be given, and placed to C.'s account, but should not be presented, and *should be returned to him after the inspection had passed. Held, that this [*579] evidence did not support the plea (*Bosanquet v. Corser*, 8 M. & W. 142).

Replication.] The plt. may traverse any special matter in this plea, on which he means to rely (see *Bramah v. Roberts*, 1 Bing. N. C. 469); or the plt. may reply *de injuriâ*, which will put in issue all the allegations in the plea (see *Griffin v. Yates*, 3 Bing. N. C. 579; *Basan v. Arnold*, 6 M. & W. 559; *Reynolds v. Blackburn*, 7 Ad. & E. 161); or he may, in his replication, state the consideration (see *Low v. Burrows*, 2 Ad. & E. 483; and *Batley v. Catterall*, 1 M. & R. 379).

Form of Replication to Plea of Want of Consideration.

In the Q. B. (C. P., or Ex. of P.) On the _____ day of [day of delivery] in the year of our Lord 1850.

A. B. } The plt. as to the plea of the deft., by him (first) above pleaded, says that the
v. } said deft., of his own wrong, and without the cause by him in his said plea al-
C. D. } leged, broke his said promise in the said [or, in the said first count of the said] declaration mentioned in manner and form, as the plt. has above in the said [or, in the said first count of the said] declaration in that behalf alleged against him, and this the said plt. prays may be inquired of by the country, &c. (reply to the other pleas, if any, requiring it).

Notes on Plea, and Evidence in Support of it.

Payees against maker of a promissory note. Plea that the plts. procured the deft. to make the note by fraud, and that the deft. was induced to make and deliver it by such fraud, and there never was any consideration or value for the making and payment by the deft. of the note. Replication, *de injuriâ*, held good (Cowper v. Garbett, 13 M. & W. 33).

Indorsee against acceptor. Plea, that the bill was accepted for the accommodation of the drawer, and without any consideration, and that, at the commencement of the suit, the plt. was the holder without consideration. Replication, *de injuriâ*, held good (Laforest v. Wall, 16 Law J., N. S., Q. B. 100).

The plt. might reply, setting out what the precise consideration was, as goods sold and delivered, concluding with a verification, in which case he would have to begin (Low v. Burrows, 2 Ad. & E. 483; Edwards v. Jones, 7 C. & P. 633; Batley v. Catterall, 1 Moo. & R. 379): rejoinder, that the goods were paid for (Rowlandson v. Roantree, 6 C. & P. 551; per Alderson, B.). In an action by indorsee against acceptor, if the deft. plead that the acceptance was for the accommodation of the drawer, who indorsed without value, the deft. must begin (Mills v. Barber; Whitaker v. Edmunds, 1 Ad. & E. 366; Mercer v. Whall, 5 Q. B. 447). The plt. cannot be called upon to prove consideration in the first instance, unless the title to the bill be called in question on the ground of duress or fraud; or it be shown that the bill has been stolen or lost (Mills v. Barber, *supra*; Lewis v. Parker, 4 Ad. & E. 838). To an action on a bill of exchange for 100*l.* the deft. pleaded that the bill was an accommodation bill, and that the deft. never had and the plt. had never given any value for it. The evidence was, that the bill was given as an accommodation bill, and that during the currency of it, it was agreed that the plt. and deft. should each give to the other cross acceptances for 100*l.* That which the deft. gave the plt. was destroyed, but the plt. was compelled to pay that which he gave the deft.; held, that the plea was not proved (Burton v. Penton, 16 Law J. 353, Q. B.; 11 Jur. 713).

*Payee against the maker of a promissory note. Plea, that one [*580] T. D., the brother of the deft., then deceased, was, in his lifetime, indebted to the plts. to the amount in the note specified; and that, after his death and before interment, one of the plts., by a threat, that unless the deft. would make and deliver the note, the plts. would prevent the funeral of his brother from taking place, procured the making of the note from the deft., who then made and delivered the same upon such threat, and for no other cause whatever: the plea also averred, that there never was any consideration for the making of the note, and that the plts. always held the same without value. Replication, that one of the plts. did not, by threat that, unless the deft. would make and deliver the note the plts. would prevent the funeral of the deft.'s brother from taking place, procure from the deft. the note in manner and form alleged: held, that the replication was a good answer to the whole plea (Atkinson v. Davies, 11 M. & W. 236).

Where, to an action by a second indorsee of a note against the maker, the deft. pleaded that he had no consideration for making or paying the note, and the plt. replied that the note was indorsed to her in part payment of a debt due to her from the payee, and that she had no notice of the premises at the time of the indorsement to her, and the deft. rejoined that she had notice on demurrer; it was held, that such rejoinder was bad for taking an immaterial traverse (Pearse v. Champneys, 3 Dowl. 276). To a general plea, of no consideration, to an action on a banker's check, by payee against drawer, the replication may be, that there was a good, valid, and sufficient

consideration, and conclude to the country (*Mills v. Oddy, supra*). It is not necessary to specify the consideration (*Prescott v. Levy, 1 Sco. 726*). To a plea, by the acceptor of a bill, that it was to the knowledge of the plt. negotiated by fraud, and that no consideration was given for the indorsement to the holder, it is sufficient to reply, generally, that he had no notice of the fraud, and that the bill was indorsed to him for a good consideration (see *Bramah v. Roberts, supra*.) The declaration at the suit of the indorsee against the acceptor, stated that the bill was drawn by A., who indorsed to B., who indorsed to plt. Plea, that the bill was drawn and indorsed by A., and accepted for the accommodation of B., and without consideration, and that there was no consideration for B.'s indorsement. Replication, that B. indorsed the bill in blank, and that afterwards, and before the bill became due, C., who then appeared, and who plt. believed to be the holder of the bill, delivered the same to the plts., with the indorsements thereon for a valuable consideration, and without notice: held good (*Arbouin v. Anderson, 1 Q. B. 498*). The deft. pleaded to an action by indorsee, that the bill was accepted for the accommodation of the drawer, and that the drawer indorsed it after it became due, and without consideration to the plt. Replication, *de injuriâ*, held good (*Griffin v. Yates, 2 Bing. N. C. 579*). So, where the deft. pleaded that the bill was drawn and accepted for the accommodation of B., who gave it to the plt. to be discounted, but the plt. did not discount it or pay the value to B. Replication, *de injuriâ*, held good, as the plea was matter of excuse for not paying the bill (*Basan v. Arnold, 6 M. & W. 559*). So, where the deft. pleaded to an action on a bill for 98*l.*, drawn by A., who indorsed to B., who indorsed to plt., that he accepted the bill for the accommodation of A., and without consideration; that A. indorsed to B. without consideration, that B. indorsed to plt. without consideration; and that plt., when the action commenced, was the holder without consideration and value. Replication, that B. had a good consideration and value for indorsing the bill to him; and that he, the plt., was not the holder of the same without consideration *and value. It appeared that A. was indebted to the plt. in 57*l.*, but that B. was indebted to him in 20*l.* only. Held, [**581*] that as only the consideration for the indorsement by B. was put in issue, the plt. was entitled to a verdict for 20*l.* only (*Simpson v. Clarke, 2 C. M. & R. 342*). *De injuriâ* would have been the proper replication. Plea that the deft. accepted the bill for the accommodation of the drawer, of which the plt. had notice, and that, after the bill became due, the plt. received from the drawer a bill upon another person of greater amount, at three months; and then, in consideration thereof (but without the knowledge or consent of the deft.) gave the drawer time for the payment of the bill sued upon, until default in payment of the new bill. Replication, *de injuriâ*, held good (*Reynolds v. Blackburn, 7 Ad. & E. 161*).

Under a traverse of the plea, or any part of it, the deft. will have to prove the plea, or such part of it as is traversed. So, under *de injuriâ*, he will have to prove the whole of his plea; the onus of proof being upon him (see p. 588).

Where an acceptor to an action on a bill of exchange, by an indorsee, pleads want of consideration, it is sufficient for the plt., in his replication, simply to aver that there was consideration (*Prescott v. Levi, 3 Dowl. P. C. 403; 1 Sco. 726*). To a declaration on a bill of exchange (by indorsee against acceptor) the deft. pleaded that no value or consideration had been given for the successive indorsements; the plts. replied, that their immediate indorser did not indorse the bill without value or consideration for so doing, but that they took it for a good and valuable consideration, concluding to the country (*Ib.*).

To the declaration on a promissory note against the maker, he pleaded no consideration; the plt. replied, that the note was indorsed to her in part payment of a debt, and that she had no notice of the premises in the plea. The deft. rejoined that she had notice. On demurrer, held, that the plt. was entitled to judgment (*Pearce v. Champneys*, 3 Dowl. P. C. 276).

The deft., as acceptor, pleaded, to an action by indorsee, that being indebted to J. M., he, the deft., accepted the bill, and delivered it to the drawer for a special purpose, viz. that it might be discounted by him, and the proceeds paid to J. M., in satisfaction of the debt; the plea then averred, that the drawer held the bill for such special purpose, and for the sole use and benefit of the deft. Replication, that the drawer did not hold the bill for the said special purpose, and for the sole use and benefit of the deft.; held, that the traverse was not too large, as it did not compel the deft. to prove more than he would otherwise be bound to prove in support of his plea (*Eden v. Turtle*, 10 M. & W. 635).

The declaration alleged the bill to have been indorsed by M. to the plt. Plea, that the bill was drawn and accepted without value, and that there never was any consideration for indorsing the bill by any of the parties, nor for the indorsement by M., nor for M. paying the amount. Replication, that the indorsement by M. was in blank, and that R., who appeared to be, and plt. believed to be, the lawful holder of the bill, indorsed the same to plt. for value, to wit, &c. Special demurrer, for want of stating consideration for the drawing or accepting of the bill, and for departure as to the allegation of indorsement to the plt. Held, that the replication was good, as the plt., against whom there was no allegation of fraud, sufficiently set up his own title by alleging an indorsement to him for value by a person whom he believed to be the lawful holder of the bill (*Arbouin v. Anderson*, 1 [*582] Gal. & Dav. 403; 1 Q. B. 498). It seems the plea was *bad on special demurrer, for not alleging that plt. gave no consideration for the bill (*Ib.*).

Plea, that the note was delivered to the plt., and that plt. received it for the purpose of his paying certain debts of the deft. to his creditors, and that the plt. then promised him to pay the said debts, and that no consideration was received by the deft., or given by the plt., for the said note. Replication, that the plt. received the said note at the request of the creditors, for the purpose of paying them as soon as the deft. should pay the note; without this, that he promised to pay the said debts as in the said plea alleged; the plt. proved the inducement to his replication, and had a verdict; and the court held that the issue was material, that it was proved by evidence of the inducement, and there appeared upon the record a sufficient consideration to entitle the plt. to judgment (*Cole v. Cresswell*, 11 Ad. & E. 661).

Indorsee against maker of a note. Plea, that the note was indorsed by L. and W. bank, as a collateral security for advances made by them to the St. M. bank, on the terms that, if the advances should be repaid by the St. M. bank before the note became due, the deft. should not be called on to pay it; averment, that the advances were repaid. The question at the trial was, whether the note was given in respect of a general balance due by the St. M. bank to the L. and W. bank, or as a security for advances to the amount of 1000*l.* which sum the deft. alleged had been repaid before the note became due. The judge directed the jury that, if the note was given as a part security for the 1000*l.*, the deft. was entitled to the verdict. Held, a misdirection, the jury not having been told to consider whether the advances had been repaid before the note became due (*Richards v. Macey*, 14 Law J., N. S. 359; 14 M. & W. 484).

The deft.'s father owed the plt. money for goods, for the price of which

the deft. made his note in his own name, and gave it to the plt., who was cognizant of the facts, and that the deft. had received no consideration for the note, &c.: held, that the above could not be given in evidence under a plea of accommodation bill, and that there was an original liability on the part of the deft., and that for a good consideration, viz. family affection (*Cook v. Long*, 1 C. & M. 510, *Wightman, J.*).

Failure of Consideration.] Where there is a total failure of consideration for the payment of the bill by the deft., it can be insisted on as a total bar to the action, for it has the same effect as its original and total absence (*Solly v. Hinde*, 2 C. & M. 516; *Wells v. Hopkins*, 5 M. & W. 7); and a partial failure may be insisted on as a bar *protanto* (*Bayl. B. 501*; *Parker v. Backhouse*, *Pea. 61, 216*; *Darnell v. Williams*, 2 *Stark. 166*; *Clark v. Lazarus*, 2 *Man. & G. 167*; 2 *Scot. N. R. 397*). Where the contract on which the bill was given is entire, deft. may prove that it was wholly rescinded (see *Mills v. Oddy*, 1 *Gale, 92*); or, where there was a partial failure of consideration, that the contract has been partially rescinded, if it consisted of divisible parts (*Bayl. B. 503*); therefore, it is a good defence to an action on a note, that it was given for an apprentice fee with deft.'s son, and that the indentures were void for want of a stamp, under 8 Anne, even though plt. had maintained the son for a time, as the consideration (the apprenticeship) was entire, and had wholly failed (*Jackson v. Warwick*, 7 *T. R. 121*). So, where it was given as a reward to the plt., if he should procure his restoration to an office, in which he failed (see *Jefferies v. Austen*, 1 *Stra. 647*. But where a bill was accepted for the balance of the purchase-money of articles bought

*at an auction, and, in two months after the delivery of the goods to [*583] the vendee, the vendor forcibly took them out of his possession:

held, that this could not be treated as a rescission of the contract, and set up as a defence to an action by the payee; it being a trespass (*Stephens v. Wilkinson*, 2 *B. & Ad. 320*). So, where deft. accepted the bill, in consideration that plt. would take deft. into partnership, and the treaty was broken off, it was held, that plt. could not recover the whole amount, if he had not sustained an adequate injury (*Ledger v. Ewer*, *Pea. 216*). And, if goods paid for by a bill are damaged, and the contract is rescinded on that account, no action lies on the bill (*Lewis v. Cosgrave*, 2 *Taunt. 2*); nor does an action lie on a bill given for the price of a horse, warranted sound, if there were a breach of warranty, and the horse were immediately returned (*Ib.*); and fraud may be given in evidence by the deft., so as to avoid the contract altogether (*Lewis v. Cosgrave*, 2 *Taunt. 2*; *Solomon v. Turner*, 1 *Stark. 52*). As, where a bill is given for the price of goods fraudulently sold under a warranty, the breach of warranty is a bar to an action on the bill, if the deft., immediately on discovering the fraud, repudiate the contract, by tendering back the goods; and, where more money has been already paid than the goods or business fraudulently sold are worth, the same may be retained, and the payment of the bill resisted (*Lewis v. Cosgrave*, 2 *Taunt. 2*; 3 *Stark. 175*; 1 *Stark. 51*; 1 *Camp. 40*). Where a check is given on a verbal condition, which the drawer finds is to be broken or eluded, he has a right to stop the payment of it as against such person (3 *Camp. 505*). A partial failure of consideration will constitute no defence, if the *quantum* to be deducted on that account is matter, not of definite computation, but of unliquidated damages (*Bayl. B. 395*); and which are the subject of an action (*Ib.*): thus, where a bill has been given for the price of an unsound horse warranted sound, but which has not been taken back (*Mann v. Lant*, 10 *B. & C. 877*; *Sheller v. Westlake*, 2 *B. & A. 155*); nor for work which has been badly done (*Trickey v. Larne*, 6 *M. & W. 278*). The deft. having sold to T.,

through the agency of the plts., who were factors, some bark, which he agreed should be equal to the sample, drew a bill on the plts. for the price of the bark, which they accepted. The bark not being equal to the sample, and being rejected by T., the buyer: held, that the consideration for the bill having failed, the plts. were entitled to recover the amount of it from the deft. (*Hooper v. Treffrey*, 16 Law J., N. S., Ex. 233). If a bill or note is given for the stipulated price of goods, previously delivered, it is no ground of partial defence that the price was exorbitant (*Solomon v. Turner*, 1 Stark. 51). As, where a stipulated price is given for a picture, the deft. will not be allowed to prove the inadequacy of its value (*Ib.*); or, that the goods were damaged when they ought to have been sound (*Morgan v. Richardson*, 1 Camp. 40, n.; *Brown v. Davis*, 7 East, 480; *Basten v. Butler*, 7 East, 479; *Tye v. Gwynne*, 2 Camp. 346; *Obbard v. Betham*, 1 Moo. & M. 483); unless the contract was rescinded on that ground (*Lewis v. Cosgrave*, 2 Taunt. 2); nor, that the consideration had partially failed by reason of the badness of the quality or improper package of the goods delivered (*Tye v. Gwynne*, 2 Camp. 346; *Morgan v. Richardson*, 1 Camp. 40, n.; 7 East, 482, n.); nor, that the goods had turned out to be worth less than the amount of the bill, and that the deft. had already paid on account of the bill more than the value of the goods (*Obbard v. Betham*, 1 Moo. & M. 483). So, where, to an action by the drawer against acceptor on a bill, drawn in November, "for value received to Michaelmas last," the deft. pleaded that before

[*584] *the acceptance he held a messuage, &c., as tenant to the plt. at a certain rent; and that the bill was drawn and accepted in payment, by anticipation (among other considerations), of 12*l.* 10*s.*, part of the said rent, not then due; and that, before the drawing and accepting of the said bill, the plt. assigned the measure to J. S., of which the deft. had no notice until after the bill was accepted and delivered to the plt., when J. S. demanded and received of the deft. the said rent of 12*l.* 10*s.*; and, therefore, the consideration for the said acceptance, as far as respected the said 12*l.* 10*s.*, wholly failed: held bad, for it was pleaded to the whole plea; whereas, it went only to part of the consideration; and, as to the fraud, it was not alleged, nor was it necessarily to be inferred from the statement in the plea (*Clark v. Lazarus*, 2 Man. & G. 167; see *Compac v. Warriner*, 1 C. B. 356, *post*, p. 585). So, it is no answer to an action on a bill or note, that it was given as the condition of a lease to be executed by the plt., and of letting the deft. into possession of the premises, and that plt. had refused to execute the lease, for he is not bound to execute till the price is paid; and, as the deft. was let into possession, the consideration fails in part only; and the sum to be allowed for such failure is matter not of mere calculation, but of unliquidated damages (*Moggridge v. Jones* 14 East, 486). So, it is no answer to an action on a bill or note, taken to accommodate the father of an apprentice, that it was for an apprentice fee, and that the apprenticeship had been dissolved for misconduct in the master (*Grant v. Welchman*, 16 East, 207; see *Spiller v. Westlake*, 2 B. & Ad. 155; *Mann v. Lent*, 10 B. & C. 877; *Cuff v. Browne*, 5 Pri. 297; *sed vide* *Ledger v. Ewer*, Pea. 216; *Bayl. B.* 508). So, where work had been done, for which the plt. charged the deft. 63*l.*, 45*s.* of which he paid in money, and gave the plt. a bill for 20*l.*, it is no defence to an action by the plt. against the deft. on the bill, that the work done was not worth 43*l.* (*Trickey v. Larne*, 6 M. & W. 278); unless, in the foregoing cases, fraud can be established (*Solomon v. Turner*, 1 Stark. 51; *Lewis v. Cosgrave*, 2 Taunt. 2; *Fleming v. Simpson*, 1 Camp. 40, n.; see *Grew v. Blond*, 3 Stark. 134; *Archer v. Bamford*, *ib.* 175; *Clark v. Lazarus*, *supra*); but where fraud is insisted on, the deft. must repudiate the contract, and retain no benefit under it (*Ib.*; see "*Fraud*," *post*, p. 593).

There is a material distinction between the want of consideration and a total failure of that upon which the bill or note was given. In the latter case, the plea must show the consideration, and then its failure; whereas, in the former, he alleges that there was *never* consideration. There would be a total failure of consideration, if the bill or note had been given on consideration that plt. would pay debts for deft. which he had not done (Cole v. Cresswell, 11 Ad. & E. 661). So, where a man gives another a note for the trouble he will have in being his executor, and the maker dies first (Solly v. Hinde, 2 C. & M. 516). And the deft. may plead that the bill was given for the purchase-money of an estate which had not been conveyed to the deft., that there was no writing within the Statute of Frauds, and that the plt. had refused to give possession of, or convey the estate (Jones v. Jones, 6 M. & W. 84). Indorsee against drawer. Plea, that the bill was given in payment of the price of seventeen pockets of hops, sold by plt. to deft. as of a certain grower, and answering certain samples; that the deft. had not delivered any hops answering the samples, *nor any hops whatsoever*; and that there was no consideration, except as aforesaid. Replication, *de injuriâ*; it appeared the hops delivered were inferior. Held, that the general allegation, that the deft. had not delivered **any hops whatsoever*, might be rejected; and that, without it, the plea showed a total failure of [*585] consideration, and was an answer to the action (Wells v. Hopkins, 5 M. & W. 7; 3 Jur. 797). Held, also, that if the plt. relied on deft.'s acceptance of the inferior hops, he ought to have replied it (Ib.). In April and July, 1843, B. purchased of A. a certain material called oropholithe; that purchased in April was described in the invoice as "roofing," and was put on a building belonging to B. by A.'s workmen; that in July as "material," and was put on by B.'s workmen; other had been purchased in October, 1842, as "flooring," and was so applied, and in respect of which money was paid into court. B., gave a bill of exchange in payment of the above goods, upon which an action was brought, and B. pleaded that he accepted the bill in consideration of goods called oropholithe, which A. had warranted "fit for roofing of buildings," but which proved to be useless. B. proved, that in September, 1843, his agent had a conversation with A.'s agent about roofing certain premises he was building with the patent article, when the latter gave the former a prospectus, which described it as fit for external roofing. Ruled, that there was no evidence to be left to the jury in support of the plea. Held right, as it was not shown that the contract for the goods subsequently supplied was made with reference to the treaty which took place in 1842, or at all events nothing to show that the "material" sold in July, 1843, was sold for "roofing," rather than "flooring," and that the plea failing as to part, failed altogether (Camac v. Warriner, 1 C. B. 356).

Where the bill was given for the performance of certain services, the plea must aver that the time for performing them had elapsed (Abbott v. Hendricks, 1 Man. & G. 791). The plea would be repugnant and defective, if it conclude that deft. has not received any value or consideration for the payment thereof (Byass v. Wylie, 1 C. M. & R. 686).

To an action on a note for 150*l.*, deft. pleaded that A. B. being indebted to the plt. in 3612*l.* 10*s.*, it was agreed that plt. should accept 1500*l.* in satisfaction; and that, in consideration of the premises, the deft. should make the note, and deliver it to the plt. in part payment, and that plt. should not enforce payment of the original debt; and that A. B. after the making of the note, became bankrupt, and that the plt., in violation of the agreement, proved for the original debt: held, that the plea was not proved by evidence of an agreement, that upon giving 350*l.* down, and a bond of other parties for 1000*l.*, and the note, A. B. should be released upon the ori-

ginal debt. Held, also, that the plea was good after verdict (*Gillett v. Whitmarsh*, 15 Law J., N. S., Q. B. 291).

Where the drawer makes the bill payable at his own house, it is evidence of an accommodation acceptance (*Sharp v. Bagley*, 9 B. & C. 44). Where a plea states an executory consideration for the note declared on, which was never executed, and the plt. replied *de injuriâ*, &c., the plt. is not precluded from proving his plea, although the note profess, on the face of it, to be founded on a past consideration (*Abbott v. Hendricks*, 1 Man. & G. 791). In an action by indorsee against acceptor, it is not even *prima facie* evidence of want of consideration between the acceptor and drawer to show that the latter, on the day before the bill became due, procured all the indorsements to be made without consideration, in order that the action might be brought by the indorsee, on the understanding that the money should be divided between one of the indorsers and the drawer, (*Whitaker v. Edmunds*, 1 Ad. & E. 638).

*It is a sufficient consideration for a promissory note payable in [*586] twelve months, that it was given by a widow for a debt of her husband, even though before she took out administration (*Searle v. Waterworth*, 6 Dowl. 684; 4 M. & W. 9; *nom.* *Nelson v. Serle*, in error, ib. 795; 3 Jur. 290); and, she will be liable for the amount of the note, unless she shows that there were no assets of her deceased husband (Ib.). But, it not appearing on the face of the record that the maker of the note was wife to the deceased, the court of error reversed the judgment, *non obstante veredicto* (Ib.; 4 M. & W. 795; 3 Jur. 290).

In an action on a banker's check, if issue be joined on a plea of no consideration for drawing the check, it is an admissible and valid defence, that the contract in consideration of which the check was given, has been rescinded (*Mills v. Oddy*, 1 Gale, 92). The defts. who were commission agents at Liverpool, were in the habit of receiving bills of lading from R., in Ireland, of goods conveyed to Liverpool, against which R. drew bills, and the defts. accepted them. On depositing the bills of lading and the bill of exchange with the plt.'s bankers at Dublin, their course of business was to make advances thereupon, and to remit the bill of exchange to the defts. for acceptance, accompanied by the bill of lading indorsed by themselves. On one occasion the plt. discounted a bill as usual, on receiving a bill of lading, and remitted it the defts., who accepted the bill of exchange, but the bill of lading turning out to be a forgery by R., defts. refused to pay their acceptance: held, that they were liable upon it to the plt. who were indorsees for valuable consideration (*Reynolds v. Robertson*, 3 P. & D. 611). In an action by payee against maker of a note, it appeared it had been given on an agreement by one of them to buy crops, &c., from an outgoing tenant; the note, when made, was handed to a third person to be attested by him and paid over to the plt., on condition that possession of the premises should be delivered up to one of the defts. the next morning, but the plt. was to hold the house for three or four weeks, paying a shilling a week rent. There was evidence of a verbal refusal by plt., on the next morning, to deliver up possession; but the deft.'s cattle were seen on the land, and remained there; the possession of the house was not obtained until three weeks after: the note, when produced, did not appear to have been attested, and there was no evidence how plt. got possession of it: held, that as no act was shown to have been done by the plt. to keep possession of the land, the jury might rightly conclude that possession had been delivered up according to the condition, and that the misconduct of the bailee of the note, in withholding his attestation to it, or not delivering it to the plt., was no defence to the action thereon (*Evans v. Morgan*, 2 Tyrw. 396).

Want of Consideration.] In an action by indorsee against drawer: held, that the issue that the bill was accepted for the accommodation of the deft. was proved by evidence that the bill had been accepted to take up a former acceptance by the same party, given for the accommodation of the deft., and that it was not necessary to plead those facts *in extenso* (Thomas v. Fenton, 5 D. & L. 28, B. C.).

In an action by drawer against acceptor, the plea is not supported if it appear, that, after the bill was accepted (as alleged) for accommodation, the plt. gave a cross acceptance and was obliged to pay the amount, and that the bill accepted by deft. was due and unpaid at the time of action brought (Burdon v. Benton, 9 Q. B. 843).

In an action against the acceptor of an accommodation bill, the following memorandum, with reference to the bill declared on, was held to be admissible in evidence without a stamp:—"I hereby acknowledge that you have for my accommodation accepted a bill of even date herewith for 25*l.*, payable, &c., and I agree to provide for the same when due" (Notley v. Webb, 5 C. B. 834).

In an action by the acceptor against the drawer of an accommodation bill, on his implied contract of indemnity, the plt., in order to prove that a former bill, in renewal of which the bill in respect of which the action was brought was given, had been made payable at a particular place, called a banker's clerk, who, without producing the bank-book, stated that he had ascertained the fact from an entry therein in his own handwriting, but that, independently of that entry, he had no recollection whatever of the fact: held, that this was not evidence of such fact (Beech v. Jones, 5 C. B. 696): held, also, that the plt. was not entitled to recover costs incurred in defending an action brought against himself upon the bill (Ib.).

To the first count of a declaration in debt by the payee against the maker of a promissory note for 20*l.*, payable on demand, the deft. pleaded, secondly, that the plt. was illegally possessed of the deft.'s goods, and wrongfully detained the same, without any right or title so to do, and refused to give them up to the deft. unless he would make his promissory note for 20*l.* payable on demand, and deliver the same to the plt.; whereupon the deft. in order to regain possession of his said goods, made the note in manner and form, &c., and delivered it to the plt. for the purpose aforesaid. Averment, that, except as thereinbefore mentioned, there was no consideration, &c.; held, by Coltman and Maule, JJ. (*dubitante* Williams, J.), on special demurrer, that the plea was bad (Kearns v. Durell, 13 Jur. 153; 18 Law J. 28, C. P.). *Seem*, the plea should have alleged the circumstances under which the plt. claimed to detain the goods (Ib.). Third plea to the same count, that, before the making of the note, there had been accounts between the plt. and deft., and at the time of the making of the note, the plt. alleged that there was a balance then due to him from the deft. on such accounts; that the deft. at the plt.'s request made and delivered to him the said note on account of the said alleged balance; that it was made and delivered on condition that the plt. should not demand payment thereof, unless it should appear that such balance was due; that, in fact, no balance or sum of money whatever was due from the deft. to the plt. in respect of the said accounts; and that, except as aforesaid, there never was any consideration, &c.: held, on special demurrer, that it was a good plea of no consideration for the note (Ib.).

Between what Parties the Consideration may be questioned.] Between the original or immediate parties, as the drawer and acceptor, drawer and payee, indorsee and his immediate indorser, want of consideration may be

insisted on (Ch. Bills, 70; Stra. 674; 7 T. R. 121); and, when the holder, plt., took it from one of such parties, after the bill fell due, the deft. may avail himself of any defence that he might have set up in an action against him by such party. But a want of consideration cannot be a bar to an action on a bill in the hands of a *bona fide* holder, for value, before the bill fell due (Collins v. Martin, 1 B. & P. 651); and it will always be presumed the plt. holds for value, unless the contrary appear, the *onus* [*587] *probandi* of which lies on deft. If, indeed, it can be proved *the plt. gave no value for the bill, then it will be presumed he is in privity with the first holder, and will be affected by everything which would affect such first holder (Ib.). The want of consideration, *in toto* or in part, cannot be insisted on, if the plt., or any intermediate party between him and the deft., took the bill *bona fide*, and upon a valuable consideration (Bayl. B. 509). But, in an action by indorsee, if it appear that a prior party made it under duress, or was defrauded of it, and the plt. has previous notice so to do, he must be prepared to prove under what circumstances, and for what value, he became holder (Duncan v. Scott, 1 Camp. 100; see *infra*). In an action by an indorsee against acceptor, if the deft. show there was no consideration between him and drawer, it lies on plt. to prove that plt., or some other person, gave value for it (Thomas v. Newton, 2 C. & P. 606).

It makes no difference whether the plt., a *bona fide* holder for value, knew the deft. received no consideration for his being a party to the bill, if the deft. became such party as an accommodation (Smith v. Knox, 3 Esp. 47; 6 Dow. 237). But, if the bill was given for a specific purpose, which has not been satisfied, and that is proved to have been known to plt., then he cannot recover (Ib.; Ch. Bills, 59). If plt. be proved to be the agent of a party who cannot recover, neither can he (1 Moo. 556). Where the holder did not give *full* value for the bill, which was an accommodation one, and that was known to him when he gave the part of such value, it was held he could only recover such part (Wiffin v. Roberts, 1 Esp. 261). If one of three partners undertake to provide for a bill drawn by the firm upon, and accepted by deft., the latter may, in an action at the suit of the three partners, give in evidence such undertaking as a defence (Richwould v. Heap, 12 East, 323).

If the bill be accepted for the accommodation of the indorser, this is of course a good defence to an action by him against the acceptor (Thompson v. Clubleby, 1 M. & W. 212; and if partly for the accommodation of the plt., it will be so far an answer (Darnell v. Williams, 2 Stark. 166). But acceptance for the accommodation of the drawer, or any prior indorser, is no answer (Knowles v. Burward, 8 Law J. 206; 10 Ad. & E. 19). If the bill be passed for full value, it is immaterial whether the party taking it knew at the time that it was an accommodation acceptance (Charles v. Marsden, 1 Taunt. 224; Ireland (Bank of) v. Beresford, 6 Dowl. 237); the plt. is a holder for value, if he received the bill for goods, or as security for a debt, or for other acceptances, or as a security to a banker from one of his customers to whom he is in advance (Woodroffe v. Hayne, 1 C. & P. 600; Greenwood v. Barwise, 5 Law J. 339; Bosanquet v. Dadman, 7 Stark. 1; Atwood v. Crowdie, 1 Stark. 483).

And the acceptor must pay, although time be given to the accommodated party without his knowledge or consent (Fentum v. Pocock, 5 Taunt. 192; overruling Laxton v. Peat, 2 Camp. 185; Rolfe v. Wyatt, 5 C. & P. 181; see Reynolds v. Blackburn, 7 Ad. & E. 161). So, although the debt for which it was lodged as security has been satisfied, but the bill has been returned as a security for another debt (Atwood v. Crowdie, *supra*). So, although some other party to the bill may have been discharged (Smith v.

Knox, 3 Esp. 46). So, although the bill was overdue when transferred for value (*Sturtevant v. Ford*, 4 Man. & G. 101; *Haywood v. Wilson*, 4 Bing. 496. So, although the accommodated party may have been released (*Harrison v. Courtauld*, 3 B. & Ad. 36).

When Plaintiff bound to prove a Consideration in the first Instance.]

*The onus of proof of consideration, or the want of it, will depend upon the pleadings in a great measure. Bills and notes are presumed to have been made on good consideration; and, therefore, before the New Rules, the holder could not, in general, be put upon proof of such consideration (where the absence of it might have been successfully set up as a defence), unless he previously gave notice of his intention to dispute it, and then cast by the evidence some doubt upon the plt.'s title to the bill, as, where the bill had not in fact been negotiated, but had been lost, &c.; this raised such an inference, therefore, as called upon the plt. for proof of the consideration (*Duncan v. Scott*, 1 Camp. 100; see *Percival v. Frampton*, 2 C. M. & R. 180; *Mills v. Barber*, 1 M. & W. 425). Since these rules, however, a special plea of want of consideration is equivalent to notice. But, where the action is between immediate parties, and the defence is simply a want of consideration, which is alleged by the plea and denied by the replication, the deft. is still bound to give evidence in the first instance of such want of consideration (*Percival v. Frampton*, *supra*; *Batley v. Catterall*, 1 Moo. & R. 379). So, where the plt. set out in his replication the consideration given, and concluded to the country, the *onus probandi* is on the deft. (*Low v. Burrows*, 2 Ad. & E. 483). But, if the replication, setting forth the particular consideration, conclude with a verification, that consideration would be parcel of the issue, and the plt. is bound to prove it (*Ib.*; *Edwards v. Jones*, 7 C. & P. 633; *Batley v. Catterall*, 1 Moo. & R. 379). If, however, the consideration be stated in such terms as to make it part of the issue, the proof is on the plt. (*Batley v. Catterall*, *supra*).

Where, to a plea of no consideration in an action on a bill of exchange, there is a replication that consideration was given, setting it out under a *scilicet*, and concluding to the country, no new matter is alleged so as to make it necessary for the plt. to prove the particular consideration set out (*Low v. Burrows*, 4 Nev. & M. 366; 2 Ad. & E. 483; *H. & W. 12*; but see *Percival v. Frampton*, 2 C. M. & R. 180; 3 Dowl. P. C. 748; 3 Tyrw. 579). But, if the replication had concluded with a verification, the consideration alleged would have been part of the issue, and the plt. must have proved it (*Ib.*). If the plea allege fraud, &c., in a prior party to the bill, (by which suspicion is cast upon the plt.'s title,) as well as no consideration, and *de injuriâ* is replied (which puts in issue the whole plea); if the deft. proves in the first instance fraud, this will put the plt. on proof of the consideration (see *Percival v. Frampton*, *supra*; *Mills v. Barber*, *ib.*; see *Lewis v. Parker*, 4 Ad. & E. 838). Where the plea alleges both want of consideration and fraud, or other circumstances of suspicion, and the plt. merely denies the want of consideration, it has been held that this is not such an admission of fraud or other circumstance of suspicion on the record as to dispense with proof, so as to require the plt. to prove that he has given value (*Edmunds v. Groves*, 2 M. & W. 642; *Smith v. Martin*, 9 M. & W. 304; see *Watkins v. Bensusan*). *Alderson, B.*, laid it down as a general rule, that although such an admission on the record is a waiver of proof of what is not denied, the party being content to rest his claim on the other facts in dispute; yet, if the jury are required to draw inferences, they must have the facts proved from which the inferences are to be drawn in like manner as any other facts (*Ib.*). But see *contra*, *Bingham v. Stanley*, *supra*. Plea, that the check was given by

the deft. to J. S., for a sum lent to him by the latter to game with, and the plt. replied that he took it from J. S., for good and sufficient consideration, to wit, *the amount of the check: held, that the burden of proof was [*589] upon the plt. (*Bingham v. Stanley, supra*; see *Edmunds v. Groves*, 2 M. & W. 642; *Robinson v. Bland, Burr. 1077*).

Where, in an action by the holder against the payee of a promissory note for 500*l.*, payable on demand, the latter pleaded that he had indorsed it for the accommodation of the maker, to whom the plt. advanced only 200*l.* on it, and that there was no consideration for the residue; to which the plt. replied, that he was the holder for good and valuable consideration given to the maker for the full amount thereof: the court held, first, that upon these pleadings it was necessary for the deft. to begin and impeach the plt.'s title; and, secondly, it appearing that the drawer, who was indebted to the plt. in more than the amount of the note, discounted it with him, and he put the amount to his credit, but actually advanced upon that occasion 198*l.* only: held, equivalent to advancing the whole amount, and that, even if it were given merely as a security for a previous debt, the plt. might properly be stated to be holder for a valuable consideration (*Percival v. Frampton*, 1 C. M. & R. 180).

Illegal Consideration.] By the R. G. H. T. 4 Will. IV. r. 3, illegality of consideration, either by statute or common law, shall be specially pleaded. But where a note or bill given by a bankrupt is void by the bankrupt act, the defendant may plead the general issue, *by statute* (*Weeks v. Argent*, 16 Law J., N. S., Ex. 209, see "*BANKRUPTCY*"); and the attorney of the payee is not privileged from disclosing that the note was agreed on in a conversation between him and his client in the presence of the deft., the bankrupt (*Ib.*).

Form of Plea of Illegal Consideration.

[*Commencement as ante*, p. 548.] Saith, that before the acceptance (or indorsement) of the said bill, and before the commencement of this suit, to wit, on, &c., the plt. and deft. did respectively game together, to wit, by the playing at a certain game, to wit (*state the name of it*). And the deft. further saith, that heretofore, and before the commencement of this suit, to wit, on, &c., the said bill was accepted (or indorsed) by the deft. upon and for the following consideration, to wit, to secure to the plt. a certain sum of money, to wit, &c., then won by the plt. from the deft. by such gaming as aforesaid (or, as the case may be) contrary to the form of the statute in such case made and provided. (*Verification. Signature.*)

Notes on Plea, and Evidence in support of it.

The payee of a promissory note sued the maker, who pleaded that the note was made at Brussels, and that the law of Belgium is that no person can take or receive, or agree to take or receive, more than five per cent. for the forbearance of money lent or agreed to be lent, and that all agreements for the payment of any interest exceeding that rate, and all promissory notes made in order to secure the payment of any sum of money lent upon such agreements, are wholly null and void. It then stated an agreement between the plt. and deft., in Belgium, that the plt. should lend money to the deft. on an usurious contract, and the making of the note to secure the loan in pursuance of such contract. Replication, that the rate of interest in Belgium is not by the law of Belgium restricted to five per cent.; nor by the law of Belgium are notes made to secure the payment of money lent on agreement to pay more than five per cent. interest null and void; nor did the deft. make, nor the plt. receive, the promissory note contrary to the law of the [*590] said kingdom of Belgium, in *manner and form, &c. Held, on

special demurrer, that the replication was not double nor uncertain (*De Bernardis v. Spalding*, 1 D. & M. 43).

To assumpsit by indorsee against acceptor of a bill of exchange, the deft. pleaded that at one sitting he had lost to C., who won of him a sum exceeding 100*l.*, by gaming and playing at *vingt-un*, and that afterwards the deft. at one sitting lost to C., who won of him another sum exceeding 100*l.* by gaming and playing at hazard, and that the deft. accepted the bills in part payment of these sums. At the trial, it was proved that the deft. and C. had played together at *vingt-un* and hazard, and that C. had won at the latter game; but there was no evidence that the deft. had won at *vingt-un*. Held, that the judge at nisi prius might amend the plea under the 3 & 4 Will. IV. c. 42, s. 23 (*Cooke v. Stratford*, 2 D. & L. 399). A mistake in the name of the game would perhaps be amended at the trial (*Cooke v. Stratford*, 13 M. & W. 379). As to pleading separate pleas, see *Temple v. Kelly*, 1 Man. & G. 904. If the bill sued on be substituted for a former one, the latter of which was given for the gaming consideration, the plea must be moulded accordingly (*Boulton v. Coglon*, 1 Bing. N. C. 640). A. accepted bills drawn by B. for a consideration which was illegal. B. indorsed them to C., and at their maturity took A.'s renewed acceptance for them; on action brought by C. against A. the above facts were pleaded, to which *de injuriâ* was replied: held, that the replication was good, for that the matters set out in the plea constituted in effect an excuse for not paying the bills (*Scott v. Taylor*, 6 Jur. 464; see "*PLEAS*," *post*).

Where the deft. pleads that the bill or note was illegal in its inception, and that the plt. took it without value; and the plt. replies *de injuriâ*: the illegality having been proved, the onus is on the plt. of proving that he gave value (*Baily v. Bidwell*, 13 M. & W. 73).

Assumpsit by bearer against maker of a draft, payable to maker or bearer, delivered by maker to L., and by L. to plt. Plea, that deft. gave the draft to L. to secure to L. a sum lent by L. to the deft. for the purpose of gaming, &c., and that L. delivered it to plt. without consideration, and to enable plt. to sue for the benefit of L.; no consideration for plt. being holder, but that he holds and sues for the benefit of L. Replication, that L. delivered the draft to plt., and plt. took it from L. for a good and sufficient consideration, to wit, the amount of the draft, and that plt. holds for such consideration; conclusion to the country; issue thereon: held, the burden of proof lay on plt. (*Bingham v. Stanley*, 2 Q. B. 117).

Where the plea is that the note was given for an illegal purpose, upon which issue is joined, the plt. is not bound to produce it, either as part of his own case or of the deft.'s, though called on at the trial to do so (*Read v. Gamble*, 10 Ad. & E. 597). In order to be permitted to call on the holder for proof of a consideration, it is not sufficient to show merely a suspicion of usury, the usury itself ought to be clearly proved; and, therefore, where in an action by the holder against the indorser for the accommodation of the drawer, the drawer proved that he applied to J., the step-father of the plt., to get the bill discounted; that J. went away, and returned with 32*l.* less than the amount of the bill, the fair discount of the bill being no more than 1*l.* 19*s.*: held, not sufficient, without proof that J. was plt.'s agent, to cast it on plt. to prove the consideration he gave for the bill (*Basset v. Dodgin*, 10 Bing. 40). Letters from the payee to the maker of a note, written contemporaneously with the *making of the note, were received [*591] to show usury in the concoction of the note in an action by the indorsee against the maker (*Kent v. Lowen*, 1 Camp. 177, 180 *d*), they being parcel of the usurious contract itself (*Beauchamp v. Parry*, 1 B. & A. 89).

If the bill were accepted under *duress*, it would be a good answer to an action on the bill; but it must be specially pleaded; it cannot be given in evidence under *non assumpsit*, &c. Where the deft. drew a bill whilst under duress abroad, and under a threat of personal violence and confiscation of his property: it was held, that plt. should give some evidence of consideration (Duncan v. Scott, 1 Camp. 100); and the replication must show that the plt. has given a valuable consideration for the bill, and must prove it (see Mills v. Barber, *ante*, p. 588).

In an action by an indorsee against acceptor, the deft. pleaded that the bill of exchange was accepted by him for money lent him by the drawer to game with, and that the plt., before the indorsement to him, had notice thereof: the court held, that as the plt. must be deemed an indorsee for value; and, therefore, *prima facie* entitled to recover, the plea consisted of matter of excuse only, and that *de injuriâ* was therefore a good replication (Humphreys v. O'Connell, 7 M. & W. 370; Curtis v. Headfort (Marquis of), 6 Dowl. 496).

Where a bill or note is given on a consideration *bad in part*, the whole becomes illegal; as, where part of it was for spirits sold in small quantities, and the rest for money lent (Scott v. Gilmore, 3 Taunt. 226; 6 East, 24; and 3 Camp. 9, *contra*). Where a bill of exchange was partly for money lent at the time and place of play, and partly for money lost at play, it was held that the plt. could recover nothing upon the bill, but that he might recover the money lent on the count for money lent, as the bill was thereby wholly vitiated (Robinson v. Bland, 2 Burr. 1077).

With respect to *what party may set up illegality of consideration* as a defence, such illegality may be shown between the immediate parties themselves, and all parties privy to the illegality when they took the bill (see Newby v. Smith, 2 Esp. 539, n.); and those to whom they have passed the bill, without value and without notice (Bayl. B. 4th ed. 529). Where a third person, having given value for a bill, knew, at the time he became the holder, that it was originally founded on an illegal transaction (Steers v. Lashley, 6 T. R. 61; S. C. 1 Esp. 166; Wyat v. Bulmer, 2 Esp. 538; Brown v. Turner, *ib.* 631; S. C. 7 T. R. 630; Feise v. Randall, 6 T. R. 146; Ch. Bills, 7th ed., 85, n. a); or where a person became holder of such a bill, for value, after it became due, he cannot recover on it (Brown v. Turner, 7 T. R. 630; Amory v. Merryweather, 2 B. & C. 573); unless the indorser could have maintained an action upon it (Chalmers v. Lanion, 3 Camp. 380). However, a person who, at the request of the holder of a bill, indorses it, and is obliged to pay the contents to a *bona fide* holder, may recover the money paid from any person whose name is on it (Seddons v. Stratford, Pea. 215; Petrie v. Hannay, 3 T. R. 424; Aubert v. Maze, 2 B. & P. 371). A *bona fide* indorsee, for value, without notice of the illegality, may recover on such bill (Wyat v. Bulwer, *supra*). The question for the jury is now settled to be whether the party taking the bill acted with good faith. Gross negligence may be evidence of *mala fides*, but is not equivalent to it (Goodman v. Harvey, 4 Ad. & E. 870). In cases where the legislature has declared that the *illegality* of the contract or consideration shall make the bill or note *void*, the deft. may insist on such illegality, though the plt., or some party between him and the *deflt., took the bill *bona fide*, and gave a valuable [*592] consideration for it. And the innocent holder can, in such case, only resort to the party from whom he received the bill, &c., and then he cannot recover upon the same, but only on the original consideration (Bendelack v. Morier, 2 H. Bl. 338; Bowyer v. Bampton, Stra. 1155; Wyat v. Bulmer, 2 Esp. 538, 539; Witham v. Lee, 4 Esp. 264). And it has been decided that, if the *payee* of a bill of exchange indorse it upon an usurious

contract made at the time of such indorsement, a *bona fide* holder cannot afterwards recover upon it against the acceptor, because such holder must claim title through such first indorser (*Lowes v. Mazzaredo*, 1 Stark. 385). But, unless it has been so expressly declared by the legislature, illegality of consideration will be no defence in an action at the suit of a *bona fide* holder, without notice of the illegality (*Wyat v. Bulmer*, 2 Esp. 538; *Brown v. Turner*, 7 T. R. 630); unless he obtained the bill after it became due (*Amory v. Merryweather*, 2 B. & C. 573; and see further, 1 Ch. Bills, 7th ed. 86). By 58 Geo. III. c. 93, no bill or note shall, though given for an usurious consideration, or upon an usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill or note had been originally tainted with usury.

By suffering a judgment by default, the deft. loses the opportunity of objecting to the sufficiency or legality of the consideration (4 T. R. 275; 4 Taunt. 683; see "BANKRUPTCY," "INSOLVENCY").

When Defence may be set up.] Whenever the deft. is at liberty to insist on the want of consideration as a defence, he may always insist that the consideration for the bill, or a part thereof, was illegal (*Guichard v. Roberts*, 1 Bl. R. 445; 3 Taunt. 226; Ch. Bills, 74); as where the bill was given to induce a prosecutor to drop a criminal information, and not to give evidence upon it (*Collins v. Blantern*, 2 Wils. 341, 347; see *Beeley v. Wingfield*, 11 East, 46). So, where the acceptance was given for the price of smuggled goods (*Guichard v. Roberts*, *supra*). So, for money lost at play (*Henderson v. Benson*, 8 Pri. 281; *Boulton v. Coghlan*, 1 Bing. N. C. 640; and see *Read v. Gamble*, 10 Ad. & E. 597, n.; *Law v. Chapman*, 11 Ad. & E. 996). So, to induce a creditor to sign a bankrupt's certificate (see "BANKRUPTCY"), or a composition deed (see *Knight v. Hunt*, 5 Bing. 432); so, to enable a stock-jobber (the drawer) to pay stock-jobbing differences (*Amory v. Merryweather*, 2 B. & C. 573). So, for engraving plates on which French assignats were to be forged, the fraudulent intention being known to the drawer (*Strongitharm v. Lukeyn*, 1 Esp. 389). So, to induce a petitioning creditor not to prosecute a fiat in bankruptcy (*Davis v. Holding*, 1 M. & W. 159; see *Goodered v. Armour*, 12 Law J., 56, Q. B.); or, for the amount of an apothecary's bill where the drawer was not qualified to practise (*Blogg v. Pinkers*, 1 Ry. & M. 25). Formerly, when a bill was given for money lost at play, or upon an usurious contract, or to secure a sum of money paid to induce a creditor to sign a bankrupt's certificate, it was by different statutes made void in the hands of a *bona fide* holder, but now they are deemed to be executed for an illegal consideration, (see 58 Geo. III. c. 93, and 5 & 6 Will. IV. c. 41). A plt. who is participant in the concern cannot recover on a bill given for money he had paid at the request of the deft. in the conduct of an unlicensed theatre (*De Begnis v. Armistead*, 10 Bing. 107. Fraud, or illegality in the drawing of the bill, will in general be a good defence to the action; therefore, the deft. *may show that the acceptance was given in blank, with instruction to draw it at nine months, [*593] whereas it was drawn at six months, (see *Haydon v. Thompson*, 3 Nev. & M. 319), and such a plea must conclude with a special traverse (see *Fisher v. Wood*, 1 Dowl. N. S. 54). If a banking company, consisting of more than six persons, and whose place of business is more than sixty miles from London, accept a bill drawn at more than six months after date, such bill is void (see 3 & 4 Will. IV. c. 98, s. 3; *England (Bank of) v. Anderson*, 3 Bing. N. C. 589). The dating, drawing, or accepting, unless in the exercise of the calling of the acceptor (but *quære*, whether he could set up

such a defence), does not affect the legality of the bill (*Bayley v. Levi*, 1 *Crompt. & J.* 180).

A *subsequent* illegal contract or consideration of any description taking place in a second indorsement or transfer of a bill, and not in its inception, nor in a transfer through which the holder must make title, will not invalidate the same, in the hands of a *bona fide* holder, who took it before it became due (1 *Stark.* 385; *Parr v. Eliason*, 1 *East*, 92; 8 *T. R.* 391; *Ch. Bills*, 7th ed. 87).

With respect to a bill *substituted* in lieu of one given on an illegal consideration, it will, in general, be open to the same objections as the original bill or note (*Chapman v. Black*, 2 *B. & A.* 588; *Preston v. Jackson*, 2 *Stark.* 287; and see *Scott v. Chappelow*, 11 *Law J.* 293); but, if the new bill is given for a consideration, excluding what made it originally illegal, and all other illegal considerations, it will be good (*Chapman v. Black*, *supra*). Thus, if a bill given originally on an usurious consideration, be substituted by a bill confined to what remains due for principal and legal interest, it will be good (*Hubner v. Richardson*, *Bayl. B.* 528; 2 *Stark.* 287; 1 *Camp.* 187; 2 *Taunt.* 184). Where a bill, affected by an illegal consideration, was in the hands of an innocent holder, and the latter on being informed of the illegality, took a fresh bill in lieu of it, drawn by one of the parties to the original usury, and accepted by a third person for the accommodation of the other party, it was held that he could not maintain an action against the acceptor of this substituted bill (*Ib.*; *Tate v. Willings*, 3 *T. R.* 538; 4 *Taunt.* 683). "If a bill or note is given in part upon a legal, and in part upon an illegal consideration, and several bills or notes are afterwards substituted in lieu thereof, the effect of the illegality may be confined to some only of the substituted bills or notes, and the other stand exempt; as, where a bill or note is given as to half for a gaming debt, and as to the residue for money received, and two bills or notes, of equal amount, are afterwards substituted for it, if the giver does any thing which may be considered an election to ascribe the gaming debt to the one, he will be liable upon the other: promising to pay one, whilst both remain unpaid, shall be deemed an election to ascribe the gaming debt to the other (*Bayl. B.* 527); and the receiving of a bill or note, if the whole consideration be not bad, will not extinguish the good part of the consideration. Thus, the receiving a bill or note upon an usurious contract, but given for a previous legal subsisting debt, will not extinguish such debt, though the security itself will be void (3 *Camp.* 119); but, if there was usury in the concoction of the bill, even the principal and interest cannot be recovered (9 *Ves.* 84; 1 *T. R.* 153). Usury, however, is no longer illegal, if the bill or note do not exceed twelve months after date, or have not more than twelve months to run at the time of the usury (2 & 3 *Vict. c.* 37, s. 1, and 4 & 5 *Vict. c.* 54; see *Ring v. Braddon*, 10 *Ad. & E.* 675; *Holt v. Miers*, 5 *M. & W.* 168; *Turquand v. Morden*, 7 *M. & W.* 504).

**Fraud, &c.*] If fraud can be shown, it is a defence to an action [*594] on a bill, for then there is no contract. A note was given for some pictures, purchased for a price greater than their value: on evidence of this being offered, Lord Ellenborough said, "If you can, by the inadequacy of the value and other circumstances, prove fraud on the part of the plt., so as to show that there was no contract at all, the evidence will be admissible; if it fall short of that, it will be unavailing" (*Solomon v. Turner*, 1 *Stark.* 51). So, if a horse be warranted, and a check given for his price, and he turn out unsound; if the seller knew of the unsoundness there is fraud, and, there being no contract, no action lies on the check (*Lewis v.*

Cosgrave, 2 Taunt. 2). So, where the plt. had distrained goods of the deft., on the premises of plt.'s tenant, and the deft., to get rid of the distress, accepted the bill in question: it appeared there was no rent due to the plt. at the time of the distress. It was left to the jury to say whether the plt. had not falsely represented to the deft. that the rent was due, in order to induce him to give his acceptance; and, if the acceptance was fraudulently obtained, the deft. was entitled to a verdict (*Archer v. Bamford*, 3 Stark. 175). In such cases the deft. must altogether repudiate the contract, and retain no benefit under it (lb.).

To a count on a promissory note made by the deft., payable to the order of M. J., and indorsed by M. J. to V., and by V. to the plt., the deft. pleaded a set of pleas, alleging that the note was obtained by the fraud of G. B. and others; and another set of pleas, alleging that the consideration was the forbearing to prosecute C. J., a son of the deft., for a felony; but it was not alleged in any of the pleas that M. J. was a party to the fraud or the illegal agreement, or had notice of them: held, that M. J.'s title being undisputed, the pleas were bad (*Masters v. Ibberson*, 18 Law J. 348, C. P.).

In *assumpsit* by the indorsee against deft., as one of the makers of two joint and several promissory notes, which notes were given to the payee in settlement of a demand, consisting of the purchase-money agreed to be paid for certain mining property, for which the payee was suing at law certain trustees of a joint-stock company, of which the deft. was one of the directors, the payee (the seller) having waived his lien on the property, and accepted as his security the personal covenant of the trustees: held, that in such action the deft. could not deny or impeach the validity of the partnership deed which he had executed: held also, that in an action by the payee of those notes, general evidence of fraud and imposition having been practised on the public in the formation of the company, and the sale of the mining property, to which the payee was privy, in the absence of any evidence of particular fraud or imposition to which the payee was privy having been used to induce the deft. to become a party, and execute the partnership deed, or to become a party to the notes, was inadmissible, such fraud being only examinable by a court of equity: held also, if the deft. had all means of information requisite to enable him to become acquainted with the state of the company's affairs, and the relative rights and liabilities of the company and the trustees, it was no defence in such action that he acted in ignorance, or that deceit had been practised on him in obtaining these securities by a representation that the company were liable to the payee for the amount of the purchase-money claimed, there being no evidence to connect the latter with such representations, and the representation itself being substantially true, the company being bound by the partnership deed to pay the trustees for the mining property: held also, that proof of the liability of the company for the purchase-money in a court of law, no matter what the value of the mines, and proof of the notes being given as a compromise of actions pending against the trustees, were, under the circumstances, sufficient evidence of consideration given by the payee of the notes: held also, that even supposing evidence had been given of fraud in inducing the deft. to make and deliver these securities, or that he had given them without consideration, yet that the *onus* of proving consideration was not thereby thrown on the plt., the indorsee, unless that evidence affected him with notice of, or participation in, the fraud;

*or that it was shown he took the note after it became due, or with [*595] out any consideration (*Howard v. Shaw*, 9 Ir. Law R. 335).

If an acceptance be obtained by fraud and covin, such fraud, &c., will form a good defence to an action on the bill. It must, since the R. G. H. T. 4 Will. IV. r. 3, be specially pleaded.

Form of Plea of Fraud and Covin.

[Commencement as ante, p. 548.] And the deft. as to the said first count of the said declaration, says, that his said acceptance (or indorsement) of the said bill of exchange, in the said first count mentioned, was obtained and procured by the fraud, covin, and misrepresentation of the plts., and others in collusion with him (*here state the circumstances of fraud, &c., relied upon*) (*verification. Signature.*)

Notes on Plea, and Evidence in support of it.

If the fraud were not perpetrated by the plt. himself, the plea must show that he had notice of it when he received the bill, or that neither he nor the intermediate indorsers to the person committing the fraud gave any valuable consideration for it (*Bramah v. Roberts*, 1 Bing. N. C. 469). It seems that the plea would be bad, for not stating the circumstances of the fraud or misrepresentation (*Robson v. Luscomb*, 2 D. & L. 859). The replication may show that the plt. gave a consideration for the bill, or deny the notice of the fraud; if the latter, the onus of proof is cast on deft.; if the former, it must show the consideration in certain, and the plt. must prove it (*Mills v. Barber*, 1 M. & W. 430; *Bayl. B.* 560, n.; *Rees v. Headfort* (Marquis of), 2 Camp. 574). Where a plea by the drawer to an action by indorsee stated that A. being in want of a sum of money, applied to the plt. for the loan of it, who consented to give, if A. would accept a bill to be drawn by the deft. for it (and which was the bill in question), and would take two-thirds in money, and one in wine; that the wine was never delivered, and the contract for sale and delivery thereof was a gross fraud: held bad, as being an answer only to a third part of the cause of action; and, as to the fraud alleged, it was not stated of what it consisted, or of what kind or nature it was, and in that respect the plea was wholly unintelligible (*Connop v. Holmes*, 2 C. M. & R. 719). If the drawer wish to put in issue the plt.'s knowledge of the fraud, he ought to expressly aver that he had notice of it (*Asher v. Rich*, 10 Ad. & E. 784).

Where the fraud was committed by the drawer, or by a prior indorser, and the action is brought by the indorser, that fact should be stated in the plea, which should then state that the plt. took the bill with notice of the fraud, or without consideration (*Bramah v. Baker*, 1 Bing. N. C. 465; *Foster v. Pearson*, 1 C. M. & R. 849; per *Tindal, C. J.*, *Lewis v. Reilly*, 1 Q. B. 349); and, therefore, a plea stating that the deft. indorsed the bill in blank to A., who, until B. became possessed of it, held it for the sole use of the deft. to get it discounted for him, and pay him the proceeds; and that A. fraudulently, and in violation of good faith, and contrary to the said purpose, delivered the said bill to B., who took it without discounting the same, contrary to the said purpose, and in breach and violation thereof, to wit, for the purpose, and under colour and pretence of securing an alleged debt from A. to B., and that B. was not a *bona fide* holder for valuable consideration, and that plt. was not at any time a *bona fide* holder for valuable consideration, and that the deft. never received consideration, or value from A. to

[*596] B., or the *plt., or any other person, for the indorsing or payment of the bill; replication, *de injuriâ*: held, that this did not put in issue any *mala fides* on the part of the plt., or whether he knew of the fraud at the time he received the bill (*Asher v. Rich*, *supra*).

Where the deft. pleaded that he made the note through, and by means of the fraud, covin, and misrepresentation of the plt., and the plt. replied that the deft. did not make the note through fraud, covin, and misrepresentation of the plt., it was held bad on special demurrer (*Robson v. Luscomb*, *supra*). Indorsee against the drawers and indorsers of a bill drawn and accepted

during the partnership: one of the defts. pleaded that the bill was indorsed by the other deft. after the dissolution of partnership, and after notice thereof to the indorsee, and without the privity, and in fraud of the deft., and for the separate purpose of the indorsing partner. Replication, that the plt. had not, at the time of making the indorsement, notice of the dissolution of the partnership. Held, after verdict for the deft., that the plea raised an immaterial issue, and that the plt. was entitled to a verdict, *non obstante veredicto* (Lewis v. Reilly, 1 Q. B. 349; 5 Jur. 98).

Where a remote indorser pleaded that he was induced to indorse the bill by the fraud, covin, and misrepresentation of the plt. and two others of the indorsers, and others in collusion with them, and without any value or consideration, and the plt. traversed the alleged fraud, &c., not noticing the alleged want of consideration, the replication was holden good on special demurrer, as the plea did not state that the plt. had not given value, &c., for the indorsement to him (Daniels v. Coombe, 2 Man. & G. 347; 2 Sc. 597).

The deft. pleaded that the note was indorsed and delivered to the plt. by his indorsee, in violation of good faith, and in fraud and contempt of an order referring the claim of that indorser to arbitration, and that the plt. took the note with full knowledge of the premises in the plea mentioned: held, that the deft. was bound to begin, and prove consideration for the indorsement to him (Smith v. Martin, 8 M. & W. 304). But it may be given in evidence under a plea denying the consideration where the fraud avoids the consideration (Mills v. Oddy, 2 C. M. & R. 103). Under a plea denying the acceptance, the deft. may show that the circumstances are such as to negative an authority from the deft. to the party accepting the bill in his name, which authority might otherwise be implied, as that it was fraudulently accepted by the deft.'s partner in the name of the partnership, for his own private purposes, of which the plt. had notice (Jones v. Corbett, 2 Q. B. 828; Wilson v. Lewis, 2 Man. & G. 197; see Musgrave v. Drake, 5 Q. B. 185). The maker of a note pleaded that it was made and delivered to W. only to get it discounted, and that W. fraudulently indorsed it to the plt., who gave no consideration and knew of the fraud. Replication *de injuriâ*; letters written by W. while holding the note are not admissible against the plt. to prove the fraud, without first establishing, *aliunde*, a privity between the plt. and him (Phillips v. Cole, 10 Ad. & E. 106).

Where a plea stated that the bill, which was payable to A. or order, was by him indorsed in blank, and delivered to B., as agent to C., and with directions to deliver the same to C. on A.'s account; and that B. received it for such purpose, but notwithstanding detained it in breach of his duty, and in fraud of C., who claimed the bill; and that C. dissented from the present action, and required the deft. to pay him the amount of the bill: held, good after verdict, but it would be bad on special demurrer, as it did not confess a delivery of *the bill to the plt. as indorsee (Adams v. [*597] Jones, 12 Ad. & E. 455; and see Adams v. Oakes, 6 C. & P. 70).

To an action against the maker of two promissory notes, the deft. pleaded that the said promissory notes, *and each of them, were and was* obtained from the deft. by the plt.'s fraud. Replication, that the said promissory notes were not obtained by fraud *modo et formâ*: held, on special demurrer, that the replication was good, and did not tender too large a traverse (Wood v. Payton, 13 M. & W. 30; 2 D. & L. 172).

In an action by B., indorsee, against C., acceptor, C. pleads that the acceptance was obtained from him without consideration, by the fraud of A. the drawer; and the bill was indorsed to B. without consideration and with notice of the fraud, and of want of consideration as between A. and C.:

semble, that B. may reply, merely traversing the fraud (*Heyden v. Thompson*, 3 Nev. & M. 319; 1 Ad. & E. 210).

The circumstances of fraud stated in the plea, being that the deft. wrote his name, and a qualified acceptance, on a blank piece of stamped paper, and delivered it to the drawer for the purpose of his drawing thereon a bill payable at nine months, but that the drawer drew upon such paper a bill payable at six months; the court held that a replication merely denying that the deft. wrote his name, or a qualified acceptance, on a blank piece of stamped paper in manner and form, &c., sufficiently put in issue the whole fraud (*Heydon v. Thompson*, 3 Nev. & M. 319). If, however, B. new assigns a different bill, accepted generally, and the deft. pleads as before, omitting the statement of the original want of consideration, a replication to such plea merely traversing the fraud is sufficient (Ib.)

Assumpsit against acceptor of a bill, stating an indorsement by the drawer to R., and by R. to the plt.; the deft. pleaded in effect that he accepted the bill in question for the accommodation of S., the drawer, to enable him to deposit it with R., as a collateral security for a debt due to R. from S.; that R. took it on those terms; that S. before the bill became due, paid R. part of that debt, and tendered the residue; that R. refused to receive the money tendered, kept the bill, and indorsed it to the plt. as a mere trustee, R. and the plt. conspiring and colluding to cheat the deft.: held, on demurrer, that *de injuriâ* was a good replication to this plea, and that the plea contained merely matter of excuse (*Herbert v. Sayer*, 5 Q. B. 965).

In an action on a bill of exchange, to which the deft. pleaded fraud and covin: held, that the plt. was not bound to produce the bill on the trial without notice. Held, also, that a notice by the deft. to produce the bill, left in the letter-box of the plt.'s attorney, in London, at half-past eight o'clock in the evening before the cause was tried at the Middlesex sittings, the plt. also being resident in London, was too late (*Lawrence v. Clarke*, 14 M. & W. 250; 15 Law J. 40, Exch.). In an action against two partners on a bill of exchange accepted by one in the name of the firm, that one suffered judgment by default, and the other pleaded that the bill had been accepted with the knowledge of the plt., in fraud of the partnership, and not for partnership purposes: held, that the deed of partnership, which prohibited either partner from pledging the credit of the firm to so large an amount as that of the bill, was admissible in evidence to prove the fraud (*Gurney v. Gurney*, 8 Law T. 159, Q. B.).

It will equally vitiate the bill if it were given in fraud of third parties; as, where an insolvent gave a promissory note for the *balance of his [*598] debt to a creditor, who refused to sign a composition deed without it (*Cockshot v. Bennett*, 2 T. R. 763; *Knight v. Hart*, 2 Bing. 432; *Bryant v. Christie*, 1 Stark. 329; see *Cook v. Tuck*, 4 Stark. 224; *Wells v. Girling*, 1 B. & B. 447). If creditors compound with an insolvent, and take notes of hand for their respective compositions, and one creditor fraudulently and clandestinely take a further security, it is all one transaction, and he cannot recover even on the notes (*Howden v. Haigh*, 11 Ad. & E. 1033). If a man become security by joining another in a joint and several promissory note, and the party to whom the security is responsible conceal from him a stipulation for an additional sum, which it is recently agreed, between himself and his principal, that the principal shall pay in liquidation of an old debt: held, that this is a fraud on the security, and releases him from his engagement (*Pidcock v. Bishop*, 4 B. & C. 605).

Where the acceptor pleads to an action by the indorsee, that the drawer obtained the acceptance by fraud, and that the plt. took the bill with notice thereof; if the deft. prove the fraud, the plt. must prove the consideration

given by him (*Duncan v. Scott*, 1 Camp. 100; *Bayley v. Bidwell*, 13 M. & W. 73).

Indorsee against A. and B. as drawers of a bill indorsed to C., and by him to plt.; A. pleaded that he and B. were partners; that B. made and indorsed, using the name of the firm in fraud of A., and not for the partnership, but for his own private purposes, namely, for a private debt due from him to C., and, without the knowledge or consent of A.; that there was no consideration or value to him, A., for the drawing or indorsement, of which C., at the time of indorsement, had knowledge and notice; and that at the time when indorsed and delivered to plt. he had knowledge and notice of the premises in the plea. Replication, that at the time when the bill was indorsed and delivered to plt., he had not any such knowledge, &c.; issue. At the trial the jury found that C. had not knowledge of original fraud in drawing of the bill, but that plt., at the time of indorsement to him, had knowledge of that fraud: held, that plea was not proved (*May v. Chapman*, 16 M. & W. 355).

Immorality likewise vitiates a bill, and therefore, if a man accept a bill in consideration that a woman will cohabit with him, no action can be maintained on the bill (*Walker v. Watkins*, 3 Burr. 1568); but if given to a woman on breaking off the connexion he is liable (*Turner v. Vaughan*, 2 Wils. 339; see *ante*, "ASSUMPSIT," "Consideration").

Accord and Satisfaction.] See the form of plea, *ante*, p. 25, "ACCORD AND SATISFACTION," where the law on this subject is more fully treated of.

In an action on a bill or note, deft. may plead that the bill has been satisfied, or plt.'s claim thereon extinguished (*Bayl. B. 335*); as, by showing that plt. has taken a security of a higher description from the deft., for the money due upon the bill or note (*Bayl. B. 334, 335*); or by taking a third person's note as a security for the original debt, or for a composition with a party's creditors (*Lewis v. Jones*, 4 B. & C. 513; *post*, "Composition"); as to a plea of a composition deed, see *Jones v. Senior*, 6 Dowl. 701; *Perfect v. Musgrove*, 6 Pri. 111; or that it has been satisfied by payment or otherwise. If the holder agree to take a renewal of the bill, his remedy on the first is suspended, until the other is dishonoured, and he cannot recover even the expense of noting, &c., incurred upon it, in an action on *the first (*Kendrick v. Lomax*, 2 Crompt. & J. 405). But see Lum- [*599] ley v. Musgrove, where the party was nevertheless held liable to be sued on the former bill for interest (4 Bing. N. C. 9). In an action against the acceptor by the indorsee, where a bill is payable to a third person, deft. may prove that it has been paid by the drawer himself, whereby he will be released from his obligation (*Beck v. Robley*, 1 H. Bl. 89, n., *Burbridge v. Manners*, 3 Camp. 194); but where the bill is payable to the drawer's own order, and he makes payment to an indorsee, and again circulates the bill upon his own indorsement, such transaction not prejudicing any other parties to the bill, and not releasing the obligation of the acceptor, he cannot set it up as a satisfaction (*Callow v. Lawrence*, 3 M. & S. 95, 97). Whilst a bill remains in the hands of an indorsee for valuable consideration, an arrangement between the acceptor and any previous party to the bill will be no answer to an action by the indorsee against the acceptor (*Clarke v. Cock*, 4 East, 57). In an action by indorsee against maker of a promissory note, payment by the payee may be set up as a satisfaction (*Cooper v. Davis*, 1 Esp. 463). And taking a new bill from the acceptor, the original bill to be kept as a security, operates as evidence of an agreement that, in the mean time, the original bill shall not be enforced (*Gould*

v. Robson, 8 East, 580; *Dillon v. Rimmer*, 1 Bing. 100, 102). But taking a warrant of attorney to enter up judgment does not operate as a satisfaction, unless judgment is actually entered up (*Bayl. B. 334*); as, where, an action having been brought against the acceptor of a bill of exchange, it was agreed between the parties that the deft. should pay the costs, renew the bill, and give a warrant of attorney to secure the debt; the deft. gave the warrant of attorney, and renewed the bill, but did not pay the costs (*Norris v. Aylett*, 2 Camp. 329); in a fresh action upon the first bill the taking of the renewed one was holden to be no defence, even although the second bill had been indorsed away by the plt., and was then in the hands of a third party; for, if the matter were specially pleaded the deft. would have been obliged to aver the payment of the costs as one of the conditions of renewal (*lb.*). And, where one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills: it was held that, the separate notes having proved unproductive, he might still resort to his remedy against the other partners, and that the taking, under these circumstances, the separate notes, and even afterwards receiving them several times successively, did not amount to satisfaction of the joint debt; and *Holroyd, J.*, said, "I think that the giving of the three notes by the one partner will not operate as a satisfaction of the joint debt: for, in the first place, it is not a satisfaction of a higher nature; and, in the second, there was an express reservation of the plt.'s claim against all the three, and the agreement between the three partners cannot vary the plt.'s right, even though it was communicated to him" (*Bedford v. Deakin*, 2 B. & A. 210). The giving a bill of sale as a collateral security for the payment of a bill, does not suspend the right to sue on the bill (*Twopenny v. Young*, 3 B. & C. 208); unless indeed it be made the subject of an express stipulation. Satisfaction as to one of several partners is satisfaction as to all (*Jacoub v. French*, 12 East, 317). It has been said that in no case will the taking a collateral security amount to a satisfaction (*Pring v. Clarkson*, 1 B. & C. 14; per **Abbott, C. J.*, see *Adams v. Bingley*, 1 M. & W. 192).

[*600] Where the holder of a bill of exchange, being a security for a debt due from A., B., C., and D., indorsed over and put the bill in the hands of B., C., and D., who settled their account with A., saying the bill had been satisfied by them, but the bill itself was not produced to or seen by A. at the time of such settlement: held, that this was no defence to A. in an action by the holder against A., B., C., and D., the bill not having been, in fact, satisfied by the persons to whom it had been indorsed and handed over (*Featherstone v. Hunt*, 1 B. & C. 113).

A judgment against a subsequent party to the bill will be no satisfaction so as to discharge a prior party, it is only an extinguishment to the parties to the judgment (*Hayling v. Mulhall*, 2 Bl. R. 1235; *English v. Darley*, 2 B. & P. 62); nor is the taking the acceptor in execution a discharge of the drawer (*Macdonald v. Rivington*, 4 T. R. 825).

Payment of the exact sum due on a note by the deft. in full satisfaction of the debt and damages is sufficient, and will entitle the deft. to a verdict, and the jury are not bound to give nominal damages for the detention of the debt (*Beaumont v. Greathead*, 2 C. B. 494).

It is a rule that a bill for a smaller sum cannot be taken for and on account of a larger (*Thomas v. Heathorn*, 2 B. & C. 477). Yet, if pleaded in accord and satisfaction, it would be a good plea (*Sibree v. Tripp*, 15 M. & W. 23). The plea in the former case should therefore be confined to so

much of the moneys or debt sued for as the bill will cover, and no more, otherwise the plea will be substantially bad (*Thomas v. Heathorn, supra*). A misdescription in a plea that the deft. accepted a bill of exchange, not yet due, on account, &c., in setting out the bill in a material part, would not be amendable at the trial (*David v. Preece, 5 Q. B. 440*). If a blank stamp had been accepted by the deft., and remitted to the plt. to fill in his name, it should be so pleaded (*Baker v. Jubber, 1 Man. & G. 212*). It seems necessary to show that the bill was running at the commencement of the suit (see *Simon v. Lloyd, 2 C. M. & R. 187*), and proved where the bill is not given in satisfaction (see *Goldshede v. Cottrell, 2 M. & W. 20*). Where the note was made by a third person, and indorsed by deft., the plea showed that the note was due before action (*Kearslake v. Morgan, 5 T. R. 513*). Averment that the bill was paid by the deft., or indorsed away before action by the plt., would be proper, where the second bill was overdue before action (*Maillard v. Argyle (Duke of), 6 Man. & G. 40*). The plea must state that the bill was given by the deft., and received by the plt. on account, &c. (*Simon v. Lloyd, supra*). "For, and on account, and in payment," was held good, payment not necessarily importing accord and satisfaction (*Maillard v. Argyle (Duke of), supra*). "In discharge" will be taken to mean "for and on account" (*Emblin v. Dartnell, 1 D. & L. 591*).

Where to a declaration on a promissory note by the payee against the maker, the deft. pleaded that the plt. drew upon him a bill of exchange for the amount of it, which he accepted and delivered to the plt., who took it for and on account of the note, and afterwards indorsed it to a person unknown, who at the commencement of the action was the holder of it, and entitled to sue upon it: held, bad upon demurrer, for not alleging that the bill was *given* as well as received in satisfaction of the debt and damages (*Crisp v. Griffiths, 2 C. M. & R. 159*). To an action on a note for 420*l.*, the deft. pleaded that after it became due he gave the plt., and the plt. received from *him, two bills for 210*l.* each, to take up the note, and in lieu thereof: held, that it was a question for the jury to say, [**601*] whether the bills were given in lieu and satisfaction of the note, or merely to give time: if the former, it was a good defence, although one of the bills was overdue and unpaid at the commencement of the action; if the latter, it was no defence, unless it appeared that both the bills were outstanding at the commencement of the action (*Goldshede v. Cottrell, 2 M. & W. 20*; *Boydell v. Champneys, 2 M. & W. 435*).

Accord and satisfaction is a good plea in an action by the drawer or indorser against the acceptor. Where to an action on a bill of exchange the deft. pleaded in bar as to 76*l.* odd, parcel, &c., and that as to 50*l.* residue, &c., the plt. ought not further to maintain his action, because, after the commencement thereof, the deft. indorsed and delivered to the plt. a bill of exchange for 82*l.*, drawn, &c., and accepted, &c., in full satisfaction and discharge of the deft.'s promise as to 50*l.*, and of all damage by the plt. sustained by reason of the non-performance of such promise, which bill the plt. took and received in full satisfaction and discharge: holden, a good plea (*Corbett v. Swinburne, 8 Ad. & E. 673*; *Dillon v. Rimmer, 1 Bing. 100*). Where the deft. pleaded to an action by the indorsee that the drawer indorsed the bill to B., who indorsed to C., who was the holder, when due; that C., not being able to obtain payment, returned it to B.; that whilst B. was the holder, and before it was indorsed to the plt., the defendant gave B. another bill, drawn and accepted by the same parties for a greater amount, which B. accepted in full satisfaction and discharge of the bill sued on: held, a good answer to the action (*Lewis v. Lyster, 2 C. M. & R. 704*). The plea also stated that the second bill was endorsed by B. to A., and that after it became

due, the deft. paid the amount to A., in satisfaction: held, surplusage (Ib.). Where the plea stated an accord and satisfaction between the drawer and the plt., and went on to state that the bill was accepted for the accommodation of the drawer, and that the plt. held the bill without consideration or value: held, bad for duplicity (*Purssood v. Peak*, 9 M. & W. 196).

A plea that the plt. drew and the deft. accepted a bill of exchange for 60*l.*, in satisfaction of the plt.'s demand, is not proved by showing that the deft. transmitted to the plt. a blank acceptance, with 60*l.* in figures written in the the margin, which the plt. altered and filled up as a bill for 46*l.* before signing it as drawer (*Baker v. Jubber*, 1 Man. & G. 212). The presumption in the first instance will be that the bill was given "for and on account" (*Sayen v. Wagstaff*, 5 Beav. 415).

A plea of the delivery of a bill of exchange or promissory note "for and on account" of a debt for which the plt. sues, must show upon the face of it that it was a negotiable instrument, in which the plt. took an interest, and if it omit to do so, the defect will not be cured by verdict (*James v. Williams*, 2 D. & L. 713; 13 M. & W. 828).

The deft. pleaded to an action by the assignees of a drawer, that before the bill became due, he delivered to the drawer certain shares as a collateral security for the bill, in order that he might by sale thereof repay himself the amount of the bill, and that after the bill became due, and was unpaid, the drawer sold the said shares for a large sum of money, to wit, 2000*l.*, which sum he appropriated to the payment of the bill and damages, without averring that the shares were received by the drawer in satisfaction: held, bad as a plea of accord and satisfaction (*Cannon v. Read*, 10 Law J., 242, C. P.) nor could it be deemed a plea of payment, the amount realised by the sale of the shares being stated under a *videlicet* (Ib.).

*In the replication the plt. may traverse the acceptance in satisfaction [*602] (see *Bell v. De Costa*, 2 B. & P. 446). It is no answer to a plea that after the bill became due the drawer made his note for 44*l.*, and delivered it to the plt. in full satisfaction and discharge of the bill, to say that the note, when it became due, was dishonoured and still remained unpaid; for, having accepted the note in satisfaction, the plt. could not afterwards sue upon it (*Sard v. Rhodes*, 1 M. & W. 153; and see *Thompson v. Percival*, 5 B. & Ad. 925; *Kirwan v. Kirwan*, 2 C. M. & R. 617). The first two counts charged deft. as the acceptor of two bills of exchange, and the other counts, for money lent, money paid, interest, and money due upon an account stated. Plea, as to the first and second counts, and as to 852*l.* 9*s.* 6*d.*, parcel of the moneys in the third and subsequent counts mentioned, that the bills were respectively drawn and accepted for and on account of the sums they severally represented, parcel of the said sum of 852*l.* 9*s.* 6*d.*, and for no other consideration; that after they respectively became due, and before the commencement of the suit, the deft. and one P. transferred certain stock of the value of 416*l.* 17*s.* 6*d.*, in full satisfaction and discharge of the sum of 416*l.* 17*s.* 6*d.*, parcel, &c., and of the causes of action in the declaration, so far as they related to the said sum of 416*l.* 17*s.* 6*d.*; that the deft. gave the plt., and the plt. took and received from the deft., three several bills of exchange for 145*l.* 4*s.* each; and that the plts. accepted and received the stock and the bills in full satisfaction and discharge of the said sum of 852*l.* 9*s.* 2*d.*, and of the causes of action in the declaration mentioned, as far as they related thereto: to this the plt. replied *de injuriâ*. Held, that inasmuch as the plea set up matter in discharge, and not in excuse, the replication was improper (*Barns v. Price*, 1 C. B. 214). Where the subject of defence has arisen after the breach of promise has occurred, it cannot be said to form an excuse for the previous breach: therefore,

de injuriâ would be a bad replication to a plea that another bill had been taken by the plt. for or on account of a bill or debt after due (*Crisp v. Griffiths*, 2 C. M. & R. 159), nor is it good where the plea amounts to accord and satisfaction, or payment (*Barnes v. Price*, *supra*). It cannot be replied, where the plea shows that the deft. was absolutely discharged from the debt, which was the consideration for the bill, before he accepted it, of which he was ignorant, therefore making the acceptance not binding upon him, or, if binding, that the plt. himself had after such acceptance released the debt (*Hartly v. Manton*, 5 Q. B. 247). If, however, the action is on a bill not between the same parties, and satisfaction to an intermediate holder is alleged, averring an indorsement after it became due, or with notice to the plt. the replication would be good, for the subsequent indorsement raises the promise, the breach of which is excused by the prior facts (*Noel v. Rich*, 2 C. M. & R. 360). But it would not be a good replication to a plea to an action by an indorsee against acceptor, stating the payment of a composition on the bill to a prior holder before it was due, and a payment to the plt. of the consideration which he had given for the bill after it became due (*Jones v. Senior*, 4 M. & W. 123). But it may be replied to a plea that the bill was satisfied by the deft. whilst in the hands of a prior holder, and was indorsed to the plt. when overdue (*Mitchell v. Cragg*, 10 M. & W. 369; *Herbert v. Sayer*, 5 Q. B. 965). So, where the bill declared on is averred in the plea to have been given in satisfaction of the previous debts (see *Scott v. Chappelow*, 4 Man. & G. 336). So, where the maker of a note to an action by the indorsee pleaded that it was given as a collateral security for a bill, upon an agreement that it should not be negotiated, and that the deft. had paid the *bill, of which the plt. had notice (*Gibbons v. Mottram*, [*603] 6 Man. & G. 692).

To an action by indorsee against maker of a note payable to P. B., the deft. pleaded that the note was delivered to P. B. by the maker without consideration, and in order that P. B. might raise money thereon in the maker's behalf; that the plt. advanced upon the security of the note a certain small sum of money, to wit, 200*l.*, and no more, and the note was therefore indorsed by the said P. B. to the plt.; that afterwards, and before the commencement of the suit, the plt. was paid and satisfied by the deft. all the money by him so advanced, as aforesaid, and all his right, title, and cause of action upon and in respect of the same. The replication denied the payment and satisfaction; at the trial, the deft. gave no evidence in support of his plea, and the jury found a verdict, under the direction of the judge, for the whole amount of the note. Held, that the direction was right, and that the deft. could not avail himself of the admission in the pleadings that only 200*l.* had been advanced, to limit the plt.'s right to recover that sum (*Robins v. Maidstone* (Viscount), 1 D. & M. 31; 12 Law J., N. S. 321; 7 Jur. 694). Plea, that C., the agent of the plt., obtained from the deft. a bill, &c., "for and on account," &c., and that plt. received it "for and on account," &c. Replication, that C. had not plt.'s authority to receive it, and that it was returned to the deft. (*Huxley v. Bull*, 7 M. & G. 571).

In debt on a promissory note for 40*l.*, payable on demand, "with lawful interest for the same," with the common counts for money lent and on an account stated, the deft. pleaded as to the said debts in the said declaration mentioned, except as to 5*l.* (which was paid into court), payments to a larger amount, before action brought, alleging that the plt. accepted and received the same in full satisfaction and discharge of the said debts, except as aforesaid, and of all damages by the plt. sustained by reason of the detention of the said debts, except as aforesaid: held, that the interest was part of the

debt, and recoverable as such, upon an issue taken on this plea (Hudson v. Fawcett, 8 Sco. N. R. 32 ; 2 D. & L. 81).

On a plea of payment neither the plt. nor deft. is bound to produce the note; and where the plea stated, by way of introduction to an allegation of payment, that the note was given in lieu of a former one, plt. replied *de injuriâ*: held, enough to prove payment without proving the superfluous introductory matter, and a verdict for the deft. on such plea would in any future action be no evidence against the plt. of such superfluous matter (Shearin v. Barnard, 10 Ad. & E. 593). If it become necessary for the deft. to prove the bill or note, he must give notice to produce it (Goodered v. Armour, 3 Q. B. 956).

Debt against maker of a note, payable at six months, with counts for money lent, interest, and an account stated. Plea, as to 100*l.*, parcel of the moneys in the second, third, and last counts, that deft., before commencement of suit, made his promissory note for the payment to the plt.'s order of 100*l.*, six months after date, and the deft. then delivered the note of the plt., who then took and received the same for and on account of the sum of 100*l.* Replication, that the period of six months, specified in the said note, expired before the commencement of this suit, and the note became, before the commencement, &c., due and payable; yet the deft. had not paid the sum of money in the note specified. Held, on demurrer, that the plea afforded no answer to the declaration, as it did not aver that the note was still running, or that it had been indorsed over by the plt. (Price v. Price, 16

Law J., N. S., Ex. 99 ; *16 M. & W. 232 ; 4 D. & L. 537 ; but [*604] see Kearslake v. Morgan, 5 T. R. 513 ; Mercer v. Cheese, 2 Dowl., N. S. 619 ; Fearn v. Cockrane, *infra*). *Seemle*, that the plea was not bad, on the ground of its omitting to state that the note was given as well as received on account of the debt (Price v. Price, *supra*). Plea, that the deft. had made his promissory note in writing, and thereby promised to pay to the plt.'s order, on demand, 1050*l.*, and delivered the same to the plt., who took and received it for and on account of the debt in the declaration, and all causes of action in respect thereof, and that afterwards a warrant of attorney was given in full satisfaction and discharge of the said promissory note, and of all causes of action in respect thereof, and of the causes of action in the declaration mentioned : held, not bad for duplicity (Fearn v. Cockrane, 16 Law J., N. S., Q. B. 304 ; 4 C. B. 274 ; 4 D. & L. 797 ; 11 Jur. 353, C. B.).

Action by indorsee of a promissory note : the deft. pleaded that the note was made by the plt. and E. ; that whilst the plt. was holder, the deft. and E., his partner, delivered to him nineteen signed bills, which were referred to taxation, and that it was necessary that the balance found due from the plt. to the deft. on such taxation, should be applied in part payment of the note, and that the balance of the note should be secured by a judgment, payable at certain times, which had elapsed before the commencement of the suit ; that the taxation was still pending, and the balance not ascertained, and that the deft. and E. had always been ready and willing to apply the balance due to the deft. towards payment of the note, and on the completion of the taxation to secure the balance of the note by a judgment : held, that the plea was bad, as being an accord without satisfaction (Carter v. Wormald, 16 Law J., N. S., Ex. 231).

The maker of several promissory notes pleaded to an action by the indorsees, that after the making of the notes, and before the indorsement of any of them to the plt., and whilst T. L., who indorsed to the plt., was the holder of them, T. L. was indebted to the deft., and J. D. ; as executors in a sum exceeding the amount of the notes, for money lent by the testator, in

which sum the deft. was beneficially interested as residuary legatee; and that before the indorsement of the notes to the plt., and while T. L. was the holder, it was agreed between him and the deft., and J. D., that the amount of the notes and moneys due thereon should be set off and allowed to him out of the moneys so due from him to them, and that the deft., and T. L., should mutually be discharged from that amount; that the notes and the moneys due thereon were thereby satisfied and discharged, and that they remained in the possession of T. L. until he indorsed them to the plts., without the consent or fault of the deft.; and T. L. indorsed them to the plts., and the plts. took them after they had been so satisfied. Replication thereto, that the notes were not satisfied and discharged as in the said plea mentioned. Held, after verdict for the deft. on this issue, that the plea was bad, for not showing distinctly that the notes were overdue when indorsed by T. L. to the plts., and that the plts. were entitled to judgment *non obstante veredicto* (Cripps v. Davis, 12 M. & W. 158).

Declaration on a bill of exchange in debt, with a count upon an account stated. Plea to the new assignment contained an averment that the bill of exchange was given "for and on account of, and in payment and discharge" of, the debt in the account stated: held, not equivalent to an averment that the bill was given in satisfaction of such debt (M'Dowall v. Boyd, 12 Jur. 980; 17 Law J., Q. B., 295—B. C.—Wightman).

The plea then went on to state, that the bill so given was afterwards altered, and showed, that; in consequence of such alteration, it became ineffectual. The plt. traversed the fact of the alteration, upon which latter issue the deft. succeeded in obtaining a verdict. On motion for that purpose: held, that judgment *non obstante veredicto* must be awarded for plt. (Ib.).

Giving Time to other Parties to Bill.] This defence must be specially pleaded, so of course the proofs will depend much upon the plea. To an action on a bill of exchange by indorsee against drawee, deft. pleaded that the drawee accepted, and plt. afterwards sued drawee on the bill, and while that suit was pending, in consideration *of 2l., agreed with the drawee that plt. should stay all further proceedings and forbear [*605] continuing to sue, for two months, during which time plt. could have continued further proceedings; which agreement was without the drawer's (now deft.) consent, and that in pursuance of the agreement, and without the drawer's consent, plt. did stay all further proceedings and forbear continuing to sue the drawee: held, a good plea, though it did not expressly aver that the indorsee could have obtained judgment against the drawee before the time until which he agreed to forbear. The plt. in the present action traversed the agreement set out in the plea, and issue was joined: held, that the drawer supported the issue on his part by merely proving the agreement, and that plt. was not entitled to show in answer, that judgment could not have been obtained earlier than the time until which he had agreed to forbear (Isaac v. Daniel, 8 Q. B. 500).

Giving time to a prior party discharges subsequent ones (Hall v. Cole, 4 Ad. & E. 577). It was held no defence that the plt. before the commencement of the suit had consented to a judge's order in an action against the drawer, that upon payment of the debt and costs all further proceedings should be stayed; and that, unless such payment were so made, the plt. should be at liberty to sign final judgment, although the plea also stated that the plt. could have obtained such judgment before the expiration of the month, inasmuch as such order did not amount to an absolute stay of proceedings (Michael v. Myers, 6 Man. & G. 702). Where B., principal. and C., surety, gave their promissory note to A., who sued B., and took from him a cognovit payable by instalments, the first of which would become payable before the

time at which A. would have signed final judgment had no cognovit been given: held, that C. was not discharged, inasmuch as no longer time had been given to B. than he would have had if the suit had proceeded (*Price v. Edmunds*, 10 B. & C. 578). The plea must show that the time given was posterior to that in which judgment could have been obtained in an action against the acceptor (*Kennard v. Knott*, 4 Man. & G. 474). If the plea merely aver an agreement *to forbear*, then it seems that the fact that the agreement was by a judge's order, and that no longer time was given than the acceptor would have had by the practice of the court, should be specially replied (*Isaac v. Daniel*, 15 Law J. 149, Q. B.). *Quere*, whether these facts might be proved under a replication denying the forbearance (*Ib.*; per *Wightman, J.*, see *James v. Williams*, 13 M. & W. 828).

In general, giving time to any of the parties is a discharge to every other party who, upon paying the bill or note, would be entitled to sue him to whom such time has been given. The acceptor of a bill is primarily liable; and the drawer and indorsers may be considered in the nature of sureties for the performance of his acts (*Clark v. Devlin*, 3 B. & P. 366); therefore, if the party take a bond, or any security, payable at a future day, from the acceptor of a bill, or the maker of a note, without the assent of the other parties, it would discharge them from liability (*Claxton v. Smith*, 3 Mod. 87; *Bayl. B.* 371). Where the holder received 100% from the acceptor and took his bond and warrant of attorney for the residue without the consent of the indorser: held, that he thereby discharged the drawer and indorser (*English v. Darley*, 2 B. & P. 61; *Gould v. Robson*, 8 East, 576). Though there is no obligation on the part of the holder to use active diligence, by suing the acceptor or any other party, yet he must not give him time, so as to preclude himself from suing him, and suspend his remedy against him, in prejudice of the drawer and indorsers (per *Lord Eldon*, 6 Ves. 734); and, if a holder agree

[*606] *to give indulgence for a certain period of time to any of the parties to a bill, this takes away his right to call upon that party for payment before the period expires, and not only to call upon him, but on all the intermediate parties; for otherwise, were he to oblige them to pay the bill, they could immediately resort against the very person whom the holder has indulged, which would be inconsistent with his agreement, and a fraud upon him (per *Bailey, J.*, *Claridge v. Dalton*, 4 M. & S. 232). And, when a bill or note become due, if the holder renew it, or agree with the drawer or maker, for a valuable consideration, to give him time for payment, without the concurrence of the other parties entitled to sue such drawee or maker on the bill or note, they will thereby in general be discharged from all liability, although the holder may have given due notice of the non-payment. So, where, in an action by the indorsee against the indorser of a note, the note being presented for payment when due, the maker desired two or three days' time to pay it in, and so from time to time, which was given him by the then holder, it was held that, as there had been a credit given, plt. could not recover (*Anderson v. George*, cited *Selw. N. P.* 396). As to giving time, the holder does it at his peril; and in no case has it been determined that the indorser is liable, after the holder of the note has given time to the maker (per *Buller, J.*, *Tindal v. Brown*, 1 T. R. 171; 2 *ib.* 186, n.; *English v. Darley*, 3 B. & P. 61). And it has been held that, if the holder of a bill of exchange, when due, after taking part payment from the acceptor, agree to take a new acceptance from him for the remainder, payable at a future day, and that, in the mean time, the holder should keep the original bill in his hands as a security, such agreement amounts to giving time, and a new credit to the acceptor, and discharges the indorser, who was no party to such agreement, though the drawer might have no effects in the hands of the acceptor (*Gould*

v. Robson, 8 East, 576); and a like indulgence to a drawer, or a prior indorser, would also discharge all subsequent parties (Ib.). And the releasing an acceptor, or other prior party to a bill or note, would discharge a subsequent party; and where, in an action on a note, against one who had indorsed it for the accommodation of the maker, it appeared that the plt., the indorsee, had signed an agreement to accept from the maker of the note five shillings in the pound in full of his demand, on having a collateral security for that sum from a third person, it was held that the debt was thereby discharged (Lewis v. Jones, 4 B. & C. 506; 6 D. & R. 567).

The mere change, or addition of securities, without expressly relinquishing the original debt, or suspending for a time the creditor's right of action, will not discharge a surety or party to a bill (Thomas v. Courtney, 1 B. & A. 1; *post*, "COMPOSITION"). And a composition with the acceptor, or other party to a bill reserving the remedy for the remainder against the other parties, will not discharge such other parties (18 Ves. 20; 4 B. & C. 507). Accepting a mere collateral security from the acceptor, will not discharge the other parties to a bill: thus, where a bill having been dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first, and the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to the plt., it was held, that the second bill was merely a collateral security, and that the receipt of it by the payee did not amount to giving time to the acceptor of the first bill, so as to exonerate the drawer (Pring v. Clarkson, 1 B. & C. 14; 2 D. & R. 78). The contract to give time must be such as to bind the parties, otherwise it will be *no bar to an action by the holder against the drawer (Philpot v. Bryant, 4 Bing. 717; and see Pring v. Clarkson, 1 B. & C. 14; [*607] Clarke v. Wilson, 3 M. & W. 208, *post*, Lyon v. Holt, 5 M. & W. 250); and therefore there is no obligation of active diligence on the part of the holder, after regular notice of the non-payment of a bill. The holder may tacitly forbear to sue the acceptor, provided he do not agree for sufficient consideration to give a precise time, without its operating as a discharge to the drawer (Walwyn v. St. Quintin, 1 B. & P. 652; see Margisson v. Goble, 2 Ch. R. 364; English v. Darley, 2 B. & P. 61); and it has been held, that agreeing (after a bill has become due, and been regularly protested for non-payment, and notice thereof given) not to press the acceptor, will not discharge the drawer. And, where the holders of a bill, which had been refused payment by the acceptor, gave notice thereof to the drawers, but informed them, that they had reason to believe it would be taken up in a few days, and offered to retain the bill till the end of the week, unless they received their instructions to the contrary, it was held that such conduct did not discharge the drawer, though no further notice of non-payment was given (Forster v. Jerdison, 16 East, 105); and even an express agreement not to sue after notice given, but without sufficient consideration, and without taking any new security, will not discharge the parties, as it is a *nudum pactum*, *semble* (Walwyn v. St. Quintin, 1 B. & P. 655; Dean v. Newhall, 8 T. R. 168; Fitch v. Sutton, 5 East, 230; Philpott v. Bryant, 4 Bing. 717); and the person to whom time is thus given must be a party to the bill (Lyon v. Holt, 5 M. & W. 250). A conditional agreement, to give time to the acceptor, on his paying part, which condition is not performed by the acceptor, is not a discharge to the indorsers (Badnall v. Samuels, 3 Pri. 521). Taking cognovit from the acceptor, by which the time of obtaining judgment against him is not deferred, does not seem to be such a giving of time as will discharge the drawer (Jay v. Warren, 1 C. & P. 532; Lee v. Levi, 4 B. & C. 390; 5 Taunt. 319; Price v. Edmunds, 10 B. & C. 578; Hewitt v. Goodrick,

2 C. & P. 468). Even, before the new rules, the taking a warrant of attorney from the acceptor, after action brought against the indorser, cannot be given in evidence under the general issue in the latter action, being matter of defence arising after action brought (*Lee v. Levi*, 4 B. & C. 390). The giving time, or taking security from one of several acceptors of a bill, or makers of a note, will not discharge the other acceptors or makers from liability (*Bedford v. Deakin*, 2 B. & A. 210); but the releasing one of several acceptors, would discharge the rest (*Co. Litt.* 232), unless, indeed, the instrument of release contained merely a covenant not to sue that one (8 T. R. 168); and this legal operation of a release to one of several acceptors, &c., may be restrained in some cases by the express terms of the instrument (*Solly v. Ellerman*, 2 Moo. 90). In those cases where the laches of the holder, in not giving notice of the non-acceptance of a bill, will be excused by the circumstances of the drawer, indorser, &c., not having effects in the hands of the drawee, such parties will also be discharged by the holder's giving time, or taking security from the acceptor (*Walwyn v. St. Quintin*, 1 B. & P. 652). Thus, the holder, for value, of a bill accepted for the accommodation of the drawer, may prove the bill under a commission against the drawer (*Ex parte Holden, Cole*, B. L. 167). But this would be allowed, if the bill were drawn for the accommodation of the acceptor (*Hill v. Read, Dow. & Ry.* N. P. 26). And, where the acceptor of a bill is merely an agent for the drawer, who is the purchaser of goods, the holder's renewing the bill without the drawer's consent, will not discharge him (*Clark v. Noel*, 3 Camp. 411). If [*608] *there be any evidence of the *assent* of the drawer or indorser to the security being taken from, and time given to, the acceptor; or, if, after notice of the time having been given, the drawer or indorser promise to pay, he is precluded from taking advantage of the indulgence of the acceptor (*Bayl. B.* 210; *Clarke v. Devlin*, 3 B. & P. 363; *Stevens v. Lynch*, 12 East, 38). Where the drawer upon being asked by the holder whether he should give time to the acceptor, said, "You may do as you like, for I have had no notice of non-payment," when, in fact, he had: it was holden, that time given to the acceptor after this did not discharge the drawer (*Clarke v. Devlin, supra*). Giving time to the acceptor will not discharge the drawer if it be an accommodation acceptance (*Collett v. Haigh*, 3 Camp. 281). But, where the holder of a bill, on its becoming due, allowed the acceptor to renew it without consulting the indorser, but he afterwards said to the acceptor, "it was the best thing that could be done;" it was held, that the indorser was discharged, as it was not a recognition of the terms granted by the holder to the acceptor; but that it was to be considered as referring to the acceptor of the bill, to whom the arrangement was obviously advantageous (*Withall v. Masterman*, 2 Camp. 179). Where the bill was accepted for the accommodation of the drawer, and the holder, knowing that circumstance, gave time to the drawer: held, that the acceptor was discharged (*Laxton v. Peat*, 2 Camp. 185); *sed quere*; it has since been held, that notwithstanding a release to the accommodated drawer, the holder who knew at the time of the release, but not when he took the bill, that it was an accommodation bill, may sue the acceptor (*Harrison v. Courtauld*, 3 B. & A. 36; *Nichols v. Norris*, *ib.* 41); if the holder give time to a prior indorser, or to the drawer, it will discharge a subsequent indorser (*Hall v. Cole*, 4 Ad. & E. 577).

Where a joint and several note is signed by one drawer, as surety for the other, and the plt. merely takes a warrant of attorney from the co-drawer, upon which he might and did enter up judgment forthwith; it was holden that this was no answer to the action either as giving or as extinguishing the simple contract (*Bell v. Banks*, 3 Man. & G. 258). And where, in such a

case, it was pleaded, that although the note was in the hands of the pl. for six months after it was due, yet the deft. had no notice of its non-payment until the action was brought, and that the plt. gave time to the co-drawer, to the prejudice, and without the consent or knowledge of the deft.; held, bad on general demurrer, as not showing that the consent was binding upon the plt. (*Clarke v. Wilson*, 3 M. & W. 208; see *Mallett v. Thompson*, 5 Esp. 178).

If the holder of a bill agree not to sue the acceptor, upon his making an affidavit that the acceptance is a forgery, he will be precluded from suing him if such affidavit be made and sworn, though it be false (*Stevens v. Thacker*, Pea. 187; Bayl. B. 212). But, if the holder of a bill which has become due, after protest for non-payment and notice, agree not to press the acceptor, he does not thereby discharge the drawer; but the drawer would not have been liable if no protest or notice had been made (*Walwyn v. St. Quintin*, 1 B. & P. 652); nor will the receiving part of the money on account, from an indorser (Ib.). Indulgence to the payee of a bill cannot affect the drawer; he may, nevertheless, pay, and enforce his remedies (*Collott v. Haigh*, 3 Camp. 281; Bayl. B. 342; *Claridge v. Dalton*, 4 M. & S. 232; *Mallet v. Thompson*, p. 609). And so, a release to the payee of a note does not discharge the maker, though the note were an accommodation note, unless that fact were known to the releaser when he gave the release (*Carstairs v. Rolleston*, 5 Taunt. 551; 1 Marsh. 207; Bayl. B. 342); *and a [*609] discharge of any of the indorsers will discharge all subsequent, though not prior, indorsers (*Smith v. Knox*, 3 Esp. 46; *English v. Darley*, 2 B. & P. 62). And so, a prior indorser may be sued after a subsequent indorser, who had been taken in execution, had been released from prison on a letter of license, without paying the debt (*Hayling v. Mulhall*, 2 Bl. R. 1235). The holder of an accommodation note, who has covenanted not to sue the payee, for whose accommodation the note was made, may yet sue the maker (*Mallet v. Thompson*, 5 Esp. 158; *ante*, p. 608).

An agreement between the plt. and a stranger to give time to the acceptor, will not discharge an indorser; therefore, where an indorsee pleaded an intermediate indorsement by him to H., and by H. to the plt. (not stated in the declaration), and an agreement between the plt. and H. to give time to the acceptor, and all other parties, the indorsement to H. was held a material averment, for otherwise he was no party to the bill, but a stranger, and it seems such a plea should aver that the acceptor was party to the bill, or privy to it (*Lyon v. Holt*, 5 M. & M. 250). When the holder sues, and recovers judgment against the indorser, the court will not stay proceedings, or set aside the judgment on the ground that such holder has subsequently given time to a prior indorser, &c. (*Bray v. Manson*, 10 Law J. 468; *Baker v. Flower*, ib. 469). In general, a mere binding agreement to give time between prior parties to the bill, founded upon a fresh and sufficient consideration, would seem a discharge of the subsequent parties (*Clark v. Wilson*, 3 M. & W. 208; *Lyon v. Holt*, 5 M. & W. 250).

Where the plea stated that the bill was accepted for the accommodation of the drawer, and that after it was due the drawer, without the knowledge of the deft., gave the plt. other bills of exchange to a large amount, which the plt. received, and in consideration thereof agreed to give time to the drawer for three months upon the bill in question, and until default should be made in the new bills; replication, *de injuriâ*, to which the deft. demurred for putting in issue more than one matter of defence: judgment for plt., the replication being as good as the plea (*Reynolds v. Blackburn*, 7 Ad. & E. 161).

Waiver and Release.] The obligation of a complete acceptance may be

waived (Bayl. B. 207), either by express agreement between the parties,—as, where it was agreed that the acceptance should be considered “at an end” (Walpole v. Pulteney, cited Doug. 236, 237, 248, 249); or by “a message to the acceptor of an accommodation bill, that the bill was settled with the drawer, and he need give himself no further trouble” (Black v. Peele, 1 Dougl. 248; Walton v. Pulteney, Bayl. B. 164); or, where the holders of the bill said, “they looked to the drawer, and should not come upon the acceptors of the bill:” Lord Ellenborough held it a question for the jury, whether the words imported an absolute renunciation by them, as holders of the bill, of all claims in respect of it against the acceptors, or only imported that they looked to the drawer in the first instance; and the jury found for the plts. (Whatley v. Tricker, 1 Camp. 35). A declaration by the holder that “he should look to the drawer for payment, and that he wanted no more of the acceptor than another debt, not connected with the bill,” will not be sufficient to discharge the acceptor (Parker v. Leigh, 2 Stark. 228). The liability of the acceptor may also be waived by implication, “as by the receipt of the known consideration of the bill” (Bayl. B. 208). Where a bill has been accepted for the mere accommodation of the drawer, it has *been [*610] held, that if the holder, knowing that circumstance, give time to the drawer, the acceptor will be discharged (Laxton v. Peat, 2 Camp. 185); but this has been doubted (Bayl. B. 210; see Lyon v. Holt, 5 M. & W. 250; Harrison v. Courtauld, p. 608). A neglect to call upon the acceptor, or an indulgence to any of the parties, though for ever so long a time, shall not be considered as a waiver (Bayl. B. 168). If the holder receive part of the money from the drawer, and take a promise from him upon the back of the bill for the payment of the residue at an enlarged time, it is for a jury to say whether this is not a waiver of the acceptance (Ellis v. Galindo, 1 Dowl. 250; Bayl. B. 210; but see Dingwall v. Dunster, ib. 247; see also Parker v. Leigh, p. 609; Farquhar v. Southey, Moo. & M. 14).

Since R. G. H. T. 4 Will. IV. r. 3, a release must be specially pleaded. To an action by indorsees against indorser of a bill of exchange, the deft. pleaded in bar a deed of release, alleged to have been executed by the plts. and other creditors of one C., a prior indorser. The deed appeared to have been executed by the plts. alone, and was in form a mere assignment by the plts. to one S., of the debt due to them from C., putting S. in their place with regard to the remedy against them on the bill, the consideration for such assignment being 2s. 6d. in the pound on the amount of the debt: held, that this deed did not sustain the plea (Houlditch v. Cauty, 6 Sco. 209). The acceptor to an action by the payee pleaded that, before the bill became due, and whilst the plt. was the holder thereof, and before the commencement of the action the plt. released the bill, without alleging that the release was after the acceptance: held, on demurrer, that the plea was bad on this ground (Ashton v. Freestun, 2 Man. & G. 1). The maker of a note pleaded to an action by the indorsees of a note, that the promise was a joint and several one by deft., and A., to whom one of the plts. executed a release under seal: replication, that the release was executed at the request of the deft., who afterwards, and while the note was unpaid, in consideration of such release, ratified his promise, and promised to remain liable to the plts. for the amount of the said note: held bad, for setting up a parol exception to a release under seal (Brookes v. Stuart, 9 Ad. & E. 854). To the same plea, pleaded to the common money counts, a replication traversing both the joint and several promise, and also the release, was admitted to be bad on special demurrer (Ib.). A release by the drawer to the acceptor, whilst the former has the bill in his hands, cannot be pleaded to an action by his indorsee for value, and with notice of the release (Dod v. Edwards, 2 C. & P. 602). A release

to the drawer, for whose accommodation the bill has been accepted, or to his assignees, if he became bankrupt, will not discharge the acceptor (*Harrison v. Courtauld*, 3 B. & A. 36). Where the deft. pleaded that the note was made by him and A. jointly and severally, and that one of the plts. executed a release to A., and the plt. replied that he executed a release at the request of the deft., who afterwards, and whilst the note was unpaid, in consideration of such release, ratified his promise, and promised to remain liable to the plts. for the amount of the note: held, no answer to the action, for it was setting up a parol exception to a release under seal (*Brooks v. Stuart*, 9 Ad. & E. 854). A note payable on demand was given to trustees of a building society to secure the payment of certain instalments, fines, and interest, and upon some instalments becoming due, the payee commenced an action on the note, took a *cognovit* from the drawer for the instalments due and costs, and when that was paid he gave a receipt for debt and costs in the action: held, *that another action would not lie on the note for instalments, which subsequently became due (*Seddale v. Rawcliffe*, 1 Cr. & M. [*611] 487).

Where a tenant gave a note to his landlord for rent due, and afterwards, whilst the note was running, the landlord brought an ejectment against the tenant to recover the premises, and a verdict was taken by consent for the landlord, upon the agreement that the tenant was not to be called upon for the rent then due: held, that this agreement extinguished all claim of the landlord on the note (*Howell v. Lewis*, 7 C. & P. 566). If the plea set up a release of the drawers before the bill was accepted, it is bad (*Drage v. Netter*, 1 Ld. Raym. 65; *Hartley v. Manton*, 5 Q. B. 263).

First count on a bill of exchange for 359*l.*, drawn at Rio de Janeiro by Steele and Manton, on deft. Manton, payable to the plts., and accepted by deft. Second count, an account stated. Plea, as to first count, and 359*l.* parcel, &c. in the second count, identifying the latter sum with the sum specified in the bill, and stating that deft. and A. Steele were partners in London under the name of M. S. and Co., and at Rio, of S. and M., deft. residing and carrying on the business in London, and S. at Rio. That the bill was drawn and indorsed by S., at Rio, in the name of S. and M., for a joint debt incurred at Rio, and was drawn upon and accepted by the deft. in the name of the London house. That after the drawing and indorsing, and before the acceptance, the deft. and S., at Rio, being indebted to the plts. in the above sum, and to others in divers other sums, became embarrassed, and it was doubtful whether they would be able to pay in full; and thereupon, and before the acceptance, &c., and whilst S. was resident at Rio, the plts. and the said other creditors at Rio, of S. & M., agreed among themselves, in writing that a liquidation of the debts of S. and M. should be forthwith commenced, under the superintendence of S. and others, and continued until the claims of plts. and the said other creditors were paid in full, or liquidated to the extent of S. and M.'s assets. That the holders of bills, drawn by the Rio house upon the London house, should be considered creditors for cash, but that their dividends should be retained until protest of the London bills for non-payment, and should be divided amongst the creditors, if those bills were paid; and that if plts. and the other creditors should be paid in full, the liquidation should cease. The plea then stated an agreement by S. and M., with plts. and other creditors, that the liquidation should take place as above stated; and averred, that afterwards and before the acceptance, the firm of S. and M., by S., proceeded and were, until the commencement of this suit, proceeding to realize the effects of S. and M., for the purposes of the agreement. That the deft. accepted the bill after the making of the agreement, being at the time resident in England, and ignorant of the pre-

mises stated to have taken place at Rio. That proceedings at Rio were according to law of Brazils, and that, by that law, the agreement and premises aforesaid were a full and absolute discharge and release of the debt, for which the bill of exchange was indorsed, and deft. is, and was, before action brought, absolutely discharged from the cause of action in first count; and in the second count, as to 359*l.*: held, as to the first count, that a release of the drawers, under the circumstances above detailed, would be no defence to the drawees (*Hartley v. Manton, supra*). *Semble*, that the plea might have been an answer to the second count, if pleaded to that only, but being pleaded to both, it was wholly bad (*Ib.*). To an action on a bill of exchange, &c., the deft. pleaded that it was agreed between the plt. and other creditors of the deft., that a sum of four shillings and sixpence in the pound should be paid by the deft. to the plt. and other *creditors; that upon receiving the money the plt. and other creditors should execute a release of their debts: that a release was prepared for execution, and that the creditors, except the plt., received the composition and executed the release; and that the deft. had always been ready and willing to pay the plt. the four shillings and sixpence in the pound upon the plt. executing such release. *Semble*, that the plea was bad for want of an averment that the deft. tendered a release to the plt. for execution (*Rosling v. Muggeridge*, 4 D. & L. 298; 16 M. & W. 18).

Where a plea shows matter of discharge and release, the replication *de injuriâ* is bad (*Hartley v. Manton*, 5 Q. B. 262).

In an action by indorsee against acceptor, the deft. pleaded that, after acceptance and before indorsement, the drawer waived the acceptance, and discharged the defts. from payment thereof, of which the plt. had notice: held, an issuable plea (*Steele v. Harmer*, 2 D. & L. 861). If the release have been lost or destroyed by accident, instead of profert, state "which writing hath been lost or destroyed by accident, and cannot be produced by the deft. to the said court here" (see *Read v. Brookman*, 3 T. R. 151).

To assumpsit against maker of a promissory note, deft. pleaded (without profert) an assignment of his property for the benefit of his creditors, and that plt. and other creditors thereby released him from their debts: the plea then averred that there never was but one part of the said indenture, and that the same did not belong to the deft.; that he had no right to it, nor had he the custody nor any power or control over it, and that the same was rightfully in the possession of the trustees, who refused to bring it into court: held, no excuse for profert (*Hudson v. Warden*, 2 D. & L. 232).

To an action on several bills, the declaration containing common counts, the deft. pleaded a release by deed, making profert. The replication set out the deed on oyer, from which it appeared that the plts. and others, creditors of the deft., agreed to release the deft. from their claims, on his agreeing to pay them a composition of 1*l.*s. in the pound thereon, and giving certain promissory notes for the amount, with a proviso that, in case default should be made in payment of any of the notes when due, the agreement and release should be void. The replication then averred that default had been made in payment of one of the notes, and that the same had been renewed by another, which was dishonoured when due. Rejoinder, that, before such default, the deft. delivered to the plts. such promissory note, which was accepted by them in lieu and satisfaction of the said first note. Held, that the rejoinder was bad, as being a departure from the plea (*Nevill v. Boyle*, 11 M. & W. 26).

Assumpsit by drawer against acceptor of a bill for 50*l.*, with counts for money lent, and on an account stated. Plea to the first count, that, before the bill became due, B. had agreed to pay the deft. certain sums, by monthly

instalments of 40*l.*; that deft. was unable to pay the bill, and thereupon, while plt. was holder, and before it became due, in consideration that deft. with assent of G., and at request of plt., would permit plt. to receive of G. so much of the instalment of 40*l.* as should amount to the sum in the bill, plt. agreed to accept payment of the bill thereout, and discharge the deft. from performing the promise in the first count: averment, that the plt. received the first instalment, but neglected of his own wrong to procure payment of the residue from G. out of the next instalment (*Kemp v. Watt*, 15 M. & W. 672). Replication, that, in consideration that the deft. would, with assent of G., at request of plt. permit plt. to receive from G. so much of the instalments of 40*l.* as should amount to the sum in the bill, plt. did not agree to *accept, &c. (traversing the plea in terms); held, bad [*613] on special demurrer, for not expressly traversing the agreement, and for leaving it uncertain whether it meant to put in issue simply the agreement, or the consideration, or both, or that G., by plt.'s consent, agreed to pay him the bill out of the instalments, so as to substitute themselves as debtors to plt. on the deft.'s acceptance (*Kemp v. Watt*, 15 M. & W. 672).

In an action by indorsee against indorser, the deft. pleaded that the plt., before the commencement of that suit, had recovered judgment against the drawer; had taken him in execution, and released him from custody, without the consent of the deft.: replication, that he did not release the drawer without the consent of the deft. *Quære*, whether this replication involved a negative pregnant (*Michael v. Myers*, 6 Man. & G. 702).

Release of a note by giving time to one for whose accommodation deft. had made it (*Smith v. Winter*, 4 M. & W. 454).

Where the holder or payee of a note or bill makes the drawer or maker his executor, and dies, upon proving the will by the executor the bill is discharged, so that he cannot even indorse the bill afterwards as executor, or join with the other executors in indorsing it, so as to confer upon his indorsee a right to sue upon it (*Freakley v. Fox*, 9 B. & C. 130).

Payment may be pleaded to an action on a bill of exchange or promissory note (see *post*, "PAYMENT"). But since R. G. H. T. 4 Will. IV. r. 3, it must be specially pleaded, unless credit be given for the sums paid in the particulars of demand (as to the form of the plea, see *post*, "PAYMENT"; *ante*, "ACCORD AND SATISFACTION"); even where made after action brought (*Corbett v. Swinburne*, 8 Ad. & E. 673). So, where the action was not brought until 20 years from the time when the bill became due, the deft. may rely upon the presumption of payment, arising from the lapse of time (*Duffield v. Creed*, 5 Esp. 52); unless rebutted (see *De Belloin v. Waterpark* (Lord), 1 D. & R. 16). The first count of a declaration in assumpsit was on a bill of exchange for 26*l.* 13*s.* 2*d.* The second count was for 30*l.* for money lent, and on an account stated. The deft. pleaded to the last count, except as to 10*l.* 9*s.* 1*d.* *non assumpsit*; and as to the whole declaration, except 10*l.* 9*s.* 1*d.* parcel of the first count, and 10*l.* 9*s.* 1*d.* parcel of the last count, payment before action and a set-off: and as to 10*l.* 9*s.* 1*d.*, parcel of the first count, and 10*l.* 9*s.* 1*d.*, parcel of the last count, payment into court of 11*l.*: held, on special demurrer, that the plea was bad (*Lattersall v. Parkinson*, 16 Law J., N. S. Exch., 196). Where a declaration contains a count on a bill of exchange, and also an *indebitatus* count, the latter relating to the sum which is the consideration for the bill, *sem le* that it would be correct to plead to both counts, that the bill was given on account of the debt in the second count, and then to plead payment into court of the amount of the bill and interest (*Ib.*). A receipt on the back of the bill is *prima facie* evidence of payment by the acceptor (*Scholey v.*

Walsby, Pea. 25), and it may be explained by parol evidence (Graves v. Key, 3 B. & Ad. 313; see Deacon v. Stoddart, 3 Man. & G. 317). So payment as to part may be specially pleaded (Corbett v. Swinburne, 8 Ad. & E. 673) as paid in full satisfaction and discharge of the promise of the deft., as to so much, and of all damages sustained by reason of the non-performance, &c., without mentioning costs, the payment having been pleaded after action brought (Ib.); but where the plea pleaded to the

amount of the bill mentioned in the declaration and not to damages, [*614] it would seem to be bad (see Whaler v. Senior, 7 M. & W. 562).

If the payment had not been in money but was an accord, &c., in goods, it should be so pleaded (Mitchell v. Cragg, 10 M. & W. 367; see Hall v. Poyser, 13 M. & W. 600). Where the acceptor pleaded that when the bill became due he gave the drawer another bill for it, and he had then no notice that the first bill had been indorsed to the plt.; the court set aside this plea as frivolous, and allowed the plt. to sign judgment (Bradbury v. Emans, 9 Law J. 7, Exch.). Even if the second bill be paid it will be no answer to an action upon the first bill, by one who was a holder of it for value before the second bill was given (Adams v. Bingley, 1 M. & W. 192). Indorsee against acceptor; plea that the drawer had indorsed it to C., in whose hands it was when it became due; that C. returned it to B.; that, before the indorsement to the plt., the deft. delivered another bill drawn by the same party and accepted by the deft. for a greater amount, which B. accepted in full satisfaction and discharge of the former bill: this was holden, on demurrer, to be a good answer to the action (Lewis v. Lyster, 2 C. M. & R. 704). The acceptor of a bill for 16*l.* 12*s.* pleaded, to an action by indorsee, that after the bill became due he paid to the drawer, who was then the holder, the sums of 2*l.* 12*s.* and 2*l.* 10*s.*, which sums, together with the price of a horse which the deft. had then sold to the drawer, and the price and value of which it was then agreed should be set-off against the deft.'s acceptance, the drawer accepted in full satisfaction and discharge of the amount of the said bill, and of the deft.'s acceptance; and that the bill was not transferred to the plt. until after the said satisfaction and discharge, and after the bill had become due: held, bad, for not stating the amount for which the horse was sold, but that it was not bad, on general demurrer, in not being pleaded to the damages, for the words "amount of the said bill," must be understood to mean all that was due upon it (Mitchell v. Cragg, 11 Law J. 343, Exch.).

Quere, whether a plea is bad, as an argumentative plea of payment, which states, that the deft. made his promissory note in writing, and thereby promised to pay to the plt.'s order on demand 1050*l.*, and delivered the same to the plt., who took and received it for and on account of the debt in the declaration, and all causes of action in respect thereof, and that afterwards a warrant of attorney was given in full satisfaction and discharge of the said promissory note and all causes of action in respect thereof in the declaration mentioned (Fearne v. Cockrane, 16 Law J., N. S., Q. B. 161). A plea stating that the bill was paid when due, and that it came to plt.'s hands without consideration, was held bad for duplicity (Deacon v. Stodhart, 5 B. N. C. 592).

Payment into Court. The deft. may pay money into court and plead it, but it must be specially pleaded under R. G. T. T. 1 Vict., and the form must not be departed from (Baily v. Sweeting, 12 M. & W. 616; see further on this subject, *post*; see also the form, *post*, "PAYMENT").

Under the above rule the deft. in an action of debt on a bill of exchange cannot plead payment of money into court as to part, in the form there

given, for in such plea he states that he never was indebted to the plt. for the residue, which he is precluded from doing under R. G. H. T. 4 Will. IV. r. 2. The deft. should rather show some answer as to part, and plead the payment into court as to the residue, and then the averment of never indebted would be mere surplusage (*Armfield v. Burgin*, 6 M. & W. 281; see per Parke, B. *ib.* 284; but see *Baily v. Sweeting*, 12 M. & W. 616). If, however, the *plt. should not demur to the plea, it may be supported by proof that the sum paid in was all the plt. advanced [*615] upon the bill, or otherwise support the issue, and the plea will be good after verdict (*Finleyson v. Mackenzie*, 3 Bing. N. C. 824). Where an action of assumpsit was brought upon two bills for 20*l.* each, and the deft. pleaded payment of 20*l.* into court, and no damage *ultra*; replication, damage *ultra*; the deft. proposed to show that the second bill was in fact given as a renewal of the first, which he had neglected to take up: held, that though the plea was demurable, yet as the plt. neglected to take advantage of it, the evidence was admissible (*Harris v. Bushell*, 2 D. N. S. 514); but, under the issue of damages *ultra*, the deft. will not be allowed to prove payment of the residue in reduction of damages (*Adams v. Palk*, 11 Law J. 185). Assumpsit: first count on a bill of exchange for 26*l.* 13*s.* 2*d.*; second count for 30*l.* for money lent, and on an account stated. Pleas: first, *non assumpsit* to the last count, except 10*l.* 9*s.* 1*d.*; second, plea to the whole declaration, except 10*l.* 9*s.* 1*d.*, parcel of the first count, and 10*l.* 9*s.* 1*d.*, parcel of the last count, payment before action brought, and a set-off; last plea, as to 10*l.* 9*s.* 1*d.*, parcel of the first, and 10*l.* 9*s.* 1*d.*, parcel of the last count, payment into court of 11*l.* (see R. G. T. 1 Vict.). On special demurrer to the last plea, it was held bad, for setting up as a defence payment of a less sum than the whole sum admitted to be due and pleaded to without other answer as to the difference than no damages *ultra* the sum paid in. Where the declaration has a count on a bill, and also an *indebitatus* count for the consideration for the bill, *e. g.* money lent: *semble*, that to prevent the plt. from recovering on both counts, by due payment into court, the deft. should plead to both counts; that the bill was given on account of the debt in the second count, and then allege payment into court of the amount of the bill and interest (*Tattersall v. Parkinson*, 16 M. & W. 752). A plea of payment into court of a less sum of money than the sum pleaded to, with no other answer to the difference than that no more damages have been sustained (*ib.*). This plea admits the handwriting of the parties (*Gutteridge v. Smith*, 2 H. Bl. 374); and the sufficiency of the stamp (*Israel v. Benjamin*, 3 Camp. 40).

The plea of payment into court, to a count on a bill or note, must specify precisely how much of the money paid into court is meant to apply to the bill, because this plea being in the nature of a plea of *non assumpsit* as to the residue not covered by the plea, is not applicable to a count on a bill or note (see *ante*, p. 613; *Jourdain v. Johnson*, 2 C. M. & R. 564). If paid on a promissory note payable by instalments, it only admits the amount of instalments as due which the money paid in will cover, and does not preclude the Statute of Limitations being pleaded to the others (*Jourdain v. Johnson*, 2 C. M. & R. 566; see "PAYMENT INTO COURT," "ADMISSIONS").

¹⁰⁰ *Payment, by and to whom made.*] In order to render a payment a defence, it must be proved to have been made to the proprietor of the bill, or to some person authorized by him to receive it (*Bayl. B.* 256); as, one of several partners (*Duff v. East India Company*, 15 Ves. 213); or a factor (*Farene v. Bennett*, 11 East, 40). But, in ordinary cases, the mere production of a bill of exchange, note, or check, is, in general, sufficient to warrant

the payment to the person who produces it (*Owen v. Barrow*, 1 N. R. 103); and though he be not proved to be the agent of the same party (12 Mod. 554). Where the plea shows facts to make it a good payment against the plt. in an action by indorsee against acceptor, evidence that the bill was paid by some one will not support the plea, unless *the deft. produce it [*616] (*Phillips v. Warren*, 14 M. & W. 379). Where the proprietor dies, payment should be made to his personal representative, if he have the power of administering his effects (*Allen v. Dundas*, 3 T. R. 125). And a *bona fide* payment to a person who has obtained probate of a forged will of a deceased party will be valid (*Ib.*)—if he become bankrupt, to his assignees; if he be an infant, to his guardian: and payment to the infant himself may be good, at least if it be beneficial to him (*post*, Pl. 160). In the case of a married woman, payment should be made to her husband (*Connor v. Martin*, Stra. 516, cited 3 Wils. 5). On a bill payable to A. or order, to the use of B., payment should be made to A. or his indorsee, and not to B. (*Cramlington v. Evans*, 2 Vent. 310; *Marchington v. Vernon*, 1 B. & P. 101). When a bill is indorsed to a person merely for the purpose of receiving payment for the indorser, and the authority given to the indorsee is afterwards revoked, either by the party himself or by operation of law, as by his death, it seems payment to the indorsee will not discharge the person making it, if he had notice of the revocation (*Poth. 168*; *sed quere*, *Tate v. Hilbert*, 2 Ves. jun. 114, 115, 118).

Payment to a bankrupt, before the date and issuing of the fiat against him will be good, if made *bona fide* and without notice of the bankruptcy (see *ante*, "BANKRUPTCY"). And accepting a bill drawn by a trader after a secret act of bankruptcy (*Wilkinson v. Casey*, 7 T. R. 711), will be protected as much as payment; though the bill do not become due, and it is notorious that a commission against him has issued. The acceptance which creates an obligation to pay was within the protection of the 1 Jac. 1, as much as actual payment (*Bayl. B. 311*; see "BANKRUPTCY"). And payment to a bankrupt, or accepting on his account, even after a commission issued, will be as much protected as a payment before, if the party paying or accepting knew nothing, and had not the means of knowing of such commission (*Sowerby v. Brooks*, 4 B. & A. 523; *Bayl. B. 311*). And payment to a bankrupt's order, without notice of his being so, will be a sufficient discharge to the person making it (*Coles v. Robins*, 3 Camp. 186).

But payment to a person or his order, after the knowledge of his having committed an act of bankruptcy, would constitute no defence (*Kitchen v. Bartsch*, 7 East, 53). Therefore, it has been held, that where a banker pays the draft of a trader who keeps cash with him, after notice of an act of bankruptcy, such payment will be no answer to an action by the assignees to recover the money (*Vernon v. Hankey*, 2 T. R. 113; *ib. 287*), unless the payment were by compulsion of law (14 Ves. 557). But still, until a commission has issued against the holder, there is no defence to an action at his suit (*Prichell v. Down*, 3 Camp. 131). Payment to a trader in prison, if the party have notice of the fact, and if the requisite time to constitute an act of bankruptcy be afterwards completed, will not be protected (*King v. Leith*, 2 T. R. 141; but it would be otherwise if the party had no such notice (*Coles v. Robins*, 3 Camp. 183; *Cash v. Young*, 2 B. & C. 413; see now "BANKRUPTCY").

The deft. also pleaded as to 50*l.*, parcel of the moneys in the second and last counts, that, before breach of the promises in these counts, plt. drew his bill for 50*l.*, which deft. accepted and delivered to plt., who then accepted and received the same *in discharge* of the said sum of 50*l.*, parcel, &c., and then indorsed and delivered the same to S., who, from thence, hitherto hath

been, and still is, the holder thereof, and entitled to sue deft. on the same. Replication, that the bill became due before the commencement of the suit, and deft. did not pay it; and that S., before the commencement of the suit, returned the bill to plt., who then *became the holder, and continued so to the commencement, &c., and still is the holder. Held [*617] bad, on special demurrer, for setting up fresh matter, without confessing and avoiding, or expressly traversing the averment of S. being holder at the commencement of the action (*Kemp v. Watt*, 15 M. & W. 672). The word discharge in the plea imported not payment or satisfaction of the debt, but only that the bill was given "for and on account of" it (*Ib.*). The ninth plea resembled the last, except in averring that, whilst S. was holder, deft. and K., at his request, and on his account respectively, paid him its amount. Replication traversing the payment of the bill in the terms of the plea, and generally averring the return of the bill by Sharp to plt., and the holding of it by plt., as in the replication to the last plea. Held bad, on special demurrer, for like reasons (*Ib.*). Where plt., instead of demurring to a double plea, replies doubly, he must not reply argumentatively, or by setting up fresh matter, without confessing and avoiding the plea (*Ib.*).

When the holder of a bill or note, indorsed in blank or payable to bearer, loses or is robbed of it, and it is presented, though by the person stealing or finding it, to the drawee at the time it is due, and it is paid, in the course of business, without knowledge of the loss or robbery, or other suspicious circumstances, it will discharge him; and, though he had notice of the fact, if the party presenting it were a *bona fide* holder, such notice would not invalidate the payment (*Solomons v. Bank of England*, 13 East, 135; *Ch. Bills*, 148; *Gill v. Cubitt*, 3 B. & C. 466; *Down v. Halling*, *ib.* 300; 6 D. & R. 455; *Snow v. Peacock*, 2 C. & P. 215; *Glover v. Thompson*, R. & M. 403; *Egan v. Threlful*, 5 D. & R. 326). But a payment before a bill is due will not discharge the drawee, unless to the real proprietor (*Lawson v. Weston*, 4 Esp. 56; *Ch. Bills*, 147). Where a bill, transferable only by indorsement, and not indorsed, is lost by the person entitled to indorse, no other person can transfer the interest in the bill, and, consequently, a payment by the drawee, even to a *bona fide* holder, will not, in such case, be protected (*Ch. Bills*, 148, 149). If the whole sum alleged to be due cannot be proved, the deft. will be allowed in reduction of damages for as much as he can prove (*Lord v. Fenwood*, 1 D. & L. 630).

Where A. drew a bill on B. in favour of C., which bill A. took up on its being dishonoured, and then indorsed it to D.: held, that D. could not recover the bill, not being negotiable after payment by A., for otherwise C. would again be made liable on his indorsement (*Beck v. Robley*, 1 H. Bl. 89, n.). But, if payment be made by the drawer to the indorsee, and the latter strike out his own and all the intermediate indorsements; held, that the bill was still negotiable, and the subsequent indorsee might sue the acceptor (*Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 4 Bing. 390). So, where a stranger paid the balance due on a dishonoured bill, not on account of the drawer or acceptor, but for the purpose of acquiring an interest in it, as purchaser, it was held that he might negotiate it, and his indorsee might maintain an action upon it, against the acceptor, to recover the balance due upon the bill at the time it was paid by the stranger, and interest thereon (*Graves v. Key*, 3 B. & Ad. 313; see *Burridge v. Manners*, 3 Camp. 194). Indorsee against maker of a promissory note: deft. pleaded, that before the making of the note in the declaration mentioned, he made another note for the accommodation of the indorser, who indorsed it to the plt.; that when it became due, he (the deft.), made the note in the declaration mentioned, and gave it to the indorser to take up such prior note. He then averred payment by the

indorser to the plt. of the note in the declaration mentioned, and acceptance by the plt. Held, that the *only material part of the plea was payment of the note declared on, and that such a payment might be proved without producing the note, and that all the averments as to the prior note were surplusage, of which the deft. was not bound to give any evidence (*Shearman v. Burnard*, 10 Ad. & E. 593; 2 P. & D. 565). Payment of a bill of exchange is understood in the *Lex Mercatoria*, and is used in the Stamp Act, 55 Geo. III. c. 184, s. 19, as a payment in cash of the bill when it comes to maturity (*Morley v. Culverwell*, 7 M. & W. 174; 4 Jur. 1163). A plea in an action on a bill of exchange by indorser against drawer, that the bill was paid by the acceptor before it became due, and afterwards re-issued by him without any new stamp, can be supported only by proof of actual payment in cash, and not by evidence of any arrangement between the drawer and acceptor whereby the bill is treated as being satisfied (*Ib.*).

Where a bill of exchange, negotiated after acceptance, is produced from the hands of the acceptor after it is due, the presumption is, that the acceptor had paid it (*Gibbon v. Featherstonehaugh*, 1 Stark. 225); if circulation after acceptance be proved (*Pfiel v. Vanbatenburgh*, 2 Camp. 439). The mere production of a check drawn by the deft. on his banker, and payable to the plt., with proof that he indorsed his name upon it, and that it has been paid, affords *prima facie* evidence of payment (*Egg v. Barnett*, 3 Esp. 196; *Boswell v. Smith*, 6 C. & P. 60). But the mere proof of a check being made payable to A., and of A. having received payment of it, is not evidence of payment of money by the maker to A., for it might have been given by a third person, and by him to A. (*Lloyd v. Stanilaws*, Gow, 16).

After payment at maturity, by or on behalf of the acceptor, a bill can no longer be transferred (see 55 Geo. III. c. 184, s. 19; *Callow v. Lawrence*, 3 M. & S. 97; *Lazarus v. Cowie*, 3 Q.B. 459). If a payment be made before a bill becomes due, the liability of any of the parties to the bill will not be thereby discharged as against the subsequent *bona fide* holder (*Morley v. Culverwell*, 7 M. & W. 174; *Cripps v. Davis*, 12 M. & W. 159).

It would be a good replication to a plea of payment by an agent that he the deft. did not by his agent in that behalf pay, &c. The case of *Webb v. Weatherby*, 1 Sco. 477; 1 Bing. N.C. 502, is an authority to show that when two matters form but one defence both may be included in one traverse. (*Bennison v. Thelwell*, 7 M. & W. 512; 9 D. 739).

Where the drawer of a bill before it became due agreed to take a mortgage from the acceptor for the amount, which was accordingly executed, and the drawer thereupon gave up the bill to the acceptor uncanceled, who passed it to A., who indorsed it to the plt., for value and without notice: held, no answer to an action between these parties; and that another plea which stated that the acceptor had paid the bill to the deft., the drawer, before it became due, and afterwards, and without a new stamp put it into circulation, could not be sustained, for there had been no payment in fact, but a security merely, which was no proof of the allegation in the plea (*Morley v. Culverwell*, 7 M. & W. 174).

Payment by a stranger will enure to the benefit of the indorsers; therefore, where the bail for the drawer paid the debt and costs, the court held this a discharge to the indorser (*Hull v. Pitfield*, 1 Wils. 46).

Where the holder gave up a bill to the acceptor on receiving a check for the amount of it, which was dishonoured: held, that he might still sue an indorser (*Ridley v. Blackett*, Peak. Ad. Ca. 62). The payee of a [*619] note for 200*l.*, payable on demand, pleaded to an *action by the holder that the former had indorsed it for the accommodation of

the maker, for the sole purpose of depositing it with B. as a security for a debt of 200*l.* due from the maker to B., and that the maker afterwards paid the debt to B., who thereupon delivered the note up to the maker: held, on general demurrer, that it was in effect an averment that the note had been paid by the maker, after which it could not legally be transferred to another, and therefore a good answer to the action (*Bartram v. Caddy*, 9 Ad. & E. 275). A judgment against a subsequent party to the bill is no satisfaction so as to discharge a prior party; it is only an extinguishment between the parties to the judgment (*Hayling v. Mulhall*, 2 Bla. 1235; *English v. Darley*, 2 B. & P. 62).

On a plea of payment, neither the plt. nor deft. is bound to produce the note, nor is the deft. obliged to give notice to produce it; and where the plea stated, by way of introduction to the allegation of payment, that the note was given in lieu of a former one, and the plt. replied *de injuriâ*, it was held enough to show payment, without proving the superfluous matter, and that in any future action a verdict for the deft. on such plea would be no evidence against the plt. of such superfluous statements (*Shearm v. Burnard*, 10 Ad. & E. 593).

The acceptor of a bill, on its presentation to him when due, did not take it up, but afterwards, on the same day, a person, unknown, called at the banker's where it lay, and paid the amount, and received back the bill, with a general receipt indorsed upon it. In an action by the indorsee against the acceptor, the bill was produced by the plt., bearing that receipt: held, no evidence of payment of the bill by the acceptor (*Phillips v. Warren*, 14 M. & W. 379).

A., being sued on a joint and several promissory note made by himself and by B. and C., pleaded that he had paid to the plt., who accepted and received the moneys in the declaration mentioned, in full satisfaction and discharge of the debt *and damages* in the declaration mentioned: held, sustained by evidence, that the amount of the note was paid by C. (*Beaumont v. Greathead*, 2 C. B. 494). Held, also, that the jury were not bound to give nominal damages, though the money was not paid until some time after the maturity of the note (*Ib.* 499).

The acceptor of a bill for 16*l.* 12*s.* pleaded, that after the bill became due, he paid to the indorser, who was then the holder, 4*l.* 12*s.*, and 2*l.* 10*s.*, which, with the price of a horse the deft. had sold to the drawer,—the price and value of which was to have been set off against the deft.'s acceptance,—the drawer accepted in full satisfaction and discharge of the bill and acceptance, and that it was not transferred to plt. until after the satisfaction, and after the bill became due. Replication, that the plea and statements therein were not true in substance and in fact: held, bad on special demurrer, the proper replication being *de injuriâ* (*Mitchell v. Cragg*, 11 Law J., 343). Plea of payment in part, on account of a bill, averring that the bill on account of which the payment was made, and that declared upon, were one and the same bill. Replication, that they were not the same: held, bad on special demurrer; the plt. should have new assigned (*Wheeler v. Senior*, 7 M. & W. 562). To an action by the drawers against the acceptors of a bill of exchange for 419*l.* 12*s.*, wherein the damages were laid at 500*l.*, the defts. pleaded, first, as to 4*l.* 18*s.*, parcel, &c., payment of 5*l.* into court; and secondly, "as to the residue of the sum mentioned in the declaration," that the plts. were the brokers of C. J. H., and sold certain property for him for 415*l.* 12*s.* 6*d.* payable at a day which would arrive before the bill would become due; and that he applied *to the plts. to advance him the amount, which they agreed to do, if C. J. H. would procure the [*620] defts. to accept a bill for 419*l.* 2*s.*, and that the plts. agreed to

appropriate the purchase-money when received by them towards the payment of the bill, and that thereupon the defts., for the accommodation of C. J. H., and without any consideration, accepted the bill, and the plts. advanced C. J. H. 415*l.* 12*s.* 6*d.*, and afterwards, and before the bill became due, they received the purchase-money, viz., the 415*l.* 12*s.* 6*d.*, which was sufficient to satisfy the residue of the sum in the declaration mentioned, and all damages, &c.: held, that the facts stated in the plea (being proved) were a good answer to the action: held, secondly, that they were evidence of a payment to the plts. by the defts. through the agency of C. J. H., of 415*l.* 12*s.* 6*d.*; and, lastly, the pleas, though informally pleaded to the sum mentioned in the declaration, yet must be taken after verdict to apply to the sum mentioned in the bill (*Hills v. Mesnard*, 16 Law J. 306). There was also to the residue a plea of payment before the bill became due. *Quære*, whether the pleas were good on special demurrer (*Ib.*). Plea, that the deft., by his agent D., duly authorized in that behalf, paid to the plt., and the plt. accepted and received of D., as such agent, 210*l.*, in full satisfaction of all the moneys and causes of action in the said declaration mentioned. Replication, that deft., by D., his agent, did not pay to the plt., nor did the plt. accept, &c., of the said D., as such agent, the said sum of money in the said plea mentioned, in full satisfaction, &c., *modo et formâ*, held good (*Bennison v. Thelwell*, 7 M. & W. 512).

Part Payment.] It was formerly held, that where the holder of the bill takes payment in part, from the acceptor, of the sum due on the bill, without the assent of the other parties to the bill, he was precluded from afterwards suing them thereon (*Tassel v. Lewis*, 2 Ld. Raym. 744; *Kelloch v. Robinson*, 2 Str. 745; *Hull v. Pitfield*, 1 Wils. 48). But it seems now to be decided, that the mere receiving part payment from the acceptor does not discharge the other parties, unless time or a release be given to the acceptor for the payment of the residue (*Gould v. Hobson*, 8 East, 580; *Walwyn v. St. Quintin*, 1 B. & P. 652). Where the drawer paid part, and upon an action being brought against him by the holder, the acceptor paid the remainder into court: held, that the plt. could not recover any further sum from the deft. (*Bacon v. Searles*, 1 H. Bl. 88; see *Ellis v. Galindo*, 1 Doug. 250, n.). And a conditional agreement to give time to the acceptor, in consideration of his paying part of the amount of the bill, will not discharge the indorsers, if the agreement be not performed by the acceptor (*Badnall v. Samuel*, 3 Pri. 521). The taking part payment from the acceptor of a dishonoured bill, after notice given to the drawer, does not discharge the drawer; but it would be otherwise if the holder had disabled himself from suing on the bill; as, by not having given notice of its dishonour (*Hewett v. Goodrich*, 2 C. & P. 468). And if the holder of a joint and several promissory note enter up judgment, by *cognovit*, against one of the makers, and levy part under a *fi. fa.*, this is no discharge of the other (*Ayrey v. Davenport*, 2 N. R. 474; *Ch. Bills*, 297, n. b).

Indorsements of partial payment made by the holder himself, may, "if they are proved to have been written at a time when the effect of them was clearly in contradiction of the writer's interest," be sufficient to take a case out of the Statute of Limitations (*Rose v. Bryant*, 2 Camp. 328).

**Receipt.*] It is the ordinary course to give a receipt on the [*621] back of the bill; and it has been said, per Lord Ellenborough, that it is the duty of bankers to make some memorandum on bills and notes paid to them (*Burbridge v. Manners*, 3 Camp. 193); and such receipt may be given in evidence, and need not, like other receipts, be stamped (44

Geo. III. c. 98). Where a part payment is made, unless such be marked on the bill, the drawer may, it is said, be liable to pay the amount again to a *bona fide* indorsee (Cooper v. Davies, 1 Esp. 463). Where an action was brought by the indorser of a bill (who had paid it to an indorsee), against the acceptor, he was nonsuited, although he produced the bill and protest, because he could not produce a receipt for the money paid by him to the indorsee upon the protest, according to the custom of merchants; though Holt, C. J., seemed to be of opinion, that, if the plt. could have proved payment by any evidence, it would have been sufficient (Mendez v. Carreroon, 2 Ld. Raym. 742). It has been held, that a general receipt, on the back of a bill of exchange, is *prima facie* evidence of its having been paid by the acceptor (Scholey v. Walshy, Pea. 25), and will not of itself be evidence of payment by the drawer, though it is produced by him. It was, however, recently held, that the production of a bill of exchange from the custody of the acceptor, is not *prima facie* evidence of his having paid it, without proof that it was once in circulation after it was accepted; nor is payment to be presumed from a receipt indorsed on the bill, unless it be proved to be in the handwriting of a person entitled to demand payment (Pfiel v. Van Battenburgh, 2 Camp. 439). The indorsement of a check by the borrower, produced by the lender, is evidence of money lent (Loyd v. Sandilands, Gow, 15). Though payment or satisfaction be made on a bill, the party making it may still be liable to a third person, who has been holder of the bill before it became due, if it had been delivered up to him (Buzzard v. Fleckroe, 1 Stark. 332). And, in cases where there is a confliction of evidence upon the question, whether the security has been satisfied, the possession of it will entitle the party to a verdict (Brembridge v. Osborne, 1 Stark. 374). If A. give an accommodation acceptance to B., which B. gives to C. as a security for some acceptance of his, and these acceptances, when they become due, are paid by B. out of the produce of other acceptances given by C., but A.'s acceptance is not given up, though C. is desired not to present it, and A. informed that it will not be presented: held, that the original transaction is continued, and A., not calling for the delivery of the bill, must be presumed to have allowed it to remain as a security in the hands of C. for such of his acceptances as were subsequent to those for which it was at first given (Woodroffe v. Hayne, 1 C. & P. 600). In an action by the payee of a bill of exchange, accepted by deft. for a valuable consideration, evidence that the plt. had been discharged as an insolvent debtor, after the bill became due, and had given in a blank schedule, is not enough to show that the bill had been satisfied (Hart v. Newman, 3 Camp. 13).

Tender.] This must be specially pleaded (see "TENDER," *post*). The plea of tender, on the day of payment, is good; if after, it is not sufficient. In an action against the drawer or indorser, they are not precluded from pleading a tender from the circumstance of their not paying the amount of the bill immediately on the receipt of notice of its dishonour, as a reasonable time is allowed them, after such notice, to pay the bill, provided the tender has been made before the writ issued (Walker v. Barnes, 5 Taunt. 246; S. C. 1 Marsh. 36; Soward v. Palmer, 8 Taunt. 277; S. C. 2 Moo. 274, *where three days were allowed to elapse before deft. tendered [*622] the amount). But, in an action against the acceptor, a tender, after the day of payment, though before action brought, is not good, the plea of tender being applicable to cases only where the party pleading it has never been guilty of a breach of contract (Hume v. Peploe, 8 East, 168; Poole v. Turnbridge, 2 M. & W. 223); unless to a note payable on demand (Norton v. Ellam, 2 M. & W. 463). But it has since been holden to be no defence

to say, that the action was commenced before a reasonable time had elapsed after notice given of dishonour; the only remedy the party has is by appeal to the court to stay proceedings (*Siggers v. Lewis*, 1 C. M. & R. 370). The maker of a note for 16*l.* 9*s.* 4*d.* payable on demand, pleaded a set-off as to 3*l.*, and a tender of 12*l.* 9*s.* 4*d.* at the time payment of the note was demanded. Replication, *nil debit*, as to the set-off; and, as to the tender, that for it he made a demand of 16*l.* 9*s.* 4*d.*, as due upon the note which the deft. refused to pay, and that no set-off, or other just cause for non-payment of the said 15*l.* 19*s.* 4*d.*, or any part thereof then existed: the court held, that the replication was good as showing that there was a time after the note was payable when the deft. was not ready to pay (*Cotten v. Goodwin*, 7 M. & W. 147). *Quere*, whether a plea of tender of part of a note, without showing that no more was due, is good (*Ib.*; see *Hesketh v. Fawcett*, 11 M. & W. 356; *Wain v. Bailey*, 10 Ad. & E. 616). But it is a bad plea to an action on a note, not negotiable, to say, that the deft. was ready and offered to pay, if the plt. would give up the note; but the plt. admitted that he had not the note, and never subsequently produced it, or offered to deliver it up on payment thereof (*Wain v. Bailey*, 10 Ad. & E. 616). The effect of a tender sometimes is, that interest cannot be recovered on the bill or note, after it is made; so, where the maker of a promissory note pays money into the hands of an agent, to return it, and the agent tenders the money to the holder of the note, on condition of its being delivered up, and the note being mislaid, the condition could not be complied with, and the agent aforesaid failed with the money in his hands, it was held that the maker was still responsible on the note, but that interest was not recoverable after the time of the tender (*Dent v. Dunn*, 3 Camp. 296).

Set-off.] See "SET-OFF." Though a bill of exchange is a chose in action, yet it may be assigned so as to meet the legal, as well as the equitable, interest therein: so, a set-off by the drawer to the acceptor cannot affect the right of action of the payee or indorsee, because the legal, and not mere equitable, interest is vested in such payee or indorsee, and the action maintainable in his own name (*Ch. Bills*, 5); the indorsee is not liable to a set-off, which the deft. might have pleaded to an action by the indorser (*Burrough v. Moss*, 10 B. & C. 558; see *Stein v. Yglesias*, 1 C. M. & R. 565).

To a plea of set-off to a bill of exchange, the plt. replied as to 19*l.* 3*s.* 2*d.*, a discharge under the Insolvent Act, and that he had inserted in his schedule, "a full and true description, according to the said act in his behalf, of the said debt or sum of 19*l.* 3*s.* 2*d.*." The deft. traversed this allegation in terms at the trial; the plt. offered in evidence a schedule, in which the debt due from him to deft. was inserted at 6*l.* 10*s.*, but gave no evidence to show that the debts were the same: held, that this proof did not support the issue (*Meile v. Bays*, 2 D. & L. 964).

To an action by the indorsee against the acceptor of a bill, the deft. pleaded, that before and at the time of the indorsement of the bill by [*623] the drawer, he, the drawer, was indebted to the deft. in a sum of money exceeding the amount of the bill, and that after the bill became due, in order to deprive the deft. of his right of set-off in respect of the debt, he fraudulently indorsed the bill, to enable the plt. to sue the deft. on the bill, and without any consideration for the indorsement: held, an issuable plea (*Watkins v. Bensusan*, 9 M. & W. 422).

In an action, by the assignees of a bankrupt, on a note belonging to the wife of a bankrupt, given to her *dum sola*, deft. cannot set off a debt due to him from the bankrupt (*Yates v. Sherrington*, 11 M. & W. 42).

The indorsee of an overdue bill or note takes it subject to all the equities

arising out of the bill or note transaction itself, but not subject to any collateral claim existing between the earlier parties to it; therefore, in an action by indorsee against payee on such a note, a distinct debt due to the payee from a former indorser cannot be set off, although the plt. had notice of such set-off at the time of the indorsement to him (*Whitehead v. Walker*, 10 M. & W. 696; 7 Jur. 330; *Borough v. Moss*, 10 B. & C. 558); *semble*, he would be precluded from recovering, if there had been an agreement between those prior parties to set off an existing debt against the amount of the bill or note, such an agreement being equivalent to payment on demand (*Whitehead v. Walker*, *supra*).

A declaration in assumpsit contained several counts upon promissory notes, and also the common counts. The third count was for 15*l.*, the balance unpaid upon a bill of exchange for 210*l.* The deft., by plea, the issues on which were found for him, answered the whole of the plt.'s demand, except that under the third count: and on a further plea of set-off to the whole declaration, he proved that the plt. was indebted to him in a sum exceeding 15*l.*, but less than the amount of the plt.'s claim in the whole declaration. Held, that as the pleas taken together answered the whole of the plt.'s demand, the deft. was entitled to a verdict on the plea of set-off, and to judgment upon the whole record (*Ford v. Beech*, 16 Law J., N. S., Q. B. 100).

A set-off will not be allowed on an unstamped bill (*Ch. Bills*, 55). The holder of a bill, indebted to a bankrupt, who is a party to a bill, may set off his debt against the amount of it (*Ex parte Hale*, 3 Ves. 304; 3 T. R. 509. See *post*, "SET-OFF").

Alteration of Bill.] Where a bill is altered without the consent of the parties, in any material part, as in the date, sum, or time of payment, such alteration will, at common law, render it wholly invalid, as against any party not consenting to such alteration, and though made by an innocent holder. Thus, if the date of the bill be altered, though by a stranger, after it has been accepted and indorsed, and without the acceptor or indorser's consent, they will be discharged from their liability (*Master v. Miller*, 4 T. R. 320; 5 T. R. 367). And, where the drawer of a bill of exchange, accepted generally, without the acceptor's consent, added the words, "payable at Mr. B.'s Chiswell Street," it was held, that this was a material alteration, and that the acceptor was thereby discharged (*Cowie v. Halsall*, 4 B. & A. 197). And such an alteration would render the bill invalid, though made after the passing of 1 & 2 Geo. IV. c. 78; *Mackintosh v. Hayden*, 1 R. & M. 362. See further, *ante*, "ALTERATION").

Declaration alleged, that plt., in France, drew a bill, for a sum named, on deft., which deft. accepted. Issues were joined: first, on a plea of non-acceptance; secondly, on a traverse of a plea alleging that the plt., after the acceptance and without deft.'s consent, changed the purport of the bill by altering the sum for which it was drawn. On the trial, it appeared that the bill was originally drawn at Paris for a larger sum than that named; but that deft. had accepted for a smaller sum. In the body of the bill the sum originally named had been altered to that for which deft. had accepted, but it did not appear by whom, or at what time or place, the alteration had been made. No stamp was on the bill. Held, that plt. was entitled to a verdict on both issues; the acceptance by the deft. furnishing evidence that he assented to the insertion of the smaller sum, and it not being shown that the alteration, even if made by the parties contrary to their original intention, was made in England, so as to render a stamp requisite (*Hameline v. Bruck*, 9 Q. B. 306). In an action by indorsee against the drawer of a bill, the deft. pleaded, that, after the making of the bill, and after it was completely

issued and negotiated and indorsed by him, certain persons, to the deft. unknown, without his consent, altered the date of the bill. It appeared that the bill had been altered by the acceptor after it had been made and indorsed by the deft. *Semble*, that the plea was proved in substance (Clark v. Bell, 12 Jur. 421, Exch.)

Statute of Limitations.] A bill of exchange, also, being merely a simple contract, is affected by the Statute of Limitations, and must be sued on within six years after it is payable * (Renew v. Axton, Carth. 3). As to the [*624] effect of a partial indorsement, *ante*, 558, et seq. Where a bill or note is payable a certain time after sight, the debt does not accrue till it has been presented to the drawee; the statute is, therefore, no bar to such a note, unless it has been presented for payment six years before the action was commenced (Holmes v. Kerrison, 2 Taunt. 323). Where a promissory note was made payable at a certain time after sight with interest thereon, and the interest was duly paid for several years (as the bill alleged), the court held that the note must be taken to have been acted upon according to its form and tenor; and therefore that the presentment for sight must have been duly made before the interest was paid; and that the payment became due upon the note at the prescribed date after such presentment, and that the Statute of Limitations would begin to run from the time the payment so became due (Way v. Bassett, 5 Hare, 55). An acknowledgment by one of several drawers, of a joint and several promissory note, will take the case out of the statute, as against any one of the other drawers, in a separate action on the note against him (Whitcomb v. Whiting, Dong. 652-3, 306); and although the latter were only a surety (Perham v. Reynal, 2 Bing. 306; see "STATUTE OF LIMITATIONS"). And, in an action against A., on the joint and several promissory note of himself and B., to take the case out of the statute, it is sufficient to prove a letter written by A. to B., within six years, desiring him to pay the debt (Halliday v. Ward, 3 Camp. 32; 11 East, 585; 1 Stark. 81): when insufficient, see Perham v. Reynal, 2 Bing. 306. The Statute of Limitations begins to run on the non-acceptance, protest, and notice, and not from the non-payment when due (Whitehead v. Walker, 9 M. & W. 506). Upon a note payable with interest, and on demand, the statute begins to run from the date of the note (Norton v. Ellam, 2 M. & W. 461). The statute was pleaded to an action against one of the makers of a note; and it appeared that the deft. had signed the note as surety for the other maker, and after six years, having been applied to by letter for the amount, wrote to request that application might be made to the executrix of the other maker, adding, "what she may be short I will assist to make up;" application was made, but the executrix did not pay. Held, sufficient to take the case out of the statute against the deft., and that it was not necessary to take legal proceedings against the executrix before proceeding against the surety (Humphreys v. Jones, 9 Jur. 333).

Payee against maker of a note. Plea, Statute of Limitations. Replication, that when the cause of action accrued the plt. was the wife of J. S., and so remained until his death, when she became *discoverd*, and that she sued within six years next after the death of her said husband. Rejoinder, after stating the coverture of plt. at the time of making said note, that the said note was payable to the order of plt.; that, before it became payable, J. S. authorized her to indorse it in her own name and deliver it, and she did by such authority indorse and deliver the note to W. F., for value; that when said note became due and payable, it was in the hands of Messrs. G., the holders and indorsees, and entitled to sue thereon, and the note came into the possession of plt. from them by delivery: held, that the replication was good, but

that if the meaning of the rejoinder was, that the note came into the hands of the plt. due and satisfied, and that therefore she had no right of action, it was a departure from the plea; secondly, that, as an answer to the replication, it was defective for not containing a denial of the death of the plt.'s husband within six years (*Scarpellini v. Atchison*, 9 Jur. 827; 7 Q. B. 876).

*The note, when produced in evidence by the payee at the trial bore upon it an indorsement as follows: "4th August, 1837. [*625] Received of J. S. 6*l.* B. & E.;" the whole of this indorsement, except the cross, was in the handwriting of the deft., and there was no attestation, nor any proof that the cross was the mark of B. E., nor any proof of the fact of payment: held, that the indorsement was not evidence of part payment, to take the case out of the statute (*Eastwood v. Saville*, 9 M. & W. 615).

Debt on a bill of exchange by payee against acceptor, for 20*l.*; pleas, first, except as to 10*l.* 11*s.* parcel, &c., a set-off for board and lodging; and as to 10*l.* 11*s.* payment into court. Replication, that the alleged debts and causes of set-off did not accrue within six years before the commencement of the suit, concluding to the country, to which the deft. by his rejoinder added the *similiter*. The plt. proved his case and the deft. his set-off, and the latter put in a letter from the plt. to him, relying on the following passage in it to take the case out of the Statute of Limitations:—"Before closing this I have to request you will send me in any bill or what demand you have to make on me, and, *if just*, I shall not give you the trouble of going to law; if you refer to your books, you will find the last payment I made you was in May, 1839, the day I have forgot; I shall leave town tomorrow, but shall be back in a few days for a month, and if you *bring my bill* in here to me by 11 o'clock, I shall be at your service:" held, that this was not a sufficient admission to take the case out of the statute; held, also, that the issue joined on the replication of the statute was no proper issue, and that there ought to be a repleader (*Spong v. Wright*, 9 M. & W. 639).

T. L., being the holder for value of certain promissory notes, made by the deft., and being indebted to the deft. and J. D., as executors, in a greater amount, it was agreed between them that the amount of the notes should be set off against and satisfied by the same amount of T. L.'s debt; on that occasion the deft. gave to T. L. a paper, in which the amounts of the several notes and interest thereon were enumerated, at the foot of which the deft. wrote as follows: "8 June, 1842, approved due to T. L.—W. Davis." T. L. retained possession of the notes, and afterwards indorsed them to the plts. for value. In an action by the plts. as indorsers, against the deft. as maker, held, that the paper so signed by the deft. was not such an acknowledgment in writing as to defeat a plea of the Statute of Limitations, inasmuch as, coupling it with the evidence, no promise to pay the deft. could be inferred from it (*Cripps v. Davis*, 12 M. & W. 159). *Quære*, whether a promise in writing, given by the maker of a promissory note, by the payee, can be made available to defeat the Statute of Limitations in an action by a subsequent party to the note (*Ib.*).

In an action by the payee of a note against the surviving executors of the maker of the note, the plt., to take the case out of the Statute of Limitations, proved that he had been supplied by J. P., the deceased executor, with malt and other articles, and he put in evidence an account between them, signed as follows: "Settled, J. P.;" on one side of which the plt. was charged with various quantities of malt, and on the other side had credit for payments, there being, amongst others, the following item: "To one year's interest, 15*l.*" Held, that this settlement of account was evidence of payment of the

15*l.* by J. P., but not in his representative character (*Scholey v. Walton*, 12 M. & W. 510); *semble*, per Parke, B., that payment by one executor will not take the case out of the Statute of Limitations as against a co-executor (*Ib.*).

*The limitation of action on a bill drawn and payable in Scotland [*626] only begins to run from the third or last day of grace (*Ferguson v. Douglas*, 6 Bro. P. C. 276).

A., B., and C., made a joint and several promissory note for 100*l.*, payable to the plts., trustees of a banking company, or their order on demand. A memorandum, indorsed on the note, at the same time, signed by A., B., and C., stated that the note was given to secure floating balances made by the company to A., from the respective times when such advances had been or might be made, together with commission, &c., not exceeding in the whole, at any one time, the sum of 100*l.* In an action by the payee of the note against C., to which he pleaded the Statute of Limitations, the plts. proved payments by A. in reduction of the floating balance, within six years, and sought to use the memorandum indorsed on the note to show that such payments bore reference to the note: held, that it could not be read in evidence without an agreement stamp (*Cholmeley v. Darley*, 14 M. & W. 344).

A *feme sole*, payee of a promissory note, payable with interest, married, and her husband survived her. In an action on the note by her administrator, the deft. pleaded the statute, upon which issue was joined: held, that the payment of interest, in the wife's life, to the husband, within six years before action brought, must be considered as made to him in the character of agent to the wife, and was an answer to the plea of the Statute of Limitations. Held, also, that under the 6 & 7 Vict. c. 85, s. 1, the husband was a competent witness in such action to prove the payment of interest (*Hart v. Stephens*, 6 Man. & G. 937; 9 Jur. 225).

A., B., and C., made a joint and several promissory note; A. died, leaving B. his executor; C., being afterwards sued on the note, pleaded the statute, and the plt. in order to take the case out of the statute, proved a payment of interest on the note by B., within six years: *semble*, the plt. was entitled to recover without reference to the question whether B. had paid such interest as the executor of A., or as a party to the note (*Griffin v. Ashley*, 2 C. & K. 139).

The deft., who was indebted to the plt. on two overdue bills of exchange, gave the following written undertaking: "In consideration of your not proceeding on the bills, I hereby debar myself of the plea of the Statute of Limitations, in case of my being sued for the recovery of the amount of the said bills, and I hereby promise to pay them whenever my circumstances will enable me to do so, and I may be called upon for that purpose." In an action on the agreement, where issue was joined on a plea of the statute: held, that the statute began to run as soon as the deft. became of ability to pay; although the plt. had no notice or knowledge of such ability, and had made no demand of payment (*Waters v. Thanet* (Earl), 2 Gal. & Dav. 166; 6 Jur. 708).

Form of Plea of Bill Lost or Stolen.

[Commencement as ante, p. 458.] And for a further plea in this behalf as to the (first) count of the said declaration, the deft. says that he has always been, and still is, ready to pay the said bill of exchange in that count mentioned, when the same is produced and given up to him (if the bill hath not been presented, say, and that the said bill has not ever been produced or presented to the deft. for payment thereof). And the deft. further says, that the plt., after he became the holder of the said bill, as aforesaid, to wit, &c. (*day not material*) lost the said bill, and thence hitherto has been, and still is, unable to produce or find the same or give up the same to the deft. on his paying the amount thereof,

and the said bill, from the time when the plt. lost the same, has not been nor is it in the possession, power, custody, or *control of the plt., and the deft. says that the said bill, at the time when it was so lost as aforesaid, was indorsed in blank [*627] and not specially, and was and is transferable by delivery (*verification. Signature*).

The payee of a negotiable bill of exchange, who has lost the instrument, cannot, on its coming to maturity, maintain without its production an action against the acceptor for the recovery of its amount, and, therefore, where in an action by the drawer against the acceptor of a bill of exchange, the deft. pleaded that after the acceptance and before the commencement of the suit, the plt. lost the bill out of his possession, and that it remained lost until and at the time of the commencement of the suit, and that the plt., at the time of the commencement of the suit, was not, nor was he at the time of the deft.'s pleading, the holder or possessed of the bill; to which the plt. replied, that by reason of such loss alone he was not the holder of the bill; that the bill, at the time it was so lost, and at the time of the commencement of the suit, had not been, nor was, indorsed by him, or transferable by delivery, or capable of being enforced or put in suit against the deft., by any other person than the plt.; that until the loss, he was always the holder and from thence until and at the time of the commencement of the suit, was alone entitled to be the holder thereof, and to receive the amount thereof from the deft.; and that the deft., at the time of the commencement of the suit, had due notice of the premises: held, that the plt. was not entitled to recover on these pleadings (*Ramuz v. Crowe*, 11 Jur. 715; 16 Law J. 280, Exch.; 1 Exch. 167).

Replication that the plt. did not lose the bill, held good (*White v. Maclean*, Exch., Feb. 1846). The loss of a bill or note, even after dishonour, affords a defence (*Hansard v. Robinson*, 7 B. & C. 90). The above plea would be no answer on a promissory note not made payable to bearer or order, because that is not an assignable instrument; the maker could not be called upon to pay twice. The plea should show the instrument to be assignable (*Wain v. Bailey*, 2 P. & D. 507; 10 Ad. & E. 616). The bill need not be produced after judgment by default (*Lane v. Mullins*, 2 Q.B. 254). Where, however, the bill comes to the hands of the plt. in the ordinary course of business, for value, and without notice, he may recover against the acceptor, or any other party (*Peacock v. Rhodes*, 2 Doug. 633; *Miller v. Race*, 1 Burr. 452; *Grant v. Vaughan*, 4 Burr. 1516; *Lawson v. Weston*, 4 Esp. 56; *Peterson v. Hardacre*, 4 Taunt. 114). Where the plt. was robbed of his pocket-book, containing a bill of exchange, and the deft. cashed the bill for an absolute stranger, but it appeared that, although the plt. stopped payment of the bill at the acceptor's, and advertised the pocket-book, yet he never mentioned the note, but said that the contents of the book were of no use except to the owner: in trover, the court held, that the plt. ought not to recover, for he had not acted so as to entitle him to maintain the action; it was not sufficient that the deft. took the bill without due caution, but the plt. must show that he gave notice of his loss as extensively as possible (*Beckwith v. Corral*, 3 Bing. 444). Where a bill-broker's clerk discounted a bill for a person whose face he knew, but whose name and address he did not, it was held that he had not used sufficient caution to entitle the broker to recover against the acceptor (*Gill v. Cubitt*, 3 B. & C. 466). So, where a country banker's clerk had cashed for a man of gentlemanly appearance, merely by asking his name, a 500*l.* Bank of England note, of which it appeared a man had been previously robbed, the jury, thinking due caution had not been used in taking the note, found a verdict for the deft., which the court refused to disturb (*Snow v. *Peacock*, 3 Bing. 406). Where a check [*628] upon a banker, dated 16th November, was, on the 22nd given to

the deft. in payment of goods, by one whom he did not know, and upon presentment at the banker's it was paid; the real owner of the check then brought an action against the deft. for money had and received, to recover the amount of it, which the court held he was entitled to, without proving that he gave any notice of his loss, or even that he lost the check: the court held, that the check being dated six days before, and tendered by a stranger, were such circumstances of suspicion as obliged the person taking it to show that the party from whom he took it had a good title (*Down v. Halling*, 4 B. & C. 330; see *Solomons v. Bank of England*, 13 East, 135, n.). Where, in an action against a person who had given money for a check five days after its date, with the words, "and Co.," across it, but under circumstances from which he might reasonably infer that the party came honestly by it, the question being left to the jury whether the circumstances under which the bill was received were such as ought to have excited the suspicions of a prudent man, and whether the party acted with reasonable caution; they found for the deft.: the court held, that, as the question left to the jury was the right one, and the court could not say the jury had come to a wrong conclusion, the plt. was not entitled to a new trial (*Rothschild v. Corney*, 9 B. & C. 388). Where two traders are in the habit of mutually remitting bills taken by each other and payable in the place of their respective residences, to take advantage of the exchange, and the profits are divided between them, if one take a stolen bill or note and remit it to the other, and the latter sue upon it, he is bound to give the same evidence of its having been taken for value, and with proper caution, as the party remitting it must have given if he had brought the action (*Bayl. B.* 472; *De la Chaumitte v. Bank of England*, 9 B. & C. 208). The onus of proof to show that he came honestly by it lies on the plt. (*Mills v. Barber*, 1 M. & W. 425). It would seem, from the foregoing cases, that where the loss of the bill is pleaded, the plt. will have to show that he gave a valuable consideration for it; that he had not notice of the loss; that he acted with reasonable caution in taking it, and received it under circumstances not calculated to excite suspicion.

Upon a plea of *non acceptavit*, in an action by indorsee against the acceptor of a bill of exchange, the plt. having proved that the bill was destroyed: held, that secondary evidence of its contents was admissible (*Blackie v. Pidding*, 6 C. B. 196). *Quære*, whether, to be available as an answer to an action at law, the non-production of the bill, when payment was demanded, should not be pleaded specially? (*Ib.*).

Bankruptcy forms a good ground of defence to an action on a bill of exchange or promissory note, but it must be specially pleaded: as to the forms of pleading, and the evidence necessary to support them, see "BANKRUPTCY." The acceptor is estopped from pleading that the drawer became bankrupt before he indorsed the bill over (*Drayton v. Dale*, 2 B. & C. 293; *Arden v. Watkins*, 3 East, 322). That he was twice a bankrupt, and that his estate did not pay 15s. in the pound (*Pitt v. Chappelow*, 8 M. & W. 616; see *Mackay v. Wood*, 7 M. & W. 420). The acceptor may plead the bankruptcy of the indorser after becoming possessed of the bill, and before he indorsed it over (see *Pickerton v. Adams*, 2 Esp. 611). If the plt. be an uncertificated bankrupt the deft. may plead in bar the bankruptcy, and that the plt.'s assignees have required him to pay them the amount, even where the bill was accepted for a debt due after the bankruptcy (*Kitchen v. Bartsch*, 7 East, 53). It is a good replication that the bill was indorsed to and received by the indorsee before the fiat, *bona fide* for value, and not by way of fraudulent preference; and that the indorsee had at the time no notice of the act of bankruptcy (see stat. 2 & 3 Vict. c. 29, s. 1; *Green v. Steer*, 1

Q. B. 707; 10 Law J. 332; see "BANKRUPTCY"). The deft. (acceptor) pleaded, in effect, that the plt. had been twice bankrupt and obtained his certificate; but that his estate under the second bankruptcy *had not paid 15s. in the pound, and that the bill was indorsed to him [*629] after his second certificate: held, good on special demurrer, by the Court of Queen's Bench (Herbert v. Sayer, 2 D. & L. 49). Reversed in Exchequer Chamber, because it did not state that the assignees had interfered, or required the deft. to pay the amount to them (Ib. 57). The plea stated that the plt. became and was a bankrupt, but did not state any act of bankruptcy on which commission a fiat was founded: held, sufficient on special demurrer by the Court of Queen's Bench (Ib. 64).

In an action on a promissory note the deft. pleaded that after the 5 & 6 Vict. c. 116, came into operation, and before the 7 & 8 Vict. c. 96, a petition for protection from process was by him duly presented, and a final order for protection and distribution made by a commissioner duly authorized, and that the debts in the declaration mentioned were contracted before the filing of the petition: held, bad on special demurrer (Fisher v. Gibbon, 2 D. & L. 869; overruled by Cook v. Henson, 14 Law J. 295).

Indorsee against maker of a promissory note. Plea, that the indorser became bankrupt before the indorsement; to which the plt. replied that the note was indorsed and *bona fide* received by the plt. before the issuing of the fiat, and that he had no notice of any prior act of bankruptcy. Rejoinder, that the note was not *bona fide* received by the plt. before the issuing of the fiat; it was proved that the note had been indorsed by the bankrupt in March, and delivered to his son, who delivered it to the plt.; and the jury found that the delivery to the son was before the fiat, but were not satisfied that the delivery by the son to the plt. was before the fiat; and this was entered as a verdict for the deft.: held, that it was rightly entered, as the plt. was bound to prove that the note had been delivered to him before the fiat (Green v. Steer, 2 Q. B. 707).

To an action by the indorsee against the acceptor of a bill of exchange, the deft. pleaded that in pursuance of the stat. 5 & 6 Vict. c. 116, she presented her petition to the Leeds District Court of Bankruptcy, in which district she had resided for twelve calendar months previously, praying to be protected against all process against her person and property, and that she might have such further relief as by the said statute was provided, and as the said court should think fit; and such proceedings were thereupon had; that afterwards, to wit, on &c., an order was made by M. B. Esq., the Commissioner of Bankrupts for the Leeds District, for the protection of the person of the deft. from all process against her person and property, and for the vesting of her estate and effects in C. F., the official assignee named by the said commissioner, whereby, and by force of the premises and of the said statute, the deft. was then discharged of and from the premises and causes of action in the declaration mentioned, and the said order and discharge still remained in full force: held, that this was not a good plea under the 10th section of the act, because it did not strictly follow the words of that section, nor under the 4th section, because it did not show all the requisites of that section to have been complied with (Leaf v. Robson, 2 D. & L. 646; Gillan v. Deane, 15 Law J. 25, C. P.).

Where the deft. and a surety joined in a promissory note to the plt., who, upon the deft. afterwards taking the benefit of the Insolvent Act, applied to the surety for payment, and the deft., in order to prevent the surety being sued, joined him in a new note; in an action against the deft. on this second note, held, that notwithstanding the new consideration for forbearance to the

surety, this note was a new contract for the old debt, and that the deft. was not liable (*Evans v. Williams*, 1 Cr. & M. 30).

*Assumpsit by indorsee against acceptor of a bill payable to C.; [*630] plea, that before the making and accepting of the bill, C. being a trader, became and was adjudged a bankrupt, and that assignees of his estate and effects were appointed; that C. had never obtained his certificate; that the bill was made and accepted after the bankruptcy of C., and that after the commencement of this suit the assignees required the deft. to pay to them the said bill of exchange, by reason whereof they were entitled to the amount of the bill: held, that the deft. was estopped by his acceptance of the bill, payable to the order of C. from saying that C. was incapable of transferring the bill by indorsement (*Braithwaite v. Gardiner*, 10 Jur. 591; 8 Q. B. 473; 15 Law J. 187, Q. B.).

That the Plaintiff is also Defendant.] Where the plts. (indorsees) and the defts. (indorsers) consist of two partnerships, and there is one partner common to both, this fact is a good plea in bar, for such partner cannot be at once plt. and deft. in the same action. So, where a promissory note was drawn by E., in favour of C., D. and himself, and was indorsed by them to A., B., and C., the latter firm brought an action upon the note against D. only, who pleaded that C., one of the plts., was liable together with him as indorser. The plea was held good, on special demurrer, although it was objected that deft. should have pleaded the nonjoinder in abatement, the court holding that he could not do so, for plt. could not give a better writ (*Mainwaring v. Newman*, 2 B. & P. 120).

But where it appeared that the plt. sold some property to a mining company, which was paid for by a note for 1385*l.* and 200 scrip certificates, for shares in their company, but the plt. never paid any instalment on the shares, nor did he sign the deed of settlement; the defts. pleaded in bar to an action on this note, that the plt. was a partner in this company: the court held, that the facts did not support this plea; the scrip certificates did not make the plt. a partner, but merely gave him the power to become one (*Fox v. Faith*, 10 M. & W. 131).

In *Steele v. Harmer*, which was an action by indorsee against three acceptors, a plea which stated that the drawer indorsed to one of them, with the intention of divesting himself of all title to it, and that such acceptor delivered it to the plt., which was the indorsement mentioned in the declaration, was held bad, as amounting to an argumentative traverse of such indorsement; but it seems it would have been good, if it had alleged that the indorsement to such acceptor was an indorsement in blank, so that he might have transferred it by delivery to the plt. (14 M. & W. 831).

That Defendant was Drunk when he Indorsed.] To an action by indorsee against the indorser of a bill, the deft. pleaded that, when he indorsed the bill, he was so intoxicated, and thereby so entirely deprived of sense, understanding, and the use of his reason, as to be unable to comprehend the meaning, nature, or effect of the indorsement, or to contract thereby, of which the plt., at the time of the indorsement, had notice: held, to be a good answer to the action, and not to amount to an argumentative traverse of the indorsement (*Gore v. Gibson*, 13 M. & W. 623).

Other Pleas.] Indorsee against indorser on a bill drawn by W. and Co. on H., indorsed by W. and Co. to the deft., and by the deft. to the plt. Plea, that W. and Co. are the plts., and no other persons; and that the plts., and

no other persons, are the makers of the bill, and the persons to whose order it was payable, and the *persons who indorsed to the deft., and who are liable to him as such indorsers, in the event of the payment of the bill by him. Replication, that, at the time of the drawing of the bill, H. was indebted to the plts. in the amount of the bill; and, thereupon, it was agreed between the plts. and H., that, in consideration that H. would procure the deft. to indorse and become surety, as indorser, to the plts. of the bill, they would give time to H. for payment of the debt; that the plts., in pursuance of this agreement, drew and indorsed the bill as in the declaration mentioned, and the deft., for the accommodation of H., indorsed it to the plts., with the intent of thereby becoming surety as indorser to the plts. of the bill; that H., in further pursuance of the agreement, delivered the bill so indorsed to the plts. and the plts. gave time to H., and that no part of the said debt has been paid to them: held, first that the facts disclosed in the replication disclosed a sufficient title in the plts. to sue the deft. on his indorsement to them, notwithstanding their previous indorsement to him; secondly, that the replication showed a sufficient consideration for the deft.'s promise to pay the plts. the amount of the bill; and, thirdly, that it was not a departure from the declaration (*Wilders v. Stevens*, 15 M. & W. 208).

The acceptor pleaded that after the indorsement to the plt. and before the commencement, &c., the plt. for good and valuable consideration indorsed the bill to J. W., who from thence, until, and at and after the commencement of the suit was, and still is, the indorsee and holder thereof, and the deft. from the time of such indorsement to the said J. W. continually, hitherto, hath been and still is, liable to pay the amount of the bill to the said J. W. Replication, *de injuriâ*. Held, on special demurrer, that the plea was in denial, not in excuse of the breach alleged in the declaration, and against the non-payment of the bill, according to the tenor and effect of the acceptance, and therefore the replication was bad (*Child v. Kilpin or Schilpen*, 8 M. & W. 673; 5 Jur. 874). *Quere*, whether the plea would not have been bad on special demurrer, as amounting to an argumentative denial only of the breach of promise of the deft. alleged in the declaration (*Ib.*).

To a similar plea the plt. replied that at the time of the commencement of the suit the plt. was, and still is, the holder of the said bill; without this, that any other person is the holder thereof, *modo et forma*: held bad, as being too large a traverse, for it put in issue the plt.'s being the holder of the bill, not only at the time of the commencement of the suit, but also at the time of the plea pleaded, which was immaterial (*Basan v. Arnold*, 6 M. & W. 559). The plt. may reply that he afterwards took up the bill, or that the plt. was the holder at the time of the commencement of this suit, *absque hoc*, that A. B. was the holder (see *Fraser v. Welsh*, 8 M. & W. 639). *Quere*, whether such plea was bad, as being an argumentative denial that the plt. was the holder at the commencement of the suit (*Ib.*; per *Alderson, B.*). If an overdue bill be indorsed after action brought, the indorser, with notice of the action, has no right of action on the bill (*Jones v. Lane*, 3 Y. & C. 281).

H., being joint owner with the deft. of estates in Berbice, advanced to the latter large sums on account of the deft.'s share of the liabilities in respect of those estates, and received on account thereof the deft.'s acceptance for 3000*l.* on the following terms, contained in a letter written by the deft. to him:—"Should the crops (of the estates) not come forward in time to provide for these notes, I shall expect to have them renewed for such period as may be found necessary from the condition of the properties." The crops being and still continuing unproductive, the bills were renewed on three *several occasions; but ultimately H. refused to renew further, and [*632]

the plts., who were indorsees of H., with notice of the agreement, brought the present action: held, that they were entitled to recover, as the agreement stipulated for one renewal only (*Innes v. Munro*, 17 Law J. 71, Ex.).

To a declaration by the payee against the maker of a promissory note, the deft. pleaded that after the note had become due it was agreed between the plt., the deft., and one A. B., that the said A. B. should, at the request of the plt., pay to the plt. in trust for E. B., 200*l.*, for her sole use and benefit, or the sum of 25*l.* per annum, so long as the sum of 200*l.* should remain unpaid, and that the rights and causes of action of the plt. upon and in respect of the said note should be suspended, so long as the said A. B. should continue to pay the said sum of 25*l.* Averment, that the said A. B. had paid the said sum, &c. Upon issue joined to a replication traversing such payment by A. B., a verdict was found, and judgment afterwards given for the deft. On error brought to reverse such judgment, held, that the above plea was bad in substance, the legal effect of the agreement therein set out being not to suspend the plt.'s right of action upon the note, but only to subject him to an action, if he sued contrary to the terms of the agreement (*Ford v. Beech*, 17 Law J. 114, Q. B.; 12 Jur. 310).

To an action by the indorsee against the maker of a promissory note, the deft. pleaded that he made the note and indorsed it to the London and Westminster Bank, as a collateral security for certain advances made or to be made to the Marylebone Bank, upon the terms, that if those advances should be repaid before the note became due, the deft. should not be called upon to pay it. The plea then averred that the advances so made were repaid before the note became due; that he had no value for his indorsement; and that the note was indorsed to the plt. after it became due. Replication, *de injuriâ*. Held, that it was an essential allegation, without which the plea must fail, that the advances were repaid before the note became due; and, therefore, that it was a misdirection for the judge, on the trial of this issue, to tell the jury that if the note was given as a part security for the advances so made to the Marylebone Bank, the deft. was entitled to a verdict (*Richards v. Macey*, 14 M. & W. 484).

To a declaration on a bill of exchange drawn by A. on, and accepted by, the deft., payable to A.'s order, and by A. indorsed to B., and by B. to the plt., the deft. pleaded that he accepted the bill for the accommodation of A. and B., and without consideration, &c., and on the terms that it should not be negotiated after it was due, and that it was indorsed to the plt. after it was due, without the deft.'s privity: held, that the plea was ill (*Carruthers v. West*, 17 Law J. 4, Q. B.; 12 Jur. 79).

Replication.—To a declaration in debt by the drawer against the acceptor of a bill of exchange, and on an account stated, the deft. pleaded that the bill was indorsed by the plt. to M. D., who then became, and thence hitherto remained the holder thereof. Replication, that the plt. was the holder of the bill at the commencement of the suit, *absque hoc* that M. D., from the time of the indorsement, hitherto remained the holder thereof: held, (on special demurrer), that the replication was not too large, and also that the plt. was at liberty to traverse the material allegation in the plea, and was not bound to state specially how he re-acquired the bill from M. D. (*Barber v. Lemon*, 17 Law J., 69, Q. B.; 10 Law T. 322; 12 Jur. 246).

*In an action on a bill of exchange by indorsee against drawer, [**633*] the deft. pleaded that before the indorsement to the plts. judgment had been recovered against the deft. by a prior indorser: held, a good plea, especially as it appeared that one of the plts. was one of those

by whom that judgment had been recovered (*Ward v. Liddaman*, 10 Law T. 225, Q. B.).

Loan Societies.] See 8 & 9 Vict. c. 60, continuing 3 & 4 Vict. c. 110. Where the society, being enrolled under the statutes, sues for a loan by the trustees, on a note payable to the treasurer, the deft. may plead that the loan was made to one person at one time, and was of greater amount than 15*l.*, or that it was a second loan before a former one had been repaid (see sect. 13). But *quære*, whether the action will lie at all, and that the only mode of recovering the payment of such notes is by application to a magistrate, as directed by sect. 16 (see *Timms v. Williams*, 3 Q. B. 413; *Albon v. Pyke*, 4 Man. & G. 421). Where the plt. states in his declaration that he sues as trustee under the acts, a plea of non-enrolment of the rules would be good (see *Bradburne v. Whitehead*, 5 Man. & G. 439). But, if the society be not enrolled, the deft. cannot plead to an action on a note made payable to an individual, that the money was really advanced by such society, and that its rules are not enrolled (*Bawden v. Howell*, 3 Man. & G. 638; *Jones v. Woolsan*, 5 B. & A. 770; *Batty v. Thompson*, 4 Camp. 5; see *Green v. Gosden*, 2 Man. & G. 446). Where the declaration alleged that the rules of the society were filed before the making of the promise, but it appeared they were not until after the making of the note, but before it became due: held, no variance (*Margett v. Parkes*, 1 D. & L. 582).

In an action by the payee against the maker of a promissory note, the deft. pleaded that the note was made and delivered to the plt. by the deft. jointly, with, and as surety for, J. S., for securing the payment of a loan to J. S. of 20*l.*, by a friendly society; that the said loan was made in the ordinary way of business of the society, and not otherwise; and that, according to the rules of the society, the said loan was to be repaid by J. S., by weekly instalments of 8*s.*, and a discount at the rate of 2*s.* in the pound, and no more, was to be charged for the forbearance of the money, to be deducted from the 20*l.* at the time of its advance; and that the society wrongfully and fraudulently, contrary to its rules, and without the deft.'s consent, deducted a larger sum, as discount, than 2*s.* in the pound: held, bad on special demurrer (*Brown v. Wilkinson*, 13 M. & W. 14). A contemporaneous written memorandum, as the rules of the society, controlling the effect of the note, might be pleaded, provided it be signed by the party to whom the note was given, and refer in the body of it to the note itself (*Brown v. Langley*, 4 Man. & G. 466).

Abatement.] To an action by the drawer against the acceptor of a bill of exchange, and on an account stated, the deft. pleaded, in abatement, that the bill was accepted, and the promise in the declaration mentioned was made, by the deft. jointly with B., who is still living and resident, &c.: held, bad, on demurrer (*Bleakley v. Jay*, 13 M. & W. 464).

COMPETENCY OF WITNESSES.

It is a general rule that it is no objection to the competency of a witness that he is also a party to the same bill or note, unless he has a *direct interest in the event of the suit. If he have such an interest, [*634] he is not admissible; otherwise he is (*Bayl. B.* 419); or, unless the verdict to obtain which his testimony is offered would be admissible evidence in his favour in another suit (*Bent v. Baker*, 3 T. R. 27). Where a witness has an interest inclining him as much to one of the parties as to the

other, so as, upon the whole, to render him indifferent in whose favour the verdict may be given, he will be competent to give evidence for either party Bayl. B. 418; see "WITNESS").

Drawer.] In an action against the acceptor, the drawer is a competent witness, either for the plt. or for the deft.; for, if the plt. recover, the drawer pays the bill by the hands of the acceptor; if the plt. fail against the acceptor, the drawer is liable to pay the bill himself (Bayl. B. 419; Dickinson v. Prentice, 4 Esp. 32; Rich v. Topping, Pea. 224; Humphrey v. Moxon, ib. 52; Beard v. Ackerman, 5 Esp. 119). In an action at suit of an indorsee against the acceptor, the drawer or indorser is a competent witness for the deft. to prove that the bill was originally void; as, that it was made in London, though dated abroad, and consequently invalid for want of an English stamp (Jourdain v. Lashbrook, 7 T. R. 601). The drawer is also a competent witness to prove usury (5 Esp. 119), or that the bill has been paid (Pea. 52). It is no objection that the drawer is a prisoner on a charge of having forged the bill (Barber v. Gingell, 3 Esp. 62).

And the drawer is competent where his interest renders him indifferent; as, in an action against one of several makers of a note, another is a competent witness for the plt., as he stands indifferent; for, if the plt. recover, he will be liable to pay contribution to the deft.; and, if plt. fail, and force him to pay, he will be entitled to contribution from the deft. (Ib.; York v. Blott, 5 Maule, 71). And, though he might, in some cases, have a greater difficulty in the one case than in the other to enforce his remedy, yet it seems that it would only render him liable to a suspicion of influence (Ph. Ev.), though it was once held otherwise (Buckland v. Tankard, 5 T. R. 579). Where a bill has been drawn by one partner in fraud of the rest to pay a separate creditor, a co-partner is a competent witness for the acceptor in an action against him by the creditor to prove the want of authority (Ridley v. Taylor, 13 East, 175). And, where the defence was a gaming consideration, and it was objected that the drawer, who was called by the deft., was interested to defeat the plt., being liable for treble penalties if he recovered, but not if he failed; it was held that the witness was competent, since, if the plt. failed, the witness was liable to him; if he succeeded, the witness might deliver himself from the penalties, by refunding within the time (Habner v. Richardson, per Holroyd, J., 1818; Manning's Index, 327). Where the witness had become bankrupt, and the costs were proveable under the commission, and he had obtained his certificate, he was held admissible at common law (Brind v. Bacon, 4 Taunt. 183; Moody v. King, 2 B. & C. 558).

Where the verdict would necessarily benefit or affect the witness, as if he be thereby subject to the costs of the action, then, without a release, he will be incompetent (Jones v. Brooke, 4 Taunt. 464). Thus, where a person has received a bill to get it discounted for the drawer, and delivered it to plt. in payment of a debt, he is incompetent to prove the fact in an action against the drawer, as he would be liable to costs if plt. succeeded (Harman v. Tabbrey, Holt, N. P. 390). And, where the acceptor has accepted the bill for the accommodation of the drawer, he is not a competent witness

[*635] for the deft. *without a release; for, if the plt. should fail, the witness would be discharged from his liability to indemnify the deft. against the costs of the action on the bill (Jones v. Brooke, 4 Taunt. 464). This decision appears to overrule Birt v. Kershaw, 2 East, 458; and Shuttleworth v. Stephens, 1 Camp. 407, since the 3 & 4 Will. IV., c. 42, s. 26; for if, in an action by indorser against acceptor, the deft. pleaded an acceptance for the accommodation of the drawer, and usury between the drawer

and the plt., and the replication denied the usury, the drawer was admitted a witness for the deft. (*Flight v. Hammond*, 2 Man. & G. 283, n. a). If such accommodation acceptor release the drawer, he will be a competent witness (*Hardwick v. Blanchard*, 1 Gow, 113). In an action against the acceptor, the drawer is competent to prove the deft.'s handwriting (*Dickinson v. Prentice*, 4 Esp. 32), or to prove his own indorsement (*Willsheir v. Cox*, cited Ch. Bills, 416, n. d).

Indorser.] "In an action by an indorsee against drawer or acceptor, an indorser is, in general, a competent witness either for plt. or deft. : for plt., because, though the plt.'s succeeding in the action may prevent him from calling for payment from the indorser, it is not certain that it will; and, whatever part of the bill or note the indorser is compelled to pay, he may recover again from the drawer or acceptor;—and he is competent for deft., because, if plt. fails against drawer or acceptor, he is driven either to sue the indorser or to abandon his claim" (Bayl. B. 422). In an action by the indorsee against the drawer of a bill, a prior indorser is a competent witness for the plt. to prove his own indorsement to the bill (*Richardson v. Allan*, 2 Stark. 334), or that the deft. promised to pay the bill after it became due (*Stevens v. Lynch*, 2 Camp. 332; S. C. 12 East, 38); or (upon a bill drawn for his own accommodation) that the plt., the indorsee, gave him value for it (*Shuttleworth v. Stephens*, 1 Camp. 408); and a prior indorser of a note is a competent witness for the maker to prove it paid (*Charrington v. Milner*, Pea. 6; *Birt v. Kershaw*, 2 East, 488). So, in an action by the second indorsee against the first indorser, the second indorser was held a competent witness to prove that he, on receiving notice of dishonour from the plt., gave notice thereof to the deft. (*Anon. coram Abbott*, C. J., cited Ch. Bills, 417). In an action by indorsee against acceptor, the indorser, though relieved by the deft., was held incompetent to prove that he delivered the bill to the plt., merely for the purpose of procuring payment, as agent for the witness (*Buckland v. Tankard*, 5 T. R. 578; but see *Birt v. Kershaw*, 2 East, 458; 1 Ph. Ev. 63, 3rd ed.).

The plt.'s indorser was admitted without a release to prove payment by the acceptor to the plt., though on the *voire dire* he stated that he had received money from the deft. to pay it, and was therefore liable to the deft. in damages if he neglected to pay (*Beacy v. Packwood*, 7 Ad. & E. 917). In an action against the indorser, a prior indorser, for whose accommodation the deft. indorsed the bill, and who has become bankrupt, and obtained his certificate, is a competent witness for the deft. (*Bassett v. Dodgin*, 9 Bing. 653).

Acceptor or Drawee.] In an action against the drawer of a bill, in order to excuse the neglect to give him due notice of the dishonour, the acceptor is a competent witness to prove that he had not received any value for the acceptance; for though, by supporting the action against the drawer, he may perhaps relieve himself from an action at the suit of the holder, yet he at the same time gives an action against himself, at the suit of the drawer, in which *the evidence he has given, of the want of consideration, would not avail him, but must be proved by another person (*Staples* [*636] *v. Okines*, 1 Esp. 332). And the drawee may also be called for the same purpose (*Legge v. Thorpe*, 2 Camp. 310). But, in an action against a drawer, it has been held that the acceptor is an incompetent witness to prove a set-off for the deft., as he is answerable to the drawer only for the amount which the plt. recovers against the deft. (*Mainwaring v. Mytton*, 1 Stark. 83); *sed quære*, for it seems that the drawer would be entitled to call upon the acceptor for the full amount of the bill (Bayl. B. 424; see *Reid v. Fernival*, 1 Cr. & M. 538).

An Indorsee is a competent witness in an action by the holder against the drawer, to prove the payment by the drawer of money into his hands to take up the bill, and that he has satisfied the bill, for he is liable, at all events, either to the holder or to the drawer for the amount of the bill (*Birt v. Kershaw*, 2 East, 458; *Bayl. B. 423*).

A *payee* is, it seems, competent, in an action by an indorsee against the acceptor, to prove that the bill was originally void, from a defect of the stamp (7 T. R. 601), having been made in London, although dated abroad. The payee of a note, made for his accommodation, who has become bankrupt, and obtained his certificate subsequent to the date of the note, was not a competent witness for the deft., the maker, to indorsement after the note became due (*Maundrell v. Kennett*, 1 Camp. 408, n.; but see now, 3 & 4 Will. IV. c. 42). The payee of a bill (drawn for accommodation), who has indorsed it to the plt., is competent, in an action against the drawer, to prove that he indorsed it for a valuable consideration; for, if the plt. should fail, he would be liable to him to the amount of the bill; if he should succeed, he would be liable to the same amount to the deft. (*Shuttleworth v. Stevens*, 1 Camp. 407).

In an action by a plt., as administrator of the payee of a note given to her before marriage, it was held that the husband of the payee by receiving interest on the note, during the life of the wife, had not reduced it into possession, and accordingly that he was a competent witness for the plt. by stat. 6 & 7 Vict. c. 85, notwithstanding any ultimate interest in the assets (*Hart v. Stephens*, 10 Jur. 225).

Maker.] The maker of a promissory note is a competent witness for the plt., and one of the joint makers of a note may be called for the plt. to prove the signature of the deft. the other joint maker (*York v. Blott*, 5 M. & S. 71). In an action by the indorsee against payee the maker is a competent witness to prove an alteration (*Levi v. Essex*, 2 Esp. Dig. 211, 4th ed.). So to prove a notice in an action by indorsee against indorser (*Bayl. B. 422*); since the 3 & 4 Will. IV. c. 42, s. 26, has rendered a joint maker of a promissory note competent for the other; for contribution could not be obtained from him without producing the record of the recovery, against the deft. (*Russell v. Blake*, 2 Man. & G. 374). So, a joint maker is a competent witness in an action by the payee against another of the makers to prove the handwriting, though he stated on the *voire dire* that he and the other maker (not sued) signed as sureties of the deft. and that his co-surety was insolvent (*Page v. Thomas*, 6 M. & W. 733).

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*ADMISSIONS.

The effect of admissions will, for the most part, be found *ante*, "ADMISSIONS." An admission by a holder of a bill, under whose indorsement the plt. claims, that the amount was settled, after the bill became due, between himself and the acceptor, is not evidence for the latter, as the holder may himself be called (*Duckham v. Wallis*, 5 Esp. 251). Where A. indorsed a bill to B., as a security for a running account, and, after the bill became due, B. indorsed it to C., an entry or declaration by B., as to the state of the accounts, is not admissible evidence for A., unless it were made at the time, and accompanying the indorsement to B. (*Collenridge v. Farquharson*, 1 Stark. 259). But where a bill of exchange was given by the acceptor for

the drawer's accommodation, and whilst in his hands he made a declaration that it was an accommodation bill, and that the acceptor had received no value, and, long after the bill was due, the drawer indorsed it to the plt., all accounts between the drawer and the acceptor being then closed, it was held, the declaration of the drawer was inadmissible to defeat the plt.'s right to sue; as what would be a good defence against the drawer would be equally a good defence against the indorsee, in this case (*Benson v. Marshall*, cited in 4 D. & R. 732; Ch. Bills, 412). What is said by a third party at the time of signing of a promissory note, as to the consideration for which it is given, is not evidence against the payee, if he was not present (*Healey v. Jacobs*, 2 C. & P. 616).

The declarations of a holder of a bill made whilst it is current, are not admissible against a subsequent holder under an indorsement before the bill became due (*Smith v. De Wruitz*, Ry. & M. 212). In an action by first indorsee against acceptor, the declarations of the drawer, made before indorsement, showing that the acceptor received no value, were not admissible, if the drawer be living at the time of trial (*Hedger v. Horton*, 3 C. & P. 179). The declarations of the drawer are admissible to show that the bill was obtained by fraud, but the plt. must be shown to be privy to it (*Peckham v. Potter*, 1 C. & P. 232). Action by indorsee; defence is that the deft. had settled it in account with the holder when due, and that the plt. took it after it became due; what was said by the person represented as the holder and indorsee, when it became due, is not evidence; he should be called (*Duckham v. Wallis*, 5 Esp. 251). The declarations of an indorser of a bill, made while he was holder, are evidence for a jury against a holder under an indorsement made before the bill was due, if there be evidence which satisfies the judge that the indorsee is merely an agent to sue for the indorser, and the jury are afterwards to judge, first, of the agency, and then of the effect of the declaration (*Welstead v. Levy*, 1 M. & R. 138). In an action against the maker of a note, letters of an indorser are not admissible evidence to impeach the indorsee's title, though the indorsement was made after the note was payable (*Clipson v. O'Brien*, 1 Esp. 10). Indorsee against maker of a note; declarations by payee (not uttered at the time of making the note) are not admissible to show that the consideration for the note was money lost at play, unless it be previously shown that the interest of the indorsee is identified with the payee, by taking the note after it was due, or without consideration (*Beauchamp v. Parry*, 1 B. & Ad. 89; see *Phillips v. Cole*, *infra*; but see *Kent v. Lowen*, 1 Camp. 177).

An admission, under a judge's order, that a bill was accepted by the deft.'s partner, for self and partner, coupled with the production of the bill, is sufficient evidence in an action against the deft., the *only plea being a traverse of the acceptance (*Bartlett v. Martin*, 1 Jur. 499). [*638] Indorsee against maker of a note; plea, that the note was obtained from the deft. by fraud, and that the name of A. (who indorsed it to plt.) had been fraudulently indorsed, of all which the plt. had notice: held, that the deft. was not at liberty to read letters of A. written while holder of the note, which it was alleged would have implicated the plt. in the fraud, for no evidence had been given to connect the plt. with A., or to show that the note had been indorsed to the plt. without consideration, or when overdue (*Phillips v. Cole*, 10 Ad. & E. 106; 4 Jur. 83). In an action by indorsee against acceptor, defence was forgery; the deft. having represented it to be so to certain bankers who were applied to, to discount it for a prior holder, the bankers wrote a letter, stating what the deft. had said, and minutely entering into the circumstances; this letter was received in evidence, prelimi-

nary to the observation which was made upon it by the holder: held, properly receivable (*Miers v. Bowler*, 2 Jur. 95).

No inference can be drawn by a jury from an admission on record (*Edmondson v. Groves*, 2 M. & W. 642; but see *Bingham v. Stanley*, 10 Law J. 319, Q. B.).

Where a bill is transferred, with or without indorsement, after it has become due, anything said respecting it, by the party in whose hands it was when it became due, may be given in evidence in defence of an action at the suit of a subsequent indorsee (*Anon. Bayl. B. 480, n.*); and if transferred to the plt. without consideration, declarations by the party who transferred it to him may be given in evidence against him (*Welstead v. Levy*, 1 M. & R. 138). If the plt. were privy to the fraud, the declarations of the drawer are admissible to show that the bill was obtained by fraud (*Peckam v. Potter*, 1 C. & P. 232; see *Coster v. Symons*, ib. 148). The declarations of the drawer before indorsement by him, and before the bill became due, that the acceptor had received no value for his acceptance, were held not to be admissible in evidence where the drawer was alive at the time of the trial, for he might have been called as a witness (*Hedger v. Horton*, 3 C. & P. 179; see *Smith v. De Wruitz*, Ry. & M. 212). The maker of a note sought to give in evidence the declaration of the payee (not made at the time of making the note), that it was given for money lost at play: held, that he could not do so unless he first showed that the plt. was identified in interest with the payee, by having taken the note from him without consideration, or after it was due (*Beauchamp v. Parry*, 1 B. & Ad. 89). The right of an innocent indorsee for value to recover upon a note payable to J. S., or order, with interest, on demand, cannot be impeached by evidence of declaration by the payee while the note was in his hands, that it was given to him by the maker without value (*Barough v. White*, 4 B. & C. 325; see *Shaw v. Broom*, 4 D. & R. 730); and where a bill is transferred when overdue, entries made by the party who was holder of it when it became due are not receivable, unless made at or before the time of his passing the bill (*Collenridge v. Farquharson*, 1 Stark. 259). The plt.'s own declarations are always evidence (*Williams v. ———*, 5 Man. & R. 121).

Where the deft. pleaded that the note was made without consideration, and indorsed and delivered to W. merely for the purpose of being discounted, and that W., in fraud of the deft., and without his consent or authority, indorsed it to the deft., who gave no consideration for it, and knew of the want of authority, to which the plt. replied *de injuriâ*; at the trial it was proposed to give in evidence W.'s declarations, whilst holder of the note, before any evidence was offered to prove any connection between him and the plt., or *that the plt. had taken the note when overdue, or [*639] without consideration: held, that the evidence was properly rejected.

The declarations of a former holder of a bill are not in general admissible to prove the want of consideration (*Shaw v. Broom*, 4 D. & R. 730). But they are admissible if the title of the plt. is identified with that of the party making the declarations; thus, where the bill is taken after it became due (*Benson v. Marshall*, ib. 732; *Beauchamp v. Parry*, 1 B. & Ad. 89). So, where plt. sues as agent for the party who made the declaration, though he did not take the bill after it was due (*Welstead v. Levy*, 1 M. & R. 138).

The declarations of the party who indorsed the note to the plt. as to the manner in which the plt. became possessed of it, cannot be given in evidence to impeach the plt.'s title, although the indorsement were after the note became due (*Clipsam v. O'Brien*, 1 Esp. 10).

In an action on a bill alleged to have been accepted by the defts., under

the style and firm of A. and Co., an order was made by consent to admit the handwriting of the acceptance; the notice to admit was as follows:—"Bill of exchange for 121*l.* 10*s.*, drawn by plt. upon and directed to the defts. as A. and Co., and accepted by B. for the defts., as A. and Co., payable, &c., and indorsed, &c.:" held, that this admission precluded the defts. from denying the authority of B. to bind the firm of A. and Co. by such acceptance, and was not a mere admission that he signed an acceptance purporting to bind that firm (*Wilkes v. Hopkins*, 1 M. & G., N. S. 737; 3 D. & L. 184).

In an action against a party as acceptor of a bill of exchange accepted in his name by another person, where evidence has been given of a general authority in that person to accept bills in the deft.'s name, an admission by the deft. of liability on another bill so accepted is good evidence confirmatory of the former (*Llewellyn v. Winckworth*, 13 M. & W. 598).

A declaration by the drawee that the drawer, the deft., had no effects in his hands, would, it seems, be evidence against the drawer, if made at the time of presentment, though not if made subsequently (*Prideaux v. Collier*, 2 Stark. 57). In an action against the drawer and indorser of a bill, the acceptor was called for the deft. to prove that after acceptance by him, and indorsement by the deft., the bill was put into his (the drawee's) hands in order to get it discounted; that he took it for that purpose to the plt., who refused to discount it or return it: held, that the witness was incompetent, on the ground of interest (*Edmonds v. Lowe*, 8 B. & C. 407. But see 3 & 4 Will. IV. c. 42, and *Faith v. McIntyre*, 7 C. & P. 44).

In cases where a partnership is proved to exist, an admission by one of the defts. of the handwriting of one of the partners to the acceptance, in the name of the firm, is sufficient evidence (*Gray v. Palmer*, 1 Esp. 135); and it will be unnecessary to prove that the defts. were of the Christian names averred in the declaration (*Ib.*). And this doctrine has been carried so far, that, in an action against three persons, as drawers of a bill of exchange, purporting to have been drawn by an agent of the firm upon one of the partners, it was held, that the acceptance by the drawee was evidence against the three partners of the bill having been regularly drawn, and rendered it unnecessary to prove the authority of the agent (*Porthouse v. Parker and others*, 1 Camp. 82). And the admission by one partner of his partnership with the co-defts., sued with him as acceptors of a bill, and who had been outlawed, has been received as evidence against him to establish a joint promise by all (per Lord Ellenborough, in *Sangster v. Mazarredo*, 1 Stark. 161; *post*, "PARTNERSHIP"). *The acceptance of a bill [*640] drawn by procuration admits the agent's signature and authority, but not the indorsement by the same procuration (*Robinson v. Yarrow*, 1 Moo. 150). But, where the drawer and payee of a bill delivers it to any other, with his name indorsed thereon, proof of such delivery, with the name indorsed, is sufficient, without proving the signature (*Glover v. Thompson*, R. & M. 403). Acceptance is also a *prima facie* admission of effects in hand (*Vere v. Lewis*, 3 T. R. 183).

The payment of money into court generally precludes the deft. from disputing the validity of the bill, or showing that it is improperly stamped, and amounts to an admission of an indorsement (*Gutteridge v. Smith*, 2 H. Bl. 374; *Israel v. Benjamin*, 3 Camp. 40). And the plt. should, on the trial, produce the rule; and it will not suffice to call the attorney to prove that he took the money out of court (*Ib.*).

When the plt. proceeds to ascertain the damages, by executing a writ of inquiry, he need not adduce any evidence, but should produce the bill, to substantiate which, however, no evidence will be necessary (*Green v. Hearne*, 3 T. R. 301; see *ante*, p. 489); for, where the action is on the bill itself, let-

ting judgment go by default is an admission of the cause of action, and of the def't's liability to the amount of the bill (*Anon.* 3 Wils. 155; *Shepherd v. Charter*, 4 T. R. 275); and the amount of the damages alone should be substantiated by the plt., or can be controverted by the def't.; and the production of the bill is required only that it may be ascertained whether any part of it has been paid (*per Buller, J.*, in *Greene v. Hearne*, 3 T. R. 301); for the same reason, the def't. cannot give in evidence any matter in defeasance of the action (*East India Company v. Glover*, 1 Stra. 612). The plt. is entitled to nominal damages, though he do not produce the bill (*Marshall v. Griffin, R. & M.* 41). See further, as to admissions, *ante*, p. 56.

BILL OF EXCEPTIONS.(a).

What it is.] A bill of exceptions is an appeal from the judgment or direction of the court, or of the judge at nisi prius (*Thruston v. Slatford*, 3 Salk. 155). It is in the nature of a writ of error, and, therefore, cannot be determined in the court in which it is executed (*Davenport v. Tyrrell*, 1 Bla. 679). It is founded on matter of law, or on a point of law, arising out of a matter of fact, not denied (*B. N. P.* 317; 3 Bla. Com. 372), either as to the competency of witnesses (*Bent v. Baker*, 3 T. R. 27); or telling the jury that there is evidence to prove the issue when there is none (*Bulkeley v. Butler*, 2 B. & C. 442); or as to the admissibility of evidence (*Thruston v. Slatford*, 1 Salk. 284); or the legal effect of it (*T. Raym.* 404; 1 Bla. 555; *Money v. Leach*, 3 Burr. 1693; *Fabricas v. Mostyn*, Cowp. 161; *S. C.* 2 Bla. 929; *Tidd*, Pr. 911); or for overruling a challenge, or refusing a demurrer to evidence (*Cro. Car.* 341; 2 H. Bl. 208; *Show. P. C.* 120). See the distinction between a bill of exceptions and a demurrer to evidence, drawn by *Best, J.*, in *Bulkeley v. Butler*, 2 B. & C. 446. If plt. intend to bring a writ of error, on the ground of misdirection in point of law, he should not submit to be nonsuited, but appear, and put the judge to express some opinion by way of direction to the jury, and thereupon tender a bill of exceptions (*Doe d. Tolson v. Fisher*, in error, 2 Bli. N. S. 9). It lies for improperly directing a nonsuit (*Strother v. Hutchinson*, 4 Bing. N. C. 83; but see *Doe* [*641] *v. Fisher*, 2 Bli. N. S. 9). It lies on a trial *at bar (*Rowe v. Brenton*, 3 M. & R. 266), and for misdirection of a sheriff to a jury in a county court (*Strother v. Hutchinson*, *supra*). But it does not lie for non-direction (*M'Alpine v. Mangnall*, 3 C. B. 496). *Quære*, whether it will lie to a judge at chambers (*Tucker v. Sleight*, 7 Law T. 414). It may be brought before the Common Pleas upon a writ of false judgment (*lb.*). *Quære*, whether it lies on a trial upon a writ of inquiry (*Price v. Green*, 16 M. & W. 346). When properly tendered, the bill must be signed by a judge, under authority of 13 Edw. I. c. 31 (*Bulkeley v. Butler*, 2 B. & C. 446; *Show. P. C.* 120); and he ought to set his seal thereto; but if the bill contain matters false or untruly stated, or matters in which the party was not overruled, he may refuse to affix his seal (*B. N. P.* 316); and, if the bill be returned, "*quod non ita est*," the party may have an action against the judge for a false return (*B. N. P.* 316; 2 Inst. 426). The statute extends to inferior courts, as well as trials at bar and nisi prius (2 Inst. 427; 3 Salk. 355; *B. N. P.* 316; *Strother v. Hutchinson*, *supra*). It must be tendered at the trial, and the substance of it reduced into writing, and may be formally drawn up afterwards

(a) See U. S. Dig. Tit. "Bill of Exceptions," p. 411; 1 Supp. U. S. Dig. p. 278; 1 Ann. Dig. p. 94; 2 Ann. Dig. p. 49; 3 Ann. Dig. p. 75.

(2 Inst. 427; B. N. P. 316). The court will in no case grant a motion for a new trial, when a bill of exceptions has been tendered, unless it be subsequently abandoned (2 Ch. R. 272). *Quære*, whether he may, without abandoning such bill, apply for a new trial on a point wholly distinct from the grounds of exception (Allen v. Hayward, 7 Q. B. 960). Where the judge dies before affixing the seal another judge cannot do so, and a motion for a new trial will be allowed (Newton v. Boodle, 16 Law J., N. S., C. P. 135; 3 C. B. 795). A bill of exceptions is only made use of on writ of error or false judgment; so that, where a writ of that kind does not lie, there can be no bill of exceptions (B. N. P. 316 *b*; Davenport v. Dillon, 1 Bl. R. 679; Strother v. Hutchinson, *supra*).

On the trial of a writ of right, the issue being joined on the mere right, two principal questions (the ruling of the court upon which was excepted to on the part of the demandant) were left to the grand assize. First, whether or not the demandant had succeeded in establishing her pedigree; secondly, whether a fine, that had been levied by the father of the tenant, was so levied as to operate in bar of the demandant's right; whether the cognisor was at the time in the possession of the premises, claiming an estate of freehold, and whether the fine was levied in the name by which the cognisor was at the time known. The grand assize found a general verdict for the tenant, accompanying it with the following statement in writing:—"It is the unanimous verdict of the grand assize, that the demandant has not made out her pedigree; that the tenant had entered into, and was in the actual possession of, the estates devised by the will of T. J. S., before and at the time of levying the fine, in 1784, and that he had taken, and used, and was then known by the name of W. S.," a name he was required by the bill to assume as the condition upon which he was to take the estate; on failure of the right heir presenting himself: held, that this written statement could not properly be introduced into the bill of exceptions, as the grand assize was not called upon by law to make it (Davies, d. v. Lowndes, ten. 1 Sco. N. R. 328; 1 Man. & G. 473). A bill of exceptions, tendered to the direction of the judge, set forth the pleading and evidence, and then referred to a lease, part of which was inserted by way of extract, the judgment of the court having been brought up to the House of Lords by writ of error. The counsel for the plt. in error proposed to read a part of the lease, not imboldened *in the bill of exceptions: held, they were not at liberty to do [*642] so (Galway v. Baker, 5 Cl. & Fin. 157).

It will not be allowed in criminal cases (B. N. P. 316 *a*; Willes, 535). And, after the seal of the judges has been affixed to the bill, the truth of the matters therein contained can never afterwards be questioned (Show. P. C. 129; B. N. P. 316 *a*). But it may be amended (Cully v. Doe d. Taylorson, 11 Ad. & E. 1098). If a party tenders a bill of exceptions, and before the return thereof brings a writ of error, he will be deemed to have waived his bill (Dillon v. Parker, 1 Bing. 17). The deft. sent plt. a copy of the bill of exceptions for his concurrence in the statement of facts, and at the same time sued out a writ of error: held, that plt. had no right to retain the bill of exceptions, on the ground that deft. had waived it by suing out a writ of error (Williams v. Taylor, 6 Bing. 512).

No bill of exceptions will lie when matter referred by the judge is not conclusive evidence; and the proper mode of proceeding is by demurrer to evidence (T. Raym. 404; Bulkeley v. Butler, 2 B. & C. 446). Where an indorsement to a foreign bill of exchange was forged, and a question arose as to proof of identity of endorser, if evidence be objected to as insufficient for that purpose, the proper course for taking advantage of that objection is by demurring to the evidence (Bulkeley v. Butler, 2 B. & C. 434; 3 D. & R.

625). Where evidence is rejected by a judge at *nisi prius*, the counsel relying on the evidence ought to make a formal tender of it to the judge, and request him to put it on his notes, and, in the event of his refusal, tender a bill of exceptions, otherwise counsel will not be allowed to raise before the court any questions arising out of such evidence, if the judge's notes do not show the point to have been raised at the trial (*Gibbs v. Pike*, 9 M. & W. 391; 6 Jur. 465).

On a bill of exceptions, the court will look at the whole evidence set out, to see whether the verdict is sustained, at least where the bill sets out the whole, and is not confined to one point (*Vines v. Reading Corporation*, 1 Y. & J. 4; *Smyth v. Latham*, 1 C. & M. 568).

If a bill of exceptions be tendered to a judge in the course of a trial at *nisi prius*, the facts shall go to the jury, but a demurrer to evidence stops the cause (*Millar v. Warre*, 1 C. & P. 237; 4 B. & C. 538).

The subsequent proceedings on the writ of error are the same as in other cases: and, if it be reversed, a *venire de novo* issues, which is made returnable in the Court of Queen's Bench, though the judgment was given in the Common Pleas (3 T. R. 36), or formerly in the Court of Great Sessions, in Wales (*Davies v. Pearce*, 2 T. R. 125, 126).

Where exceptions are not properly taken (as where they appear upon the record after the finding of the jury) the court of error cannot give judgment thereon (*Armstrong v. Lewis*, in error; 4 Moo. & Sc. 1; 2 C. & M. 274; *London Grand Junction Railway Company v. Freeman*, 2 Sco. N. R. 720, n.). Where a bill of exceptions is taken at the trial of a cause, it must be set down for argument within the first four days of the ensuing term (*Hill v. Watts*, 4 Alc. & Napier, 130, (Irish)). The deft. below tendered a bill of exceptions, and afterwards brought error, the bill of exceptions not having been ready when the writ of error was returned; the court in consideration of the circumstances allowed it to be tacked to the record afterwards (*Taylor v. Willans*, 2 B. & Ad. 846). Where the deft. sent a copy of a bill of exceptions to the plt. for the purpose of concurring

[*643] in the statement of facts, and at the same time sued out a writ of error: held, that the plt. had no right to retain the bill of exceptions on the ground that the deft. had waived it by suing out a writ of error (*Willans v. Taylor*, 6 Bing. 512; 4 M. & R. 257).

An information having been tried at the summer assizes, the deft. tendered a bill of exceptions to the learned judge, and on the day after the trial supplied him with a sketch of the exceptions. On the 3d of November the deft. furnished the prosecutor with a draft of the bill of exceptions for his approval. On the 5th of November, the draft being still in the hands of the prosecutor, the deft. moved for a rule to restrain the prosecutor from proceeding on his judgment until one week after the bill of exceptions had been sealed. On the 7th of November, the 5th day of the term, the prosecutor signed judgment: held, that the deft. had been sufficiently prompt in his proceedings, and that he was entitled to a reasonable time to seal the bill of exceptions, and sue out a writ of error, and the court refused to compel him to pay the costs of the application, and directed that they should be costs in the cause, or to impose a term upon him to enter the fact upon the record, that the bill of exceptions was sealed after judgment signed (*Reg. v. Rowley*, 2 Dowl. 2 N. S. 335).

As to the mode of stating the points, see *Jenny v. Brook*, 6 Q. B. 323. The bill of exceptions must be set out in terms what the judge's direction was. It is not enough to state that he inclined to direct the jury in the way suggested (*McAlpine v. Mangnall*, 3 C. B. 496, in error). It is not sufficient to state that the counsel requested the judge to leave certain questions to the

jury, and that he refused to do so (*M'Alpine v. Mangnall*, 15 Law J., N. S., C. P. 298). Whether it is necessary to suggest the true law to the judge, see *Jenny v. Brook*, *supra*. Judgment may be signed, notwithstanding the pendency of the bill of exceptions (*Fishmonger's Company v. Robertson*, 16 Law J., N. S., C. P. 118). On the direction of a judge, as to a question of probable cause, see *Panton v. Williams*, 2 Q. B. 169.

A bill of exceptions will not be included in the taxation of costs, in the court below, it being no part of the record, till carried into the court of error, where it then becomes a part of the record there, by the judge's seal being acknowledged (*Gardner v. Baillie*, 1 B. & P. 33).

Form of Bill of Exceptions.

to wit. Be it remembered that in the term of in the year of the reign of our sovereign lady Victoria, now queen of the United Kingdom of Great Britain and Ireland, &c., came A. B., by , his attorney, into the court of our said lady the queen, before the queen herself, at Westminster, and impleaded C. D. in a certain plea of trespass on the case upon promises, on which the said A. B. declared against him, that, &c., [*set out the declaration, and other pleading, then proceed,*] and thereupon issue was joined between the said A. B. and C. D. And afterwards, to wit, at the sittings of *nisi prius*, holden at the Guildhall of the City of London aforesaid, in and for the said city on the day of in the year of the reign of our said lady the queen, before the right honourable Thomas Lord Denman, chief justice of our said lady the queen, assigned to hold pleas in the court of our said lady the queen, before the queen herself, J. J. esquire being associated unto the said chief justice according to the form of the statute in such case made and provided, the aforesaid issue so joined between the said parties as aforesaid came on to be tried by a jury of the City of London aforesaid, for that purpose duly impanelled, that is to say E. F. of [*insert the names and additions of the jury*], good and lawful men *of the said City of [*644] London: at which day came there as well the said A. B. as the said C. D., by their respective attorneys aforesaid; and the jurors of the jury aforesaid, impanelled to try the said issue, being called, also came and were then and there in due manner chosen and sworn to try the same issue; and upon the trial of that issue the counsel learned in the law for the said A. B. to maintain and prove the said issue on his part gave in evidence that &c. [*here set out the plt.'s evidence and afterwards the deft.'s and proceed.*] Whereupon the said counsel for the said C. D. did then and there insist before the said chief justice on behalf of the said C. D., that the said several matters so produced, and given in evidence on the part of the said C. D. as aforesaid, were sufficient and ought to be admitted and allowed as evidence to entitle the said C. D. to a verdict, and to bar the said A. B. of his action aforesaid, and the said counsel for the said C. D. did then and there pray the said chief justice to admit and allow the said matters so produced and given in evidence for the said C. D. to be given in evidence in favour of the said C. D. to entitle him to a verdict in this cause, and to bar the said A. B. of his action aforesaid. But to this the counsel learned in the law of the said A. B. did then and there insist before the said chief justice that the same were not sufficient nor ought to be admitted or allowed to entitle the said C. D. to a verdict or to bar the said A. B. of his action aforesaid, and the said chief justice did then and there declare and deliver his opinion to the jury aforesaid, that the said several matters so produced and given in evidence on the part of the said C. D. were not sufficient to bar the said A. B. of his action aforesaid, and with that direction left the same to the said jury; whereupon the said counsel for the said C. D. did then and there on behalf of the said C. D. except to the aforesaid opinion of the said chief justice and insisted on the said several matters as an absolute bar to the said action, and inasmuch the said matters produced and given in evidence on the part of the said C. D., and by his counsel aforesaid, objected and insisted on as a bar to the action aforesaid, did not appear by the record aforesaid, the said counsel for the said C. D. did then and there propose their aforesaid exception to the opinion of the said chief justice, and requested him to put his seal to this bill of exceptions containing the said several matters so produced and given in evidence on the part of the said C. D. as aforesaid according to the form of the statute in such case made and provided, and the jury aforesaid then and there gave their verdict for the said A. B. and £ damages. And thereupon the said chief justice at the request of the said counsel for the said C. D. did put his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and provided, on the said day of in the year of the reign of her present majesty.

Bill of Exceptions to be tacked to the Record, as to a Witness being bound to answer a question tending to disgrace him in K. B.

[After the end of the issue and award of *venire facios*, proceed as follows:] Which said issue, in form aforesaid, joined between the said parties afterwards, to wit, at the sittings at *nisi prius* holden at Westminster Hall, in and for the county of Middlesex, on the day of _____ in the _____ year of the reign of our lady the now queen, before the right honourable Thomas Lord Denman, chief justice of our said lady the queen, assigned to hold pleas in the court of our said lady the queen, before the queen herself, J. J., esquire, being associated unto the said chief justice according to the form of the statute in such case made and provided, came on to be tried by a jury of the said county of Middlesex, for that purpose duly impanelled. At which day came there, as well the said A. B. as the said C. D., by their respective attorneys aforesaid; and the jurors of the jury aforesaid, impanelled to try the said issue, being called, also came and were then and there in due manner chosen and sworn to try the said issue. And upon the trial of the said issue one E. F. was produced and examined upon oath as a witness by the counsel learned in the law for the said A. B., in support of the said action, and upon the cross-examination of the said E. F. by the *counsel learned in the law for the said C. D., the said E. F. was asked by the said last-mentioned counsel whether he had not been imprisoned upon a conviction for forging a coal-meter's ticket. Whereupon the said chief justice then and there interposed and before the said E. F. had given any answer to the said question, declared and delivered his opinion that the said E. F. was not bound to answer the said question; and the said E. F. thereupon refused to answer the said question. And afterwards, at the said trial, the said chief justice, in summing up the evidence given in the said cause to the jury aforesaid, did further declare and deliver his opinion to the said jury, that the said E. F.'s refusal to answer the said question threw no manner of discredit upon him, the said E. F., and the jury aforesaid, thereupon, then and there gave their verdict for the said A. B., and £ _____ damages. Whereupon the said counsel for the said C. D. did, then and there, on behalf of the said C. D., except to the aforesaid opinion of the said chief justice, and insisted that the said E. F. was bound to answer the said question, and that his refusal to answer the same was and ought to be considered by the said jury as an impeachment of his credit, and inasmuch as the said several matters herein-before mentioned do not appear by the record, &c. (as in the last).

BILL OF LADING.

[*Its Effect in Evidence*] A bill of lading is written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight (*Lickbarrow v. Mason*, per Lord Loughborough, 1 H. Bl. 358). The interest in goods may be proved by the production of the bill of lading, and the evidence of the captain that he had on board the goods mentioned in it (*M'Andrew v. Bell*, 1 Esp. 373). The bill of lading itself is evidence of property in the consignee (2 Camp. 38; *Lickbarrow v. Mason*, 2 T. R. 71; 5 T. R. 683). But, if the master guards his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading alone is not evidence either of the quantity of the goods or of property in the consignee (*Haddow v. Parry*, 3 Taunt. 303); the signature of the master must be proved, and, if it be indorsed, proof of the indorsement will be necessary (2 Ph. Ev. 48); and the bill of lading will be evidence of property in the hands of the indorsee or holder (*M'Andrew v. Bell*, *supra*; 1 Esp. 373; 1 T. R. 215); and it will be such, though the indorsement be special or in blank (*Lickbarrow v. Mason*, 2 T. R. 71; Ab. Sh. 392). Where a bill of lading had been signed by a master of a vessel, since deceased, for goods to be delivered to a consignee or his assigns, on his paying freight, the document was held to be evidence to show that the consignee had an insurable interest in the goods (per Lawrence, J., *Haddow v. Parry*, 3 Taunt. 303). The captain's signature is not evidence, if he be alive (*semble*, *Dickson v. Lodge*, 1 Stark. 266). The shipment of goods is

proved, if the captain be dead, by production of the bill of lading and proof of his handwriting (*Haddow v. Parry, supra*).

Where to prove property in a cargo, the plt. produced a bill of parcels of one Gardner, at Petersburg, with his receipt to it, and proved his handwriting, Lee, C. J., allowed the evidence in an action against the insurers (*Russell v. Boheme*, 2 Stra. 1127). Any person intrusted with or in possession of any bill of lading, dock warrant, &c., shall be deemed and taken to be the true owner of the goods, so as to give validity to any contract for sale of goods, or any deposit or pledge, provided there be no notice by the documents *or otherwise that the person so intrusted was not the actual owner (5 Geo. IV. c. 94, s. 2; see now the Factors' Act, 5 [*646] & 6 Vict. 39, s. 2).

The right of the vendor to stop goods *in transitu*, is defeated by assigning the bill of lading to a *bona fide* assignee for a valuable consideration (*Lickbarrow v. Mason*, 1 H. Bl. 357; 5 T. R. 683; Ab. Sh. 398; see *post*, "TROVER;" *Lickbarrow v. Mason*, 1 Lead. Cas. in not.; *Morrison v. Gray*, 2 Bing. 260; *Waring v. Cox*, 1 Camp. 369; *Coxe v. Harden*, 4 East, 217). But the assignee must have acted in the transaction with fairness and honesty (*Caming v. Brown*, 9 East, 514; *Salomons v. Nissen*, 2 T. R. 674; see *Jones v. Jones*, 8 M. & W. 431).

The delivery of a bill of lading indorsed puts it in the power of the indorsee to transfer the property to a *bona fide* purchaser for a valuable consideration, and deprives the original owner of any right of stoppage *in transitu*; but as between the original parties, the consignor or consignee, the question whether the property passed will depend upon what the real contract was (*Jenkins v. Osborne*, 8 Sco. N. R. 505). Deft. sold to the plt. wheat, to be paid for by draft, to be remitted on receipt of the bill of lading and invoice; it was shipped by order of the plt., for and on account of, and at the risk of the plt., and the bill of lading was indorsed by the deft. to the plt. The plt. received the bill of lading and invoice, but did not remit any draft: held, that deft. could not stop *in transitu* (*Wilmhurst v. Bowker*, 7 Man. & G. 882). But an indorsement and delivery of the bill is not essential to the right of stopping, for the consignee may transfer the property under circumstances which will be equivalent to an indorsement (*Dick v. Lumsden*, Pea. Ca. 189; *Davis v. Reynolds*, 4 Camp. 267; see *post*, "TROVER," "*Stoppage in Transitu*").

Bills of lading made out to the order of the shipper and his assigns are negotiable, and transferable, by the shipper's indorsement (*Haille v. Smith*, 1 B. & P. 564), and such indorsement is necessary to their negotiability (*Nix v. Olive*, Ab. Sh. 403).

Letters to a party who has accepted a bill of exchange on the faith of a consignment, which gave him advice of a fact, are not equivalent to bills of lading indorsed (*Nichols v. Clent*, 3 Pri. 547). An assignment by the assignee of a bill of lading by way of pledge will not defeat the right of the vendor, subject to the pledge; a pledging had not in this respect the effect of a sale (*In re West Zinthus*, 5 B. & Ad. 817).

A bill of lading is not conclusive between the shippers of the goods and owners of the ship, but the owners may show that less goods than specified in the bill of lading were shipped, the master who signed the bill of lading having been misled by the fraud of the agent of the shippers (*Bates v. Todd*, 1 M. & R. 106).

See a plea of the forgery of a bill of lading, *Robinson v. Reynolds*, 2 Q. B. 196.

By charter-party between B. and plt., being owner of a vessel, it was agreed that the vessel should proceed to T., and there load from B.'s agent a

cargo, and proceed to London. By the bills of lading the goods were to be delivered to B. or his assigns, he or they paying freight as per charter-party and primage. Before the ship arrived in London, B. sold part of the goods to deft., and indorsed to him the corresponding bills of lading; when the ship arrived in London the goods were sold by deft.'s order, entered in his name at the Custom-house and the Docks, deft. paying the duties, and deft. obtained possession of the goods under the bill of lading: held, that if the bill had not referred to the charter-party, but had merely stated

[*647] *that the goods were to be delivered to the consignee or his assigns on their paying freight, the taking the goods under the indorsement would have been evidence from which a jury might have inferred a contract between deft. and plt. to pay freight (*Sanders v. Vanzeller*, 4 Q. B. 260). As to the form of declaration against indorsee of a bill of lading, see *Ib.* Bills of lading for goods and merchandise to be carried coastwise, must be stamped with a three-shilling stamp, by 55 Geo. III. c. 184, schedule.

A bill of lading is not negotiable so as to enable the indorsee to maintain an action upon it in his own name, the effect of the indorsement being only to transfer the right of property in the goods, but not the contract itself (*Thompson v. Dominy*, 14 M. & W. 403; 14 Law J., N. S. 320; but see *Lickbarrow v. Mason*, *supra*). Parol evidence has been received to explain the meaning of "days" in a bill of lading (*Cockran v. Retberg*, 3 Esp. 121).

When a bill of lading stipulates on the face of it for payment of demurrage, the indorsee taking goods under it is liable for demurrage (*Stindt v. Roberts*, 5 D. & L. 460).

Where a party has lost the benefit of the bill of exceptions, tendered to the ruling of a judge at nisi prius or at the assizes, by the death of the judge, and without any default on his part, it is not competent to another judge of the court out of which the record issues to seal the bill of exceptions (*Newton v. Boodle*, 3 C. B. 795).

But, in such a case, the court will, where the circumstances warrant it, allow the party to move for a new trial, notwithstanding the proper time for doing so has elapsed (*Ib.*).

BILL OF SALE.

SEE INDEX.

BOARD AND LODGING.

THE observations as to the pleadings and evidence in this action will be found principally collected *post*, "USE AND OCCUPATION." The finding and providing the board, &c., should be proved by the plt.'s servants or other witnesses; and the agreement as to the sum to be paid also proved: if there be no such agreement, then the value of the board, &c., should be proved (see also "WORK AND LABOUR," "GOODS SOLD").

Precedents.

Board and lodging found and provided for deft.

[*The inhabitant count for this claim is as ante, 225, inserting these words:*] For the use and occupation of certain rooms and apartments in and parcel of a certain dwelling-house of the plt. before that time had, used, held, occupied, possessed, and enjoyed by the deft., (or, if provided for a third person, say, "for one A. B.,") at his (or deft.'s) request,

and by the permission of the plt., together with divers large quantities of household furniture of the plt., therein, and for meat, drink, wine, beer, breakfasts, luncheons, dinners, teas and suppers, fire, candles, attendance, goods, chattels, and other necessities by the plaintiff found and provided for the deft. (or for the said A. B.), and at his (or deft.'s) like request; and, being so indebted the deft. in consideration thereof afterwards, on the day and year aforesaid, promised the plt. to pay him the sum of money on request; yet the deft. hath disregarded his said promise, and hath not paid the said sum of money, or any part thereof, to the plt.'s damage, &c., and thereupon he brings suit, &c.

*BOND, ACTION ON.(a)

[*648]

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(a) See 1 U. S. Dig. Tit. "Bond," p. 432; 1 Supp. U. S. Dig. p. 305; 1 Ann. Dig. p. 101; 2 Ann. Dig. p. 55; 3 Ann. Dig. p. 81.

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Form of Remedy.

Parties to Action and when to be brought.] The action of debt lies to recover money due on single bonds (Com. Dig. Debt, A, 4; 1 T. R. 40), or bonds conditioned for the payment of money, or for the performance of any other act by or against the parties thereto, and their personal representatives (Com Dig. Debt, A, 4), and against the heir of the obligor, if he be expressly named in the deed, or against a devisee having legal assets (Bac. Abr. Heir; 7 East, 128); or against the heir and devisee jointly (3 & 4 Will. IV. c. 14, s. 3; *Hunting v. Shelldrake*, 9 M. & W. 256); or if there be no heir at law then against the devisee solely (11 Geo. IV. & 1 Will. IV. c. 47, s. 4); and the acceptance of a bond for a simple-contract debt merges the latter, and obliges the party to proceed in debt on the bond (Y. B. 13 H. 4; 1 Rob. Abr. 604). But debt does not lie if the money be payable by instalments, or on contingencies, and the whole amount be not due, unless, indeed, the payment be secured by a penalty, as is usual (Bac. Abr. Debt, B.; *Coats v. Hewett*, 1 Wils. 80; 1 Lev. 54; 1 Ch. Pl. 123); or unless the bond provide that, in case of failure of any one instalment, the whole debt shall then become due. But since 8 & 9 Will. III. c. 11, s. 8, an action may be maintained on such a

bond on failure of payment of any of the instalments, and in default in payment of any subsequent instalment the plt. may recover it by sci. fa. (Willoughby v. Swinton, 6 East, 550). Debt lies at the suit of A. against C., on a bond by which C. acknowledges himself to be bound to A. in 100*l.*, *to be paid to A. or B.* (White v. Hancock, 1 C. B. 830). An action of covenant may be supported (3 Lev. 119; Com. Dig. Action, 1 M. 4; 1 Ch. Ca. 294; 1 Ch. Pl. 116); but it is not usual to bring it. (See further, "DEBT"). A promise to the assignee of a bond to pay him in consideration of forbearance may be sued on in assumpsit (1 Saund. 210, n. *l*; see "ASSUMPSIT").

Form of Pleadings.

Declaration.] The form of the declaration relative to actions of debt on specialties here applies (see "DEBT").

*It seems, in general, necessary to declare by or against a party by the name by which he is called in the deed or bond, and not in [*650] the name by which he executed it. But if in the deed or bond he be called by different names, then he should sue or be sued by the name by which he signed, for the execution in that name would be considered as clearing up the ambiguity (2 Ch. Pl. 284; see Gould v. Barrow, 3 Taunt. 504; Bonner v. Wilkinson, 5 B. & A. 682). A declaration against him by his right name, stating that he, by the wrong name, executed the bond, is bad (1*b.*; see Bryant v. Williams, 5 M. & W. 447; 7 Dowl. P. C. 502; Kepp v. Wiggett, 11 Law T. 243, C. P.)

Where, in an action of covenant on deed, the declaration stated that the deed was made between the plt. of the first part, J. C. and H. his wife of the second part, and A. B. of the third part, the deed appeared on production to have been made by the plt. as trustee of J. C. and H. his wife of the first, G. C. and H. his wife of the second, and A. B. of the third part, and was executed by the name of G. C.; it was considered a fatal variance, and that it being uncertain from the body of the deed whether the party's real name was James or George, and he having executed it by the name of George, it should have been stated to have been made by G. C. of the second part (Mayelston v. Palmerston, 2 C. & P. 474; 1 Moo. & M. 6).

It is a fatal variance to describe a bond conditioned for payment by A. B. and C., as above, for payment by A. B. and D., though the bond is several as well as joint, and the action lie against A. severally (Adams v. Bateson, 6 Bing. 110).

The declaration complained against W. F. B., sued by the name of W. B.; plea *non est factum*. It appeared that the deft. did in fact execute a bond, agreeing with that described in the declaration, by the name of W. B., and that at the time of execution he was known by that name: held, proof sufficient and no variance, and that if the objection were valid it could not be taken under the plea (Williams v. Bryant, 5 M. & W. 447). Where Cocken was arrested under a writ against Cocker: held, that a bail bond taken upon it, reciting that deft. Cocken had been arrested under the name of Cocker was illegal (Finch v. Cocken, 2 C. M. & R. 196).

Bond by which C. acknowledges himself to be bound to A. in 100*l.*, *to be paid to A. or B.*: held, that A. may declare upon the bond without noticing B., although the alternative mode of payment appears by the bond being set out upon oyer, and although the declaration negatives payment to A., but is silent as to non-payment to B. (White v. Hancock, 2 C. B. 830).

If it appears on the face of the declaration, or other pleadings, that another person jointly sealed the bond, it will be bad in arrest of judgment (1 Saund.

291 b); but, otherwise, the nonjoinder can only be taken advantage of by plea in abatement (*ante*, p. 10). In an action against one of several obligors on a joint and several bond, it is usual only to state that the deft. made the bond; but it should seem, that if it be stated that all made it, the execution by the deft. alone need be proved (4 Camp. 34). As to the statement of the time and place of making the bond, see *post*, "DEED." A profert of the bond must be stated, as in other actions on deeds (and as to the profert, see "DEED," "PROFERT;" *post*, p. 657). Unless indeed the plt. have not possession of it, when he excuse the production of it as in the instances in the form. If, where an excuse should be made, the declaration make profert, the plt. will, on a plea of *non est factum*, be nonsuited on failure to produce

the bond, for, however satisfactorily he may account for its non-
[*651] production, *he will not be permitted to give secondary evidence of it (Smith v. Woodward, 6 East, 585). Where the production of a deed was sought to be excused by reason of its being in the possession of a third party by agreement between the plt. and deft., this was holden not to be sufficient without showing that the party who had it refused to produce it (Hill v. Marden, 9 Law J. 262, Ex. ; 6 M. & W. 719; Hodgson v. Warden, 13 M. & W. 22). The omission to make profert of the deed is ground of special demurrer only (4 & 5 Anne, c. 16). Where the party pleading is not entitled to possession of the instrument, he need not make profert of it unless there be such a privity of interest between the party pleading and him who has such custody as to constitute in law an identity of person, as in the case of heir and ancestor, testator and executor, &c. (Bain v. Cooper, 8 M. & W. 750; Dangerfield v. Thomas, 8 Ad. & E. 292). See Read v. Brookman, 3 T. R. 156, as to excuses for profert. As to the mode of traversing an excuse of profert, see Fisher v. Ford, 12 Ad. & E. 654; Todd v. Emly, 11 M. & W. 1.

A variance in stating the penalty was amended at nisi prius under the 3 & 4 Will. IV. c. 42, s. 23 (Hill v. Salt, 2 C. & M. 420). The plt. should state as much damage as will cover all interest due (see Watkins v. Morgan, 6 C. & P. 661; Baker v. Brown, 2 M. & W. 199). The measure of damages is the penalty (Branscombe v. Scarboro', 6 Q. B. 13).

In an action of debt on bond to H., not to enter into the service of another within ten miles of S. during two years after leaving H.'s service, some good consideration ought to be shown on the face of the declaration, as the court will not presume one (Hutton v. Parker, 7 Dowl. P. C. 739.)

Where the obligor of a *post-obit* bond craved oyer, and set out the condition: held, not necessary for the obligee to aver the death of the person at whose decease the money secured by the bond was to become payable (Murrey v. Stair (Earl), 3 D. & R. 278; 2 B. & C. 82). As to the mode of setting out the bond, see *post*, "DEED."

Declaration on a bond for the payment to the plts. or to one W. E. on request, alleging that, "by reason of the non-payment thereof, an action had accrued," &c., and assigned for breach the non-payment to the plts. The defts. set forth the bond and condition on oyer, by which it appeared that the condition of the bond was, that one J. L. and the defts., or some of them, should pay over such sums as should be assessed and collected in a certain parish by the said J. L., and that the said J. L. should demand the sums assessed of the persons from whom the same were payable, and, in case of non-payment, enforce against the defaulters the power of certain acts of parliament. The defts. then pleaded generally, that they had duly performed the condition of the bond: held, that the declaration was good, and that it was not necessary to expressly negative payment to W. E., or to aver a request to pay (Kepp v. Wiggett, 12 Jur. 831; 17 Law J. 295, C.

P.; 6 C. B. 96). Held, also, that the plea was bad in substance, for not showing performance by J. L. (Ib.)

Breach.] In practice the breach is always shown, but in strictness it is not necessary; it seems sufficient to show the existence of the debt, and then the debt must show that it is satisfied (Ashbee v. Pidduck, 1 M. & W. 564). It is not necessary to state the condition and breach of the bond, in pursuance of the 8th and 9th Will. III. c. 11, or otherwise, in an action on a common money-bond (4 & 5 Anne, c. 16, s. 13; 1 Saund. 58, 5th ed.; Cardozo v. Hardy, 2 Moo. 220; Smith v. Bond, 10 Bing. 125; James v. Thomas, 5 B. & Ad. 40); or a bond for the payment of a sum certain at a day certain, as a *post-obit* bond (Murrey v. Stair (Earl), 2 B. & C. 82; 2 Camp. 285); or a bail-bond (Moody v. Pheasant, 2 B. & P. 446), replevin-bond (2 Saund. 187; Middleton v. Brown, 3 M. & S. 155); or a petitioning creditor's bond (Smithy v. Edmondson, 3 East, 22; Smith v. Broomhead, 7 T. R. 300); or a bond to replace stock (Savill v. Jackson, 13 Pri. 715); or to bonds conditioned for the payment of any gross sum of money (see James v. Thomas, 2 Nev. & M. 663); that statute being confined to bonds conditioned for the doing of some collateral act, as the performance of covenants in another deed or the like (see Hurst v. Jennings, 5 B. & C. 650).

On the other hand, all other bonds, either for the payment of money by instalments (Willoughby v. Swinton, 6 East, 550; Van Sandau v. Burt, 1 B. & A. 214), unless it be provided that the whole sum shall become due in case of any one default (Vines v. Thomas, 5 B. & Ad. 40; Smith v. Bond, 10 Bing. 125); or of an annuity (Walcot v. Goulding, 8 T. R. 126); or for performance of an award (Welch v. Ireland, 6 East, [*652] 613; Hanbury v. Guest, 14 East, 401), or for the performance of any covenants or agreements, are within the statute (2 Saund. 187, n. c); and, on such bonds, the condition and breach must appear on the record, or the proceedings will be erroneous (Rolls v. Rosewell, 5 T. R. 636, 638; Draye v. Brand, 2 Wils. 377; Tidd, Pr. 9th ed. 584). In some cases, at common law, and independent of this statute, it is frequently necessary, in a bond for performance of covenants, where debt. has pleaded a general performance, to assign breaches (see *infra*, "*Replication*"). Although the statute applies to bonds to pay money at different periods where part had not accrued due (Vansandau v. Burt, 1 B. & A. 214; Tighe v. Crafter, 2 Taunt. 387); yet it does not where the bond was conditioned for the payment of a principal sum on a named day, and interest at fixed periods before that day, as stipulated for in a deed, if the action be brought after the day on which the principal was due, so that the whole sum is due (Smith v. Bond, 10 Bing. 125).

If the breaches be assigned in the declaration, the debt. may take issue upon them, and the subsequent proceedings are then the same as in ordinary cases (see Quin v. King, 1 M. & W. 42). But where the debt. suffers a judgment by default, the plt. must *suggest* upon the roll such breaches as he complains of, if the breaches have not been already assigned in the declaration. In a case where breaches must be assigned or suggested under the statute 8 & 9 Will. III., c. 11, s. 8, if the debt. do not rejoin, the ordinary course is for the plt. to sign judgment for want of a plea, strike out all the pleadings subsequent to the declaration, and suggest breaches if the declaration itself do not state them; but this is only a rule of convenience, and if the nature of the case require that the pleadings down to the default should continue on the record, they ought to be retained. Therefore, where to debt on bond conditioned to perform certain duties, the debt. pleaded generally

performance of the condition; plt. replied, alleging breaches by not performing some of the duties; deft. suffered judgment by default, and plt. sued out a writ of inquiry, setting forth on the writ all the pleadings down to the end of the replication: held, that the course pursued was right, and that a statement of breaches appeared, of which the court executing the inquiry might properly take notice (*Lawes v. Shaw*, 5 Q. B. 322). The Lord Chancellor, under 1 & 2 Will. IV. c. 56, made an order that each official assignee of the Court of Bankruptcy should pay into the Bank of England "all such sums of money as should come to his hands as soon as they should amount to 100*l.*, and should state in writing among other things the name and description of the bankrupt, or bankrupts, to whose estate the money belonged:" held, well assigned, as a breach of this order by an assignee that he, as such, received divers sums on account of divers estates of bankrupts, amounting in the whole to a sum over and above 100*l.*, to wit, &c., and did not pay them in (*lb.*). So, if the plt. get judgment on a demurrer; or, if the deft., instead of setting forth the condition of the bond upon oyer, and pleading performance, plead any other plea, which cannot lead to an issue on the breaches, but upon which the plt., if he recovers, must have judgment *quod recuperet*. If, for instance, to a declaration as on a common money-bond, he plead *non est factum* (*Athersey v. Jackson*, 8 T. R. 255; 1 Esp. 277), or *non est factum* and fraud and covin (*Homfray v. Rigby*, 5 M. & S. 60), or the like, the plt., in making up the issue, immediately after entering the pleadings, may suggest the breaches, and then enter the award of *venire* (5 M. & S. 60; 8 T. R. 255; 2 Arch. Pr. 907; *Darbyshire v. Butler*, 5 Moo. 190; *2 Saund. 187 a; see 8 & 9 [*653] Will. III. c. 11, s. 8, 3 & 4 Will. IV. c. 42, s. 16), and deliver a copy to the deft.; but he is not allowed to answer them. If, after the first inquisition or trial, deft. be guilty of further breaches, the plt., in order to obtain damages for them, must sue out a *scire facias* on the judgment, and thereupon suggest the further breaches, and so proceed to judgment (2 Arch. Pr. 902, 909).

An action of debt was commenced in Michaelmas Term against executors on a bond of their testator, conditioned for making it void on payment of a certain sum at a future day, or within one month after his decease, whichever should first happen, and a rule to plead was given as of that term. The defts. in the following vacation obtained a judge's order for time to plead, which they neglected to do, and final judgment was given for want of a plea, which was set aside in the next Hilary Term, on defts. undertaking to plead within a week, when they pleaded a judgment recovered against them as executors, which not being signed by a serjeant, the plt. again signed judgment: held, that it was unnecessary to suggest breaches under the statute (*Cardozo v. Hardy*, 2 Moo. 220). When, in debt on bond, the plt. has suggested breaches on the roll pursuant to the statute, the court, after plea of *non est factum* pleaded, refused a rule to show cause why some of them should not be struck out or judgment by default suffered on them, with entry of nominal damages; for by that statute the plt. may suggest breaches on any part of the condition, and the jury are to inquire of the truth of them, and the deft. had another course, viz., by pleading performance of the condition, and suffering judgment by default on the replication (*Canterbury (Archb. of) v. Robertson*, 3 Tyrw. 419; 1 C. & M. 181).

In judgment on bond for the payment of an annuity, if a *fi. fa.* be sued out, and marked for only part of the penalty, a new *fi. fa.* for subsequent arrears cannot be taken out without a *sci. fa.* under 8 & 9 Will. III.

In debt on bond with a penalty for performance of covenants, breaches may be assigned in the replication under the statute, and, on denurrer, an

interlocutory judgment may be given, and final judgment stayed until after award and execution of the writ of inquiry (*Johnes v. Johnes*, 3 Dowl. 1). And where the interlocutory judgment was in Easter Term, and then, as the inquisition could not be taken under the statute until after Trinity Term, a day was given in Michaelmas Term, passing over Trinity Term, without continuance: held, that as in the due execution of the object of the statute, the giving a day in Trinity Term would be nugatory, the reason for the continuance failed, and the omission was no error (*lb.*).

As to the mode of assessing damages where breaches are entered upon the roll, see 8 & 9 Will. III. c. 11, s. 8; 3 & 4 Will. IV. c. 42, s. 16; see *Tidd*, Pr. last Sup.; 2 Arch. Pr. 8th ed. Bond; *Rolls v. Rosewell*, 5 T. R. 538; *Hardey v. Berne*, ib. 636. The award of *venire* must be special, *tum ad triam quam ad inquirendum* (*Quin v. King*, *supra*; but not if the breaches are assigned (*Scott v. Staley*, 4 Bing. N. C. 724; 6 Dowl. 714; see *Perkins v. Hawkins*, 2 Stark. 381). A suggestion of breaches cannot be introduced on the record, except in the three cases, of judgment on demurrer, by confession, or *nil dicit* (*De la Rue v. Stewart*, 2 N. R. 362); and on judgment on demurrer for the plt., in debt on bond conditioned to pay an annuity, he cannot take out execution for the arrears due, but assign breaches on the record (*Walcot v. Goulding*, 8 T. R. 126).

*The usual and best mode of declaring, in these cases, is to declare as upon a common money-bond; and the breaches should (unless a judgment by default be expected) be reserved for the replication, because the deft., in rejoining, can only present one answer to each breach; whereas, in pleading to the declaration, he may answer each breach by any number of pleas (2 Ch. Pl. Index, Bond). Where expedition is of importance, it may be better to assign the breaches in the declaration. If the declaration do not state the condition, &c., and the deft. sets forth the condition upon oyer, and pleads performance, or any other plea leading to an issue on the breaches, the plt. must assign them in his replication, and the deft., in his rejoinder, takes issue on them, and the *venire* may be awarded, and all the other proceedings had, as in other cases (*Scott v. Staley*, 4 Bing. N. C. 724).

The plt. cannot assign, as well as suggest, breaches in his replication (2 Saund. 187, 5th ed.).

According to this statute of Will. III., the plt. may assign or suggest as many breaches as he thinks fit, and the court will not restrain him (*Canterbury* (Archb. of) *v. Robertson*, 1 C. & M. 181). If only one breach be assigned in the replication, it is not necessary to state it in terms to be according to the form of the statute; and it is doubtful whether it be necessary in any case (*Tombs v. Painter*, 13 East, 1; 2 Saund. 187 *a*, 5th ed.).

We have seen that, under the 8 & 9 Will. III., the plt. has his option to declare on the bond as a common money-bond, or to set out the condition and assign a breach or breaches; but should he select the latter course, and the deft. should crave oyer and set out the condition, and then plead performance, the plt. must specially assign breaches in his replication. It is considered the more advisable course to set out the condition, and assign breaches in the replication, if it be expected that deft. will plead to the action; because, if the breaches be assigned in the declaration, the deft. may plead several distinct pleas; but if they are reserved for the replication, in answer to a general plea of performance, the deft. can only give one answer in his rejoinder, for pleas of several matters will be allowed on certain terms; not so several rejoinders to the same matter or replication. If however it be anticipated that deft. will suffer judgment by default, or, if it be necessary to prevent delay, then the plt. ought to assign the breaches in the declaration.

The breach must be stated according to the facts, and with certainty and particularity, that the deft. may know what he is called upon to answer. Where there are alternative parts of the condition, the plt. must confine himself to a particular breach (*Cornwallis v. Savory*, 2 Burr. 772). If the condition of a bond be "that A. shall not embezzle any money that shall come to his hands belonging to his master," it is necessary, in an action against the obligor, to state in the breach what particular sum of money was embezzled, and how and from whom it was received (*Jones v. Williams*, 1 Doug. 214). The breach of the condition of a bond, otherwise well assigned, is not vitiated by the addition of immaterial allegations (*Stothart v. Goodfellow*, 1 Nev. & M. 202).

A count set out a deed of covenant, dated 21st June, 1839, for payment by deft. to plt. of 900*l.*, and interest at 5*l.* per cent. on 21st June then next. Declaration was dated in July, 1843. Breach, non-payment of 900*l.* and interest on 21st June, 1840; and that there was due and owing a large sum, to wit, 1200*l.*, whereby an action had accrued, &c.: held, good on [*655] motion in arrest of judgment; *first, because it did not appear that only one year's interest was due on 21st June, 1840; secondly, because if that did appear, the averment that more was due might be rejected as surplusage, or a *remittitur* be entered for the excess (*Simmons v. Wood*, 5 Q. B. 170). In an action of covenant upon a mortgage deed, the breach assigned was, that on a certain day, which had elapsed before the commencement of the suit, to wit, on the 13th of August, 1842, there became, and was, and still was due and owing, for and in respect of divers, to wit, six half-years' interest of and upon the said principal sum, a large sum of money, to wit, 90*l.*, which had not been paid: held, sufficiently certain on special demurrer (*King v. Greenhill*, 6 Man. & G. 59). As to what is a breach of the condition of a bond given to indemnify commissioners against default of a tax-collector, see *Gwynne v. Burrell*, 6 Bing. N. C. 853. As to what is a condition precedent to their right to put the bond in suit, see *Ib.*

A replication stating a breach should conclude with a verification (*Cornwallis v. Savory*, 2 Burr. 774; 1 Saund. 101, 102). If the plea does not amount to a plea of *general performance*, but puts in issue a particular fact, plt. need only deny that fact (see the rule, *infra*).

In debt on a bond conditioned for the performance of an award, if the deft. has pleaded no award, the replication must state the whole of the award verbatim, and also assign a breach (*Willes*, 12; 2 Saund. 62 *b*, n. 5; 1 Saund. 103, n. 1, n. 4, 317). See the mode, *Wilcocks v. Nicholls*, 1 Price, 109; 6 Taunt. 45, 47. The plt. may suggest breaches under the statute at the conclusion of his replication (*Humphrey v. Rigby*, 2 Ch. Rep. 298; 5 M. & S. 60). A plea that all the sums of money which became due on the bond were paid may be replied to generally—a general denial of the words of the plea, without assigning any particular breach (*Turner v. McNamara*, 2 Ch. Rep. 697).

In a debt on bond conditioned not to assault, &c., the person of the plt., the replication alleging that the deft. assaulted, &c., the person of the plt. by then and there beating and otherwise ill-treating him, was held a sufficient assignment of a breach of the condition, for which the jury were to assess damages on the statute, although such breach was not alleged "according to the statute" (*Tombs v. Painter*, 13 East, 1). Where one gives a counter security to another, containing a covenant to pay an annuity and indemnify him, and also a warrant of attorney as collateral security, and it is agreed that, in default of any one payment of the annuity, judgment shall be entered up, and execution issue for the whole sum specifically being the price of the annuity, it is not necessary to assign breaches under the statute,

but the execution may issue for the whole sum. (Howell v. Stratton, 2 Sm. 65).

If, to debt on a bastardy or indemnity bond, the deft. plead *non damnificatus*, the plt. must reply specially, setting forth how he was damnified (see Ch. Rep. 4th ed. 504, 505). Upon a bond conditioned that a collector of poor-rates shall render an account of moneys received, after general performance pleaded it is necessary to reply that he received moneys to be accounted for (Serra v. Wright, 6 Taunt. 45; Serra v. Fyffe, 1 Marsh. 441; *semble*, overruling 1 Pri. 109; and see Jones v. Williams, Doug. 214). But, where to debt on bond the deft. craved oyer, and, after reciting a mortgage-deed, which showed the condition to be for payment of a sum of money on a day specified, according to the tenor of a proviso contained in the indenture, and for the performance of the covenant therein pleaded that there was no negative or *disjunctive covenants in the indenture, and that he paid the money mentioned in the condition, on the day therein specified, according to the effect thereof, and performed all the covenants and provisoes in the indenture on his part to be performed, and the plt., in his replication, took issue generally on the non-payment of the money, and concluded to the country. On special demurrer, assigning for causes that it should have concluded with a verification, and that no breach of the condition was assigned, according to the 8 & 9 Will. III. c. 11, s. 8: it was held that such replication was good, as the only point in issue was the payment of the money, and the plt. had therein denied the whole substance of the deft.'s plea (5 Moo. 193). And a plea (to a declaration on a bond, conditioned, amongst other things, for the payment of 3000*l.*), that all the sums of money which became due on the bond were paid, may be replied to generally, by a general denial of the words of the plea, without assigning any breach (Turner v. McNamara, 2 Ch. Rep. 697).

Pleas and Replication.] For the general law relating to these, see the several heads, *post*. The qualities of, and necessary pleas and replication in actions on bonds, within the 8 & 9 Will. III. may be collected from the preceding notes. At common law, and independent of this statute, it is frequently necessary, in a bond for performance of covenants, where deft. has pleaded performance, and the plt. has not assigned the breach in his declaration, to deny the effect of the plea, and show a particular breach: the rule is, that in all cases (except in the case of an award, which stands on a particular ground), when the deft. pleads matter of excuse which admits a non-performance, it is sufficient if the plt. deny the plea, and he need not assign a breach in his replication; but it is otherwise where deft. has pleaded performance, or, in other words, where the plea does not put in issue any particular fact or breach (Willes, 12, 13; see instances, *supra*).

Demurrer.] When the declaration assigns a breach, &c., not supported by the instrument as set out, the deft. may crave oyer, set out the deed, and then demur (Anon. 3 Salk. 119; Longavil v. Isleworth (Hundred of) 6 Mod. 27; Jeffery v. White, 2 Doug. 476; Snell v. Snell, *supra*, per Bayley, J.). *Quære*, as to the remedy for not setting out the bond and condition on oyer correctly, whether by demurrer or motion to the court (Kepp v. Wiggett, 11 Law T. 243, C. P.).

Precedents.

Declaration in debt on common money-bond.

In the Q. B. (or C. P., or Ex. of P.) On the _____ day of _____, A. D. 1850.

Middlesex, to wit. *Commence as post*, "DEBT.") Whereas the deft. heretofore, to wit, on the _____ day of _____ A. D. _____, by his certain writing obligatory sealed with his seal and now shown to the court here, the date whereof is the day and year aforesaid,* acknowledged himself to be held and firmly bound unto the plt. in the sum of £ _____ (*penal sum*) above demanded to be paid to the plt., yet the deft. although often requested so to do hath not as yet paid the said sum of £ _____ or any part thereof, and the same remains wholly due to the plt. to the damage of the plt. of 100*l.* and thereupon he brings suit, &c. (*a count on an account stated may be joined, if necessary.*)

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*Averment in excuse of a profert.

* *If the bond be lost, &c., instead of this profert, insert an averment of excuse, thus: "And which said writing obligatory having been lost," or "destroyed by accident," or "by fire," or "by the deft." &c. (or when in the deft.'s possession, "being in the possession of the deft.") "the plt. cannot produce the same to the said court here." (See post, "DEED," as to profert.)*

Setting out condition.

[*Same as preceding to the words "paid to the plt." then say,*] Which said writing obligatory was and is subject to a certain condition thereunder written, whereby after reciting to the effect following, to wit &c. (*set forth recitals and condition in past tense, and state breach in words of the condition: if there be a second breach, then say,*) and the plt. for assigning a further breach of the said condition of the said writing obligatory according to the form of the statute in such case made and provided further says that (*assign another breach, and then say,*) by reason of which said several breaches the said writing obligatory became forfeited and thereby an action hath accrued to the plt. to demand and have of and from the deft. the said sum of £ _____ above demanded yet the deft. although, &c. (*as in preceding form, inserting a sufficient sum to cover all damages and interest until final judgment.*)

Counts on several bonds.

Several counts, on different bonds may be joined in the same declaration, and may be as follows: "And whereas also the deft. heretofore, to wit on &c. by his certain other writing obligatory, sealed, &c. (*same as the first count to the end, and then state*) which said several sums of money in the said first and second counts mentioned amount together to the sum of £ _____, above demanded. Yet the said deft., &c.

Other forms.

See the various forms of declarations in 3 Ch. Pl. Index, Bond, and in this work under each particular title, as, "BAIL-BOND," "REPLEVIN-BOND," &c.; against the surety of a bond given for the fidelity of an agent to whom plt. intrusted goods to sell, see *Stother v. Goodfellow*, 1 Nev. & M. 202; *Bishton v. Evans*, 2 C. M. & R. 12; on Jamaica bond, 2 Ch. Pl. 315; on bond to replace stock, 319; to perform covenant on another indenture, 320; on annuity-bond, 318; on bastardy-bond, *ib.*; on bonds relating to the character in which the party sues, or is sued, 335 to 339; as executors, heirs, &c. *ib.* "Trover."

Pleas, &c.

Most of the forms of pleas, &c., relating to bonds, will be found, *post*, "DEED," and 3 Ch. Pl. Index, Debt.

Non est factum.

General issue.

In the Q. B. (C. P., or Ex. of P.) On the _____ day of _____ A. D. 1850.
 A. B. } The deft. by A. B. his attorney (*or in person*), says that the said supposed
 ats. } writing obligatory in the said declaration mentioned is not his deed, and of this
 C. D. } he puts himself upon the country, &c.

Notes on Plea of Non est factum.

This plea is applicable when the deft. denies his execution of the bond, or relies on a variance.

When the deft. means to rely on the invalidity of the deed, he should refer to it in his plea by the term "writing," or "supposed writing obligatory," "indenture," &c., and should not say "writing obligatory, &c., generally, for such admission would be inconsistent with the proposed defence (1 Saund. 291 a, n. 1; 3 Ch. Pl. 838). Since R. G. H. T. 4 Will. IV. the plea of *nil debet* cannot be pleaded (see Williams v. Owen, 2 Dowl. 83): where it was pleaded, and the plt. demurred, the court on motion granted a *concilium* for argument the following day; and, by the same rule, in debt on specialty or covenant, the plea of "*non est factum*" shall operate as a denial of the execution of the deed in point of fact, and all other defences shall be specially pleaded, including matters which make the deed absolutely *void, as well as those which make it voidable; as to [*658] alteration, see *ante*, "BILLS OF EXCHANGE," and *post*, p. 669. It is not usual to plead *non est factum* setting out the condition on oyer, unless where the deft. pleads double. If the deft. wish to take advantage of a variance in the deed, as stated in the declaration, he should not crave oyer of the deed, and set it out, and plead *non est factum*, for by that the variance would be aided, as the deed so set out becomes part of the declaration, and the only question upon it would be whether the deed set out was executed by the deft. (Snell v. Snell, 4 B. & C. 741; Waugh v. Russell, 5 Taunt. 707; Wilson v. Woolfries, 6 M. & S. 341; Ashton v. Freestone, 2 Man. & G. 1; 3 Ch. Pl. 838, n. e). Where the declaration assigns a breach, &c., not supported by the instrument as set out, the deft. may crave oyer, set out the deed, and then demur to the declaration (Anon. 3 Salk. 119; Longavil v. Isleworth (Hundred of), 6 Mod. 27; Jeffery v. White, 2 Dougl. 476; Tidd, 9th ed. 589; Steph. Pl. 4th ed. 78; Snell v. Snell, *supra*, per Bayley, J.). The plea should describe the instrument as in the declaration; where the declaration styled it a deed and the plea an indenture, the court thought the plea bad (Bird v. Holman, 9 M. & W. 761; 2 Dowl. N. S. 234).

Special Pleas.] In pleading specially the deft. must not plead any defence which would operate as an estoppel, for, if the estoppel appear from the declaration, the plt. may demur, if not he may reply the estoppel; and, therefore, where an obligor sued on a bond reciting a certain consideration, he was held estopped from pleading that the consideration was different, unless he could make it appear by his plea that the real transaction was fraudulent or unlawful (Hill v. Manchester and Salford Water Works, 2 B. & Ad. 545). So the obligor of a bond conditioned for the payment of rent at the rate of 170*l.* a year "according to an indenture of lease," is estopped from saying that the rent reserved by the indenture was 140*l.* a year (Lainson v. Tremore, 3 Nev. & M. 603; 1 Ad. & E. 792). See tit. "ESTOPPEL."

Form of Plea of Escrow.

In the Q. B. (C. P., or Ex. of P.). On the day of , A. D. 1850.

A. B. } The deft. by E. F. his attorney (or in person) says that the writing in the said
ats. } declaration mentioned was delivered by the deft. to one G. H. as an escrow to
C. D. } be kept by him upon this special condition that is to say that if &c. (state the
negative of the condition by which the bond becomes void) then and in that case the said
writing was to be immediately discharged, annulled and held for naught, and returned
and re-delivered to the deft. but if &c. (affirmative of the condition) then the said writing
should be deemed the writing obligatory of the deft. and should be delivered by the said

G. H. to the plt. and should be in full force and effect against him the deft., and the deft. further says that, &c. (*state in substance the negative of the condition that the event by which the bond was to be delivered to the plt. did not happen*) whereby the said writing became and was wholly discharged annulled and vacated and so the deft. says that the said writing in the said declaration mentioned is not his deed and of this he puts himself upon the country, &c.

The plea should state to whom the bond was delivered (5 Bac. Abr. Obligation, C). It is no escrow if delivered to the obligee (1b.; Hob. 246; Vent. 9; 3 Ch. Pl. 849, n. m). The plea should conclude to the country (Watts v. Rosewell, 1 Salk. 274; 2 Ld. Raym. 803; Rast. Ent. 181 (6), 182 a; Co. Ent. 145 b; see "Escrow").

Payment on the day.

A. B. } The deft. by E. F. his attorney craves oyer of the said writing obligatory in
ats. } the said declaration mentioned and it is read to him, he also craves oyer of the
C. D. } condition of the said writing obligatory and it is read to him in these words
*(insert condition with *recituls*, if any, *verbatim*), which being read and heard
[*659] the deft. says that he on the said day of A. D. (day of
payment mentioned in the condition) in the said condition of the said writing obligatory mentioned paid to the plt. the said sum of £ in the said condition mentioned together with all interest due thereon according to the form and effect of the said condition and this the deft. is ready to verify, &c. (*Need not be signed.*) (Tidd, Pr. 9th ed. 671, 672; 1 Arch. Pr. 8th ed. 247.)

By R. G. 4 Will. IV. this plea and *payment after the day* are not both to be allowed; but it may be pleaded with a plea of accord and satisfaction, or release; unless the deft. is confident that the payment was made on the very day named in the deed, it is better to plead payment after the day (3 Ch. Pl. 858 e). A plea of payment *before* the day is not an immaterial plea (Fletcher v. Hennington, 1 Bla. R. 210; 2 Burr. 944; Giddings v. Giddings, 1 Ld. Raym. 335). If the bond be made payable on a certain day, a plea of payment before the day would be bad on general demurrer (Anon. 2 Wils. 158). Where the bond was conditioned to pay money on or before a certain day, and the deft. pleaded he did not pay it before the day, to wit, on such a day, it was held bad (1b.). Where the declaration set out the condition, which was for the payment of principal and interest, but as a breach, the non-payment of the principal only, a plea of payment of principal *and interest* was held demurable (Bishton v. Evans, 2 C. M. & R. 14; 3 Dowl. 735; 1 Gale, 76; 5 Tyrw. 639). To debt on bond conditioned to pay money on demand, plea, no demand; replication, that there was a demand, concluding to the country, held good (Thorne v. Jenkins, 12 M. & W. 614).

After the day.

[Commencement, as ante, p. 658, then say.] The deft. says that he after the said day of A. D. (day of payment in the bond) in the said condition mentioned and before the commencement of this suit to wit on &c. (day of actual payment) paid to the plt. the said sum of £ in the said condition mentioned together with all interest then due thereon and this the deft. is ready to verify. (*Must be signed.*)

See R. G. 4 Will. IV., *supra*. This plea is given by the 4 & 5 Anne, c. 16, s. 12. But the deft. cannot plead payment as to part, and some other plea as to the residue, under the statute, for it applies only to the payment of the whole sum mentioned in the condition and interest (Ashbee v. Bidduck, 1 M. & W. 564; 2 Gale, 106; Worthington v. Wigley, 3 Bing. N. C. 454; 5 Dowl. 504); nor payment of a less sum in satisfaction (Field v. Robins, 8 Ad. & E. 90). It is a good plea to the interest of a bond if the payment of such interest would prevent a forfeiture of the bond (Hodgkinson v. Wyatt, 4 Q. B. 748), but not otherwise (Marriage v. Marriage, 14 Law J. 244, C. P.).

Replication.

In the Q. B. (C. P. or Ex. of P.). On the day of , A. D. 1850.

C. D. } And the plt. as to the plea of the deft. above pleaded, says that the deft. did not
v. } pay to him the plt. the said sum of £ in the said condition of the said
A. B. } writing obligatory mentioned together with all interest due thereon in manner and
form as the deft. has above in his said plea in that behalf alleged and this the deft. prays
may be inquired of by the country, &c.

This replication will suffice for the plea of *solvit post diem*.

Payment into Court.] As to the payment of money into court and the form of the plea, see *ante*, "ASSUMPSIT, *Payment*;" *post*, "PAYMENT INTO COURT." It is doubtful whether the R. G. T. T. 1 Vict. applies to an action of debt on a bond. It does not apply *to an action of debt on a bond payable on a contingency (*England v. Watson*, 9 M. & W. [*660] 333; 1 Dowl. N. S. 398; 6 Jur. 763).

Payment of money into court, under the 4 & 5 Anne, c. 16, s. 13, in discharge of principal and interest on a bond and costs, cannot be pleaded to an action on the bond (*England v. Watson*, *supra*). If the deft. have not paid all that is due on the bond, he should apply for leave to bring in the residue into court, and that further proceedings be stayed. Where the deft. had paid the amount due for principal and interest and costs into court, and there is no dispute as to the amount due, a judge at chambers will make an order to stay proceedings.

Action on bond for 250*l*. Plea setting out on oyer the condition of the bond, which recited that R. J. had agreed to become tenant to the plts. of a public-house; that it was stipulated that he should take from them the ales, &c., to be consumed there; that he became bound with a surety to pay for the same to the amount of 50*l*. before he should have a fresh supply, as long as he should continue tenant of the plts., that when he should cease to be their tenant, the surety was to be liable in such sum not exceeding 50*l*. as R. J. might then owe to the plts. for ale, &c. The condition then stated that if R. J. should pay the plts. for all ale received from them, to an amount not exceeding 50*l*. before he should have a fresh supply, and when he should become indebted to them in that sum, if he should pay them for all sums which he should owe them for ale, &c., not exceeding 50*l*., when he should cease to be tenant, the obligation was to be void. Plts. permitted R. J. to become indebted to them in a larger sum than 50*l*. Held, that deft. was not discharged by reason of the plts. having supplied R. J. with ale to a greater amount than 50*l*. upon credit, but that in any event in default of the principal the deft. was liable to the extent of 50*l*. (*Seller v. Jones*, Law J., N. S., Ex. 20).

Performance of Condition Precedent.] To debt on bond, by the executors of the obligee, the deft., after setting out on oyer the condition, which was, that "the obligor should practise as a surgeon or apothecary at S. *at any time*, without the consent in writing of the obligee, then, if the obligor should pay the obligee 1000*l*., the bond should be void, otherwise it should remain in force," pleaded that he did not practise as a surgeon or apothecary at S. without the consent in writing of the obligee: held bad, on general demurrer; for not showing the performance of the condition which rendered the bond void (*Hastings v. Whitely*, 2 Exch. 611). Held, also, that the period of restraint mentioned in the condition was not confined to the lifetime of the obligee (*Ib.*).

Form of Plea of Performance.

Plea of performance.

[*Commencement as ante*, p. 658, and *craving oyer of the bond and condition*.] The deft. says that he did from time to time and at all times after the making of the said writing obligatory and the said condition thereof well and truly observe perform fulfil and keep all and singular the articles clauses payments conditions and agreements in the said condition of the said writing obligatory specified and mentioned in all things therein contained on his part and behalf to be observed performed fulfilled and kept according to the tenor and effect true intent and meaning of the said writing obligatory and this the deft. is ready to verify, &c.

If any particular act is to be done, or the deft. has the option of performing one of two acts, then just before the verification in the above form say: And that he did after the making of the said condition of the said writing obligatory and before the commencement of this suit to wit on the day of A. D. (*state performance in the very words. If the condition be in the negative, then say*) and that he did not at any time after the making of the said condition of the said writing obligatory and before the commencement of this suit in the words of the condition according to the said condition. (See form, 2 Saund. 409.)

Performance cannot be pleaded without craving oyer, and setting out the condition *in hæc verba* (2 Saund. 409, n. 2). In pleading performance generally, the allegations in the plea are usually in the words of the condition, unless some specific act is to be performed, then the time and mode of performance should be stated (1 Saund. 116, n. 1). If there be any thing specific in the subject, though consisting of a number of acts, they must all be enumerated (*lb.*). *The above general form will not suffice [*661] where the condition is in the negative, there the deft. must plead specifically that he did not do the act, that he was bound not to do. So, if the condition be in the alternative, he must show which of the acts he has performed (2 Saund. 410, n. 3; 1 Saund. 116, 117, n. 1; Sanders v. Coward, 15 Law J. 97, Ex.). If an act is to be done on a contingency, the deft. must state and show specially that the contingency has not happened (*Beswick v. Swindells*, 5 B. & Ad. 914; 5 Nev. & M. 378). Where the condition is for the performance of all the covenants in an indenture the deft. must plead a general performance, and it must come from the other side to show the contrary in some particular (1 Saund. 116, n. 1). A plea in excuse of performance may be pleaded, as, the non-performance of a condition precedent (see *Webb v. James*, 8 M. & W. 645; 1 Dowl. N. S. 36). This defence cannot be given in evidence under a plea that the plt. was damaged of his own wrong (*White v. Ansdell*, 1 M. & W. 350). If the bond be conditioned for the performance of several matters it is requisite to set forth in the plea with particularity the manner in which the terms of the condition were complied with (*Reynald v. Reynald*, 1 Lord Raym. 357). The plea set out the bond on oyer correctly, and then the recitals of the condition, without stating them to be such; and then craved oyer of the condition, which was set out without the recitals; and concluded with averring performance by the defts. only. The plts. then suggested that the bond and condition were not correctly set out in the plea, and prayed that they might be enrolled, "and they are enrolled in these words," &c.; and then set out the same, and demurred specially to the plea for the incorrect setting forth of the bond and condition, in the plea, and for the plea not being a good plea of performance of the condition, which was for the payment by L. and the defts. of the sums collected by L., a tax-collector, and that L. should duly demand the sums assessed, and enforce payment against defaulters: held,

that the plea was bad, for not averring performance by L. (Repp v. Wiggett, 11 Law T. 243, C. P.).

To an action against a surety upon a bond given under 1 & 2 Vict. c. 110, s. 8, the deft. pleaded, that, after the making of the bond, and before the commencement of the suit, the plt. brought an action against the principal in B. R., and recovered judgment against him, and issued a *ca. sa.* thereon, under which the principal was taken; that the latter thereupon caused himself to be brought up by *habeas corpus* before a judge, "who then, and before any breach of the condition of the bond, and before the time for the principal rendering himself according to the practice of the said court, and the said condition had expired, and according to the practice of the said court, committed him into the custody of the marshal, in execution at the suit of the plt. upon the said judgment;" that the marshal received and kept him in execution as aforesaid, according to the practice of the said court, until after the return day of the *ca. sa.*, for a long space of time, to wit, hereto; and that, from the time of the recovery of the said judgment, until he was so taken under the *ca. sa.*, the principal was always ready and willing to render himself according to the practice of the court and the said condition, and whilst he remained in custody, as aforesaid, was ready and willing to render himself, and would have rendered himself accordingly, *but that he was prevented by the plt. from so doing in manner aforesaid.*" Held, that if the plea was to be regarded as a plea of performance, it was bad, for not stating distinctly that the principal did render himself according to the practice of the court; and that, if it was to be considered as a plea *in excuse*, it was *equally bad, for not distinctly alleging [*662] that the act of the plt. in suing out the *ca. sa.* against the principal made it impossible for him to render—the Court not taking judicial notice that the issuing of that writ was any impediment to a render (Hayward v. Bennett, 3 C. B. 404; 4 D. & L. 228).

Debt on bond for payment of a sum of money, with interest, on a certain day. Plea; performance generally. Replication; non-payment of the principal and interest on the day named (the day being laid under a *videlicet*), concluding with a verification. Demurrer; on the grounds, first, that the day being laid under a *videlicet*, it did not appear that the breach was before the commencement of the suit; secondly, that the replication ought to have concluded to the country; thirdly, that it was double, for alleging non-payment of both principal and interest. A learned judge at chambers having set aside this demurrer as frivolous, the court refused to set aside that order (Trix v. Thorne, 7 L. T. 451, Q. B.).

To a declaration in debt on a bond, conditioned for the payment of 1000*l.* on a day certain, and for the performance of the covenants in a certain indenture, the defts. pleaded a general plea of performance of all things mentioned in the condition. The plt., by his replication, denied that the defts. paid the said sum of 1000*l.* in manner and form alleged, concluding to the country. Held, upon special demurrer to the replication, that it properly concluded to the country, as the allegation of such payment must be implied in the plea, or it would have been bad; and that, as the plt. was proceeding solely on the breach in non-payment of the money, it was not necessary for him to assign breaches, under 8 & 9 Will. III. c. 11. *Seem*, that the plea of general performance would have been bad on special demurrer, as the bond was conditioned for the performance of several matters, and the plea ought to have contained a distinct allegation of the payment (Roakes v. Manor, 14 Law J. 199, C. P.).

Plea of performance where the condition is to perform the covenants in another indenture.

[Commencement as *ante*, p. 658, *craving oyer of the condition and bond, and setting the condition out.*] And the deft. further saith that in and by the said indenture in the said condition in the said declaration mentioned which said indenture being in the plt.'s possession the deft. cannot produce to the said court here and which is sealed with the deft.'s seal he did covenant, &c. (*set it out*) and the deft. avers that he did (*performance of the covenant and condition in general terms*) according to the said covenant and the said condition and this the deft. is ready to verify, &c.

A copy of the indenture may be obtained by an application to the court, or on a judge's summons at chambers but oyer of the indenture cannot be craved (1 Saund. 8, 9), and the whole of it should be set out (Sanders v. Coward, 15 Law J. 97, Ex.); and where the condition is general for the performance of deft.'s covenants he should aver performance of them all (*Ib.*; Chit. jun. Pl. 2nd ed. 452, n. k; see 1 Saund. 52; 2 Saund. 409; Kerry v. Baxter, 4 East, 344; Brookes v. Manser, 1 C. B. 531).

Replication.

When the deft. pleads performance generally the plt., in his replication, must show a particular breach of the condition; and in cases within 8 & 9 Will. III. c. 11, s. 8, the plt. may assign as many breaches as he thinks fit (*ante*, p. 654; for the forms see De La Rue v. Stewart, 2 N. R. 362; Jephson v. Hawkins, 2 Man. & G. 366; Chapman v. Berkington, 3 Q. B. 703; Humphrey v. Mitchell, 2 Bing. N. C. 620; Darbyshire v. [*663] Butler, 5 Moo. 198; Turner v. McNamara, 2 Ch. *R. 697; Webb v. James, 8 M. & W. 645). The replication traversing the matter of excuse must conclude to the country (Webb v. James, 8 M. & W. 457; Thorn v. Jenkins, 12 M. & W. 614; see Roakes v. Manser, 3 D. & L. 17; 1 C. B. 531). And such replication was held good, though the bond be for the payment of a sum of money, as well as for performance of the averments in another indenture, the deft. having expressly pleaded general performance (Roakes v. Manser, *supra*). The 8 & 9 Will. III. c. 11, s. 8, does not authorize the assignment of breaches in a replication which traverses a material averment in the plea (Webb v. James, *supra*). The deft. after setting out the conditions on oyer, pleaded performance of the condition only, and matter of excuse for non-performance of the residue. Held, that the replication which commenced by assigning a breach which would have been a good answer to the plea at common law, and then as a necessary introduction to the assignment of other breaches, proceeded to traverse the matter of excuse, was bad; for the statute does not authorize any double pleading, except the multiplication of such breaches as could be properly assigned at common law. Held also, that a replication traversing the matter of excuse, though affirmative, properly concluded to the country without assigning a breach (Webb v. James, 8 M. & W. 545). In debt on bond conditioned for performance of covenants, if deft. plead performance of such covenants specially, and also general performance, the plt. must assign specific breaches in his replication; if he merely take issue on the general performance, and enter a separate assignment of breaches on the record, no damages can be assessed on them, and the court will award a replader (*Plomer v. Ross*, 5 Taunt. 386; 1 Mar. 95).

To debt on bond conditioned that one B. R. should account for and pay over to the plt., as treasurer of a charity, such voluntary contributions as he should collect for the use of the charity, the deft. pleaded general performance. The plt. replied that B. R. received divers sums amounting to a large sum, viz., 100*l.*, from divers persons for divers voluntary contributions for the use

of the said charity, which he had not accounted for or paid over, &c. Held, on special demurrer, that the replication was certain (*Barton v. Webb*, 8 T. R. 459). The deft. pleads performance in the words of the condition, which were, that J. S. should render an account to the plts. for all moneys which he should receive as their agent. Replication, that J. S. received divers sums of money amounting to 2000*l.*, belonging to and relating to the plt.'s business, as their agent, and hath not rendered to the plts. an account of the said 2000*l.*, or any part thereof. This replication being specially demurred to for generality, was held sufficient (*Shum v. Farrington*, 1 B. & P. 640). The bond recited that G. had been appointed clerk of a banking company, and it had been agreed that G. on his appointment, should find sureties for his fidelity and honest conduct *while in the service of the bank*, and that deft. should become such surety; condition, that if G., *while he should continue in the service* of the said bank, should faithfully serve them, devote his whole time to their business, give such attendance as the directors or managers should require, keep secrets, &c., account, &c., not embezzle, &c., and in all other respects *skilfully and faithfully conduct himself as one of the clerks* of the said bank, *and perform the duties of his said office in that or any other capacity*; and if deft. and a co-surety should indemnify the bank against all losses, &c., by reason of any thing done, &c., by G. in and during his service, the obligation should be void. Plea: after oyer and before any breach of the condition, to wit, on January 11th, 1836, G. was duly appointed by the *banking company to be manager of a branch of [*664] their bank, and was thenceforward employed by them as such manager; that the duties and responsibilities of a manager were much greater than those of a clerk, as in the condition mentioned, and the office of manager other than and different from that of clerk; and that G., *from the day aforesaid*, ceased to be such clerk, and that while he continued to be such clerk, and before he was appointed such manager, he well and truly fulfilled all things, &c., and the bank suffered no loss, &c., from any thing done or omitted by G. in or during the service, as in the condition mentioned, *and before he was appointed such manager*; special demurrer; held, that the plea was bad, as not showing conclusively that G. had ceased to be clerk when he became manager, so that no breach of the condition could have happened after he became manager. *Quere*, whether the condition made the sureties responsible for G. in the office of manager as well as that of clerk (*Anderson v. Thornton*, 3 Q. B. 271).

Debt on bond conditioned for the payment of a sum of money and interest on a given day, and for the performance of covenants on an indenture. Plea, performance generally. Replication, that the obligors did not pay the money in the conditions mentioned *modo et formâ*, concluding to the country; held, that the replication was proper, as taking issue on the payment impliedly alleged in the issue tendered (*Roakes v. Manser*, 1 C. B. 531), and that the plea was bad (*lb.*).

Bond for 300*l.*, dated 29th September, 1829. Plea, after setting out on oyer the condition, which was for payment of 300*l.* and interest on the 29th March next ensuing the date of the bond, general performance. Replication, that deft. did not pay the 300*l.* and interest according to the condition of the bond. Verification. Held, replication good, and plea bad; demurrer to former set aside (*Trix v. Thorne*, 16 Law J., N. S., Q. B. 16).

Accord and Satisfaction.

The accord must be by deed (*Preston v. Christmas*, 2 Wils. 86; see 3 Bing. 454, 491); see a plea of payment in accord and satisfaction after for-

feiture of an indemnity bond, and whilst the damages are unliquidated, in *Field v. Robins*, 8 Ad. & E. 90.

When a bond is given to secure payment by A. to B. of a specified sum, it is not an invariable rule of law that all payments made by A. are to be applied in immediate and final liquidation of the sum named, or of the first items in A.'s debit, or that even if A. on a long course of transactions, should, after the giving of the bond, be for a time in advance to B. the bond is thereby satisfied (*Henniker v. Wigg*, 4 Q. B. 792). It may in default of express stipulation be inferred, from the language and conduct of the parties after execution of the bond, that they intended the bond to stand as a continuing security; and that inference being drawn, the above-mentioned rule of application will not hold (*Ib.*). Plea, that after the making of the bond the partnership of the obligees was dissolved, and a new one formed, by the retiring of one of the old partners and admitting a new one, with which new partnership, W. and W. (for whom the deft. entered into the bond as surety), with the privity of the retired partner, kept an account; and that at the time of the dissolution of partnership, a balance of 5000*l.* was due from W. and W. to the partnership for such overdrawings; but the partner did not at any time demand payment of it, but on the contrary, at and after the dissolution discharged W. and W. from making such payment, and consented [*665] that the balance should be and it was *transferred to the account between W. and W. and the new partnership, and became incorporated in their account; held, ill, for the assignment of a chose in action is no discharge of an obligation (*Parker v. Wire*, 6 M. & S. 239).

Bankruptcy and Insolvency of Plaintiff and Defendant.] The bankruptcy of the plt. may be pleaded to an action on a bond in the same manner as in *assumpsit*, and it would be a good replication to such a plea to say that before the plt.'s bankruptcy he assigned the bond to A. B., as a security for a larger debt, and that the action was brought for his benefit (*Dangerfield v. Thomas*, 9 Ad. & E. 292). The bankruptcy and certificate of the deft. is a bar to an action on a bond conditioned for payment of money in the same cases as in *assumpsit* (see the "*Form of Pleas*," *ante*). But if the bond be conditioned for the doing of any act other than the payment of money, the plea must show that it was forfeited before the date of the fiat to make the certificate a bar; it will therefore be necessary, where the declaration does not set out the condition, to set it out in the plea on oyer, and then the forms in *assumpsit* will answer in substance.

The insolvency of the plt. or deft. may be pleaded specially to an action on a bond in the same manner and under the same circumstances as in *assumpsit* (see "*BANKRUPTCY*," *INSOLVENCY*").

Non-damnificatus to an indemnity bond.

[*Commencement as ante*, p. 658, *craving oyer of the bond and condition, as ante*, p. 657.] Says, that the plt. hath not at any time since the making of the said writing obligatory and the condition thereof in the said declaration mentioned hitherto been in anywise damaged by reason or means of any matter cause or thing in the said condition of the said writing obligatory mentioned and this the deft. is ready to verify, &c.

Non damnificatus cannot be pleaded to debt on bond conditioned for the payment of money at a certain day, though it appeared by the condition that the bond was given by way of indemnity (*Holmes v. Rhodes*, 1 B. & P. 638). So, a plea that the bond was given as an indemnity was held bad (*Mease v. Mease*, Cowp. 47). The above plea is proper where the bond is to indemnify and nothing more, and the plt. must reply any damage specifically (1 Saund. 116, n. 1). Matter of law, as, that the default was not

within the meaning of the indemnity, cannot be pleaded (*Summers v. Ball*, 8 M. & W. 596; see *Webb v. James*, 7 M. & W. 279; 9 Dowl. 314). If it be requisite to aver some matter of performance, the above plea would not be good. In *White v. Ansdell*, the deft. pleaded that "if the plt. was damnified, he was damnified by his own wrong, &c." (1 M. & W. 348).

Illegality, &c.] As in actions of assumpsit, so in debt on bond, the illegality or immorality of the contract on which the bond is founded, as well as its being contrary to public policy, may be pleaded as a defence to an action on a bond (*ante*, p. 228). It must be specially pleaded (R. G. H. T. 4 Will. IV. sec. II.). The illegality of the condition of a bond may be shown by the plt. in stating the bond itself with the condition in his declaration; or if he omit to state the condition it may be shown by the deft. in his plea, and the court will equally take notice of the illegality in either case (*Duvergier v. Fellows*, 1 Cl. & Fin. 39; 10 B. & C. 826). If the condition be set out in the declaration, and the illegality appear upon the face of the condition, the deft. may demur, or he may set out the condition on oyer, and demur where the plt. has not set it out in his declaration. If the illegality do not appear upon the face of the condition, *then the deft. may crave oyer of the bond and condition, set it out and plead the [*666] illegality, although the defence be inconsistent with the bond (*Cotton v. Goodrick*, 2 Bl. R. 1108; *Greville v. Atkins*, 9 B. & C. 462). To debt on bond the deft. pleaded, that the bond was given in pursuance of a corrupt agreement that the deft. should serve the obligee as an apprentice to the business of a surgeon, apothecary, and man-midwife for two years, and that the agreement should be ante-dated to make it appear that he had served five years, in order that by such corrupt contrivance he might be admitted to his examination for the business of an apothecary at the end of two years instead of five, as required by the statute; a verdict having been found for the deft., the court held that the bond was void, and refused to enter judgment *non obstante veredicto*, which was moved for on the ground that it appeared to be the object of the parties to enable the deft. to practise as a surgeon also, and that a five years' apprenticeship was not required for the business of a surgeon, and that it was not open to the deft. to object to the legality of his own bond (*Prole v. Wiggins*, 3 Bing. N. C. 230; 3 Sco. 607).

Where to an action on a bond, after setting out the condition on oyer, which was for the payment of money merely, the deft. pleaded, first, *non est factum*; secondly, that by agreement between certain persons indicted for perjury, and J. S., the prosecutor, the plt. gave the prosecutor his note for 350*l.* as a consideration for his not appearing against the parties, and that the bond was given to the plt. as an indemnity for giving such note: held, that the latter plea was a good answer to the action (*Collins v. Blantern*, 2 Wils. 341). Where the deft. pleaded after setting out the condition on oyer, which was, that the deft. should not follow or be employed in the business of a coal merchant, directly or indirectly, for nine months after he should have left the service of the deft., that he had not been so employed within the time limited, but the jury found a verdict against him; the court, on motion in arrest of judgment, held, that the bond was illegal and void, being in restraint of trade (*Ward v. Byrne*, 9 Law J. 14, Ex.). So, where the declaration set out the condition of the bond, which was that the servant should not enter into the service of any other person than the plt., in the town of S., or within ten miles thereof during two years after leaving the service of the plt.: held, on demurrer, that the bond was invalid, for there appeared no consideration on the face of the condition, and the court would

not presume one (Hatton v. Parker, 7 Dowl. 739). So, it is a good defence that the bond was given in consideration of future cohabitation (Smyth v. Griffin, 13 Sim. 245; Frind v. Harrison, 2 C. & P. 584); otherwise of past cohabitation (Hale v. Palmer, 3 Hare, 532); Nye v. Moseley, 6 B. & C. 133). But in no case is such a contract not under seal valid (Beaumont v. Reeve, 15 Law J. 141, Q. B.). So, simony, compounding of felonies, will constitute a good defence, although the bond recite a legal consideration (see B. N. P. 173; Andrews v. Eaton, Fitzg. 73; Empson v. Bathurst, Hut. 52; Foden v. Haines, Comb. 245; Mitchell v. Reynolds, 1 P. Wms. 189).

Plea of Usury.

The deft. by E. F. his attorney craves oyer of the said writing obligatory in the said declaration mentioned and it is read to him he also craves oyer of the condition of the said writing obligatory and it is read to him in these words [*set out the condition with recitals, if any, verbatim*] which being read and heard the deft. says that before the making of the writing obligatory in the said declaration mentioned to wit on the day of A. D., it was corruptly and against the form of the statute in that case made and provided agreed by and between the plt. and deft. that the plt. should lend and advance to the deft. the sum of £ and that the plt. should *forbear and give [*667] day of payment thereof to the deft. until and upon the day of A. D. then next ensuing and that the deft. should for the loan of the said sum of £ and for giving day of payment thereof as aforesaid for the time aforesaid give and pay to the plt. the sum of £ making together the sum of £ in the said condition mentioned and that the deft. should pay to the plt. interest on the said sum of £ from the day of A. D. aforesaid until the time of the payment of the said sum of £ in the said condition mentioned and for securing to the plt. the said sum of £ and interest as aforesaid that the deft. should make and seal and as his act and deed deliver to the plt. his certain writing obligatory binding himself in the penal sum of £ conditioned for the payment by the deft. to the plt. on the day of A. D. of the said sum of £ and interest and the deft. says that in pursuance of the said corrupt and unlawful agreement the plt. afterwards, to wit on the said day of A. D. lent and advanced to the deft. the said sum of £ and that for securing the repayment thereof together with the said sum of £ so to be paid and given to the plt. as aforesaid for the purpose aforesaid making together the sum of £ as aforesaid the deft. in further pursuance of the said corrupt and unlawful agreement to wit on the day of A. D. aforesaid did make and seal and as his act and deed did make and deliver to the plt. the said writing obligatory in the said declaration mentioned with the said condition thereunder written and the plt. then accepted and received the same in pursuance of the said corrupt and unlawful agreement and for the purpose aforesaid and the deft. avers that the said sum of £ so as aforesaid agreed to be given and paid to the plt. for the purpose aforesaid and the interest by the said condition so reserved and made payable on the said sum of £ exceed the rate of five pounds for the forbearing and giving day of payment of 100*l.* for a year contrary to the form of the statute in such case made and provided by means whereof and by force of the said statute the said writing in the said declaration mentioned was and is wholly void. And this the deft. is ready to verify, &c.

This plea must be specially pleaded. The court will not infer usury without a plea to that effect (Ferguson v. Spraney, 1 Ad. & E. 576). The usurious agreement must be stated precisely and fully according to the facts (Tate v. Wellings, 3 T. R. 538; Hill v. Montague, 2 M. & S. 377; King v. Gillham, per Lord Kenyon, C. J., 6 T. R. 267; 4 Taunt. 810; see 3 Bing. N. S. 396; R. & M. 158). If pleaded generally the plea will be bad on demurrer (Hill v. Montague, 2 M. & S. 378); but the objection is cured by pleading over (Webb v. Headley, 1 Camp. 166). The plea must allege that it was corruptly agreed (3 Mod. 35; 2 Show. 329). It is not necessary to recite the statute, which is the 12 Anne, st. 2, c. 16 (3 Ch. Pl. 851). It must be expressly averred, that the agreement was for giving day of payment (Jones, 410). The day on which the money is averred to have been advanced on an usurious contract is material (n. (b), Fox v. ———, 4 Esp. 152; Brooke v. Middleton, 1 Camp. 445; 3 Ch. Pl. 852; Fox v.

Keeling, 2 Ad. & E. 670; Robson v. Fellow, 3 Bing. N. C. 396). Declaration on a bond showed that the bond was conditioned for the payment of 100*l.* advanced on the 7th January, 1837, with interest at five *per cent. per annum* on the 600*l.* to be computed from the 1st January, 1837, payable every 1st July and 1st January, the first payment to be made on 1st July, 1837, the loan being also secured by deposit of title deed on leasehold property in land: plea, that the bond was given on a corrupt agreement for payment of more than five *per cent. per annum* on the loan of 600*l.* On the trial the only evidence was the bond and condition: held, that deft. was entitled to a verdict under the 2 stat. 12 Anne, c. 16, s. 1, the bond and condition showing, if unexplained, a contract for payment of five *per cent.* interest on the 600*l.* for less than a year, and the contract not being protected by stat. 2 & 3 Vict. c. 37, s. 1, inasmuch as the proviso of that section prevents it from applying where a security on land is given, and a collateral security by equitable mortgage on deposit of title deeds to leasehold property in land is within the proviso (Hodgkinson v. Wyatt, 4 Q. B. 751). Stat. 3 & 4 Vict. c. 37, s. 1, is retrospective (*Ib.*). The usury laws are still in force prohibiting contracts where the loan is secured on real property (Doe v. King, 11 M. & W. 333; Holt v. Myers, 5 M. & W. 168; Turquand v. Mosdon, 7 M. & W. 504).

In the Q. B., (or C. P., or Ex. of P.) On the _____ day of _____ A. D. 1850 [*day of delivery*].

C. D. } And the plt. says that the said writing obligatory in the said declaration mentioned was made by the deft. for a good and legal consideration and not in pursuance of or upon the said corrupt or unlawful agreement or for the purpose in the said plea of the deft. mentioned in manner and form as the deft. has in his said plea above alleged.

The replication may conclude with a verification, or to the country (Hodges v. Sandon, 2 T. R. 439); but where the replication concluded with a special traverse of the corrupt agreement, it was holden necessary to conclude with a verification (Smith v. Dovers, 2 Doug. 428; Beynham v. Matthews, 2 Stra. 871); but special traverses must now conclude to the country (R. G. 4 Will. IV. s. 13).

Plea of duress.

[*Commencement as ante*, p. 658.] Says that at the time of making of the said writing in the said declaration mentioned, to wit on the _____ day of _____ A. D. aforesaid he the deft. was unlawfully imprisoned by the plt. (and others in collusion with him) and was then so detained in prison until by force and duress of such imprisonment of him the deft. he made the said writing and delivered the same to the plt. as his deed. And this the deft. is ready to verify.

This is a good plea in bar to a debt on bond, but the imprisonment must have been unlawful, or it would be no duress (2 Inst. 482; 3 Ch. Pl. 850, n. (r); see Whelpdale's case, Al. 92; B. N. P. 172; Ch. Contr. Duress). It is likewise a good plea that the bond was obtained by menaces, battery, &c. (See B. N. P. 173; and 3 Ch. Pl. 850, where the forms may be found).

Infancy.

In the Q. B. (or C. P., or Ex. of P.) On the _____ day of _____ A. D. 1850.
A. B. } And the deft. by E. F. his attorney says that he the deft. at the time of
C. D. } the making of the said writing was an infant within the age of twenty-one years
to wit of the age of _____ years, and this the deft. is ready to verify, &c.

The replication and evidence under this will be similar to those under the like plea in assumpsit (see *post*, "DURESS"); the plt. however cannot reply that the deft. ratified it after he came of age (Baylis v. Dineley, 3 M. & S.

477; nor that the bond was given for necessities, (see Co. Lit. 173 a; Fisher v. Mawbrey, 8 East, 330). The deed of an infant is voidable only, and not void (Gouch v. Parsons, 3 Burr. 794; Allen v. Allen, 2 Dr. & W. 307).

Coverture.

In the Q. B. (or C. P., or Ex. of P.). On the day of A. D. 1850.
 A. B. } And the deft. saith that at the time of the making of the said writing
 ats. } she was and still is the wife of one E. F. and this she is ready to verify,
 C. D. } &c.

*This plea must be pleaded specially (Reg. Gen. H. T. 4 Will. [*669] IV.). If the deft. be still covert she must plead in person and not by attorney (2 Saund. 209 c).

Fraud, &c.

In the Q. B. (C. P. or Ex. of P.). On the day of A. D. 1850.
 A. B. } And the deft. by E. F. his attorney says that the said writing in the said declara-
 ats. } tion mentioned was obtained from the deft. by the plt. and others in collusion
 C. D. } with him by the fraud covin and misrepresentation of the plt. and others in collu-
 sion with him and this the deft. is ready to verify, &c.

Fraud must be pleaded (Edwards v. Brown, 1 Tyrw. 196). It is a good defence at law (Cockshott v. Bennett, 2 T. R. 765; 3 T. R. 48); but not when both parties are implicated (Doe d. Roberts v. Roberts, 2 B. & A. 370).

Replication.

In the Q. B. (or C. P. or Ex. of Pl.). On the day of A. D. 1850.
 C. D. } And the said plt. as to the plea of the deft. by him (firstly) above pleaded says
 v. } that the said writing obligatory was not obtained from the deft. by the plt. and
 A. B. } others in collusion with him by fraud covin and misrepresentation as in the said
 plea alleged and this the plt. prays may be inquired of by the country, &c.

Alteration.] Any material alteration in a bond after its execution may be specially pleaded (Adams v. Bateson, 6 Bing. 110; Waugh v. Russell, 5 Taunt. 707; see Henden v. Clifton, *infra*: Mason v. Bradley, 11 M. & W. 590; Hemming v. Trenery, 9 Ad. & E. 926, and *ante*, pp. 113, 565; Davidson v. Cooper, 13 M. & W. 342); and it must be shown that the alteration was in writing, and above the seal (Henden v. Clifton, 1 G. & D. 23; 10 Law J. 159, Q. B.; 1 Q. B. 522).

In a bond conditioned "for the payment of 100*l.* by instalments until the sum of one pounds be paid," the word hundred being omitted, held, that the insertion of it by a stranger was an immaterial alteration, and did not avoid the instrument (Waugh v. Bursell, *supra*); but the variance between the oyer and condition will preclude the plt. from recovering (Ib.). In debt on a joint and several bond, the obligees declared against one of three obligors, and set out the condition in the declaration to be for payment by the defts., C. and D., any or either of them. Plea, *non est factum*. On the production of the bond, it was conditioned for payment by the defts., C. and E., and it appeared that after its execution by the deft. the name of E. was substituted for that of D. at the request of the party to whom the money for which the bond was given was advanced, and with the assent of the plts. (the obligees), but without the knowledge or assent of the deft.: held, that this was a fatal variance, and avoided the bond as against the deft., although he afterwards assented to the alteration and paid some instalments due on the bond (Adams v. Bateson, *supra*). As to alteration, see Harden v. Clifton, 1 Q. B. 522; Davidson v. Cooper, 13 M. & W. 343.

Release.

¶ In the Q. B. (or C. P., or Ex. of Pl.). On the day of A. D. 1850.
 A. B. } The deft. by E. F. his attorney says that after the making of the said writing
 ats. } obligatory and before the commencement of this suit to wit on the day of
 C. D. } A. D. the plt. by his certain deed, sealed with his seal and now shown to the
 court here, released or discharged the deft. of and from the said writing obligatory and all
 actions claims and demands in respect thereof and this the deft. is ready to verify, &c.

*A release by one of several obligees to one of several obligors is a release by all, to all, and therefore it is a bad replication to a [*670] plea of a release of one of several joint obligors to say that it was agreed that the others should not be discharged (Cocks v. Nash, 9 Bing. 342; 2 M. & Sc. 434). An agreement not to sue, not under seal, cannot be pleaded to debt on bond (Blackburn v. Edwards, 8 Law J. 200, Q. B.; see *post*, "RELEASE"). A release given to one of two joint and several obligors, without notice to the other obligor, is a release as to both; but where such a release contained a proviso that the release should not be construed to extend to prejudice the obligee's right to enforce payment against the other obligor, held, that the proviso restrained the effect of the release, and that the debt of the other obligor was not therefore extinguished (Thompson v. Lack, 16 Law J. 75, C. P.).

Form of Plea of Tender.

Commencement as ante, p. 657, craving oyer of the bond and condition, and then follow the form under the title "TENDER," *post*.

A tender after the day of payment appointed by the condition cannot be pleaded (Underhill v. Matthews, B. N. P. 171).

Licence.] When to debt on bond conditioned that the deft. should not open a shop within a certain distance of premises demised by a lease, the deft. pleaded that he opened a shop by the license of the plt.: held, that such plea was bad, on general demurrer, on the ground that a license after breach was not good unless by deed (Sellers v. Pickford, 1 Moore, 460).

Set-off.

[*Commencement, as ante*, p. 657, *craving oyer of the bond and condition.*] Saith that at the time of the commencement of this suit there was due and owing from the deft. to the plt. upon the said writing obligatory for the principal and interest in the said condition mentioned a certain sum of money to wit the said sum of £ and that before and at the time of the commencement of this suit the plt. was indebted to the deft. in a much larger amount than the said sum of money due and owing from the deft. to the plt. upon the said writing obligatory to wit in the sum of £ for &c. [*state the subject of set-off*], which said sum of money so due and owing from the plt. to the deft. as aforesaid exceeds the money so due and owing from the deft. to the plt. as aforesaid by virtue of the said condition of the said writing obligatory and out of which said sum of money so due and owing from the plt. to the deft., the deft. is ready and willing and hereby offers to set off and allow to the plt. the said sum of money so remaining due and payable by the condition of the said writing obligatory and of the damages sustained by the plt. by reason of the non-payment thereof according to the force of the statute in such case made and provided and this the deft. is ready to verify, &c.

By the 8 Geo. II. c. 24, the deft. must set forth the sum really due on the bond before he is entitled to set off any cross demand (Grimwood v. Barrit, 6 T. R. 460). The sum is traversable though laid under a videlicet (Ib.; Simmons v. Knox, 3 ib. 65; 3 Ch. Pl. 856). To an action on an annuity bond by the assignees of the obligee, a bankrupt, for four quarterly payments of the annuity, amounting to 100*l.* the deft. pleaded that before

any of the payments became due, he lent the obligee 200*l.* and the obligee then agreed that the plt. should retain the several payments of the annuity as they should become due, until the whole 200*l.* and interest were paid: holden good, although the payments had become due after the bankruptcy (Sturdy v. Arnould, 3 T. R. 599).

Cancellation of the Bond.] The deft. may plead that the bond was cancelled. Where an action was brought against one of several obligors *who were jointly and severally bound, and the deft. pleaded that the seal of one of the others had been torn off, and the bond cancelled; it was held that the plea was good, and that by tearing off the seal of one of the obligors the bond became void as to all (Seaton v. Henson, B. N. P. 172; 2 Show. 21; Winchmore v. Pigot, 11 Co. 27). Where a bill of exchange was deposited with the deft. by a bankrupt as an indemnity to a third person against a bond which he had executed to the petitioning creditor; held, that the production of the bond by the assignees to the deft. in a cancelled state (the seals torn off), was *prima facie* evidence that it was cancelled with consent of the obligee (Alsager v. Close, 10 M. & W. 576; see Grummer v. Adams, 13 Law J. 40, Ex.).

Statute of Limitations.

In the Q. B. (C. P. or Ex. of P.). On the day of A. D. 1850.
A. B. } The deft., by E. F. his attorney saith that the said supposed cause of action in the
ats. } said declaration mentioned did not nor did any part thereof accrue to the plt. at
C. D. } any time within 20 years before the commencement of this suit in manner and
 form as the plt. has in his said declaration complained against the deft. (*conclude as post*,
 "STATUTE OF LIMITATIONS").

By 3 & 4 Will. IV. c. 42, s. 3, all actions of debt on bonds are to be brought within ten years after the end of the session of 1833, or within 20 years after the cause of action accrued, provided that infants, married women, lunatics, and persons beyond the seas, may bring actions beyond that time, so that they proceed within the same time after the disability is removed (sect. 4). No part of the United Kingdom, nor the islands of Man, Guernsey, Jersey, Alderney, Sark, nor any islands adjacent to any of them, being part of the dominions of his majesty, shall be deemed to be beyond the seas, within the meaning of the act (sect. 7).

Provided, that if any acknowledgment shall have been made, either by writing, signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, the person entitled to such actions may bring his action for the money remaining unpaid, and so acknowledged to be due within twenty years after such acknowledgment, by writing, or part payment, or part satisfaction, as aforesaid, or in case the person entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be, and the plt. in any such action or (a) any indenture, specialty, or recognizance, may by way of replication state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute (sect. 5).

Plea craving oyer of bond and condition, which was for payment of money, pursuant to a covenant in an indenture of the same date, and for performance of the covenants in that indenture, that the cause of action in the declaration mentioned did not accrue within twenty years next before the com-

(a) Sic in Statute.

commencement of the suit. Held bad, on special demurrer, on the ground that it did not appear whether the deft. was pleading to the cause of action in respect of the recovery of the penalty of the bond, or to any of the causes of action arising on breaches of the condition (*Sanders v. [*672] Coward*, 13 M. & W. 65). The deft., after craving oyer of the bond and condition, which was for payment of money pursuant to the covenant, in an indenture of even date with the bond, and for performance of the covenants, &c., contained therein, on the part of the obligors, pleaded that no cause of action in respect of the said writing obligatory by reason of any breach of the said condition, or of the covenants, &c., in the said indenture contained, had accrued at any time within twenty years next before the commencement of the suit. Held bad, 1st, for not setting out the indenture, as it might contain impossible covenants, in which case the bond would be single, and the plea to the breaches only would be bad; 2ndly, in not properly confessing a breach of the condition. It seems the proper mode would have been to set out the indenture, to aver performance of all that was performed within twenty years; to admit the breaches beyond twenty years, and to these breaches to plead the statute (*Sanders v. Coward*, 15 M. & W. 48). To debt on bond simply, a plea that the debt did not accrue within twenty years held to be disproved by the production of bond, with condition for the payment of the money upon an event which happened within twenty years. It seems the plt. might have replied, showing when the condition was broken. There is no general replication that will let in the subsequent acknowledgment or payment, as in *assumpsit* or debt, for proof of a promise not under seal does not support the declaration, and if under seal it is another and different cause of action (*Maddock v. Bond*, 1 Ir. T. R. 332). Under the above act, covenant on debt for rent arrear may be brought within twenty years, and is not confined to six years by the act (*Paget v. Foley*, 2 Bing. N. C. 679). So debt for arrears of an annuity secured by bond is barred after twenty years, and not after six years only (*Sims v. Thomas*, 12 Ad. & E. 506). On an issue that the debt and causes of action did not accrue within twenty years, pleaded to a declaration on a bond not setting out the condition, the plt. produced at the trial a post-obit bond, and also proved the death of the obligor within twenty years: held, that the plt. was entitled to the verdict (*Huckey v. Hawkins*, 9 Law T. 247, C. P.).

To debt on a bond, bearing date on a day more than twenty years before the commencement of the action in the declaration mentioned; plea, that the debt and cause of action did not accrue at any time within twenty years next before the commencement of the suit. Replication, that the debt and cause of action did so accrue. At the trial the bond was produced, and appeared to be a post-obit bond; and it was proved that the party, upon whose death the sum secured was made payable, died within twenty years: held, that the plt. was entitled to the verdict (*Tuckey v. Hawkins* 4 C. B. 655). *Semble*, that the replication would have been bad on special demurrer (*Ib.*).

Demand.] When to debt on bond conditioned for the payment of a sum of money on demand there is an issue as to the demand, the plt. must prove an express demand before action brought (*Carter v. Ring*, 3 Camp. 459). Plea, that there had been no demand; replication, that there had been a demand, held good (*Thorne v. Jenkins*, 12 M. & W. 614).

Foreign Law.] Plea, that the bond was made in France, and was not passed by an officer of France, or written throughout by the deft., nor did the deft. write the acknowledgment or *approuvé*, bearing in words at length the debt secured, nor was the deft. at the time a merchant, &c.; and that,

by reason of the premises, the bond by the laws of France never was nor is binding on the deft., and was and is of no force or validity: held, on special demurrer, that the plea was inferential only in not stating in direct terms what the law of France is, and was therefore bad. *Quære*, whether *de injuriâ* would have been a good replication to such a plea (*Benham v. Mornington* (Earl of), 15 Law J. 221, C. B.; 10 Jur. 618).

Subsequent Pleadings.] Debt on bond; plea, after setting out the bond and condition on oyer, which was that A. B. should faithfully account for all moneys received by him as collecting clerk, that A. B. *did ac-
 [*673] count; replication, that A. B. received divers sums, amounting to 2000*l.*, for which he did not account; rejoinder, that the sums mentioned in the replication were three sums of 1000*l.*, 500*l.*, and 500*l.*, received by A. B. of C. D. and F. and G., and that A. B. accounted for those sums; surrejoinder, that the sums mentioned in the replication were other and different sums than those alleged in the rejoinder to have been received and accounted for by A. B. and concluding to the country. Held, upon special demurrer, that the surrejoinder was good (*Calvert v. Calvert*, 7 B. & C. 809; 1 M. & R. 497).

Evidence for Plaintiff.

Judgment by Default.] Where the breaches are assigned in the declaration, and the deft. suffers judgment by default, the plt. need not on the writ of inquiry under the statute prove averments contained, or breaches assigned in his replication, but he must prove all averments connected with the breaches suggested on the record after judgment (see 1 Saund. 58 a, 6th ed.). Thus, if in suggesting his breaches, he sets out the condition of the bond, and that appears to be for the performance of an award, or of articles of agreement, &c., the plt. must prove the condition of the bond, the award, indenture, or articles, as well as the breaches suggested (Ib.). In an action on a bond against a surety, it was held, that if non-payment by the principal after notice in writing, required by the condition be averred in the declaration, and the deft. suffer judgment by default, it is not necessary to give evidence of the notice, because the allegations in the declaration are not put in issue, though if the breach be suggested on the record under the statute after judgment, it would be otherwise (*Barwise v. Russell*, 3 C. & P. 688; see *Canterbury (Arch.) v. Robertson*, 1 C. & E. 690). Where in debt on bond conditioned for the performance of covenants in an indenture, &c., or of an award, deft. lets judgment go by default, and breaches are suggested, the plt. should state the pleadings on the record (*Lawes v. Shaw*, 5 Q. B. 322), and prove the condition of the bond, the award, &c., as well as the breaches (1 Saund. 58 a; see *Bartlett v. Pentland*, 1 B. & Ad. 704; see *post*, "*Breaches*").

Demurrer.] On the execution of a writ of inquiry after judgment on demurrer, the execution of an instrument which the deft. has stated in setting out the condition of the bond in his plea need not be proved (*Collins v. Rybott*, 1 Esp. 157). If breaches have been suggested on the roll after judgment for the plt. on demurrer, it will be necessary to give some evidence that the bond produced, and in which the conditions are contained, is the same as that on which the judgment has been obtained, but it will suffice if the plt.'s attorney proves that the bond produced is the one delivered to bring the action upon, and that he knows of no other of the same date; the attesting wit-

nesses need not be called (*Hodgkinson v. Marsden*, Pea. Ev. 287; 2 Camp. 122). Where the deft. on oyer set out the bond and condition, which was for the performance of covenants contained in an indenture of lease, and pleaded a sham plea, on which there was a replication, demurrer, and judgment; held, that it was not requisite to prove the execution of the lease on the writ of inquiry, as the deft. was estopped by his plea from denying it (*Col-lins v. Rybot*, 1 Esp. 157).

Under General Issue.] This issue puts the plt. upon proof of the instrument as described in the declaration, and of such collateral circumstances *as are necessary to give validity to the execution (as [*674] in case of a company executing a deed, that they have complied with the private act) (*Hill v. Manchester, &c., Company*, 5 B. & Ad. 866). A declaration as on a joint bond is supported by proof of a joint and several bond (*Middleton v. Sandford*, 4 Camp. 34); it admits the breach alleged in the declaration. As to an alteration, see *ante*, "BILLS OF EXCHANGE," "ALTERATION OF CONTRACT." The plt. must produce the instrument duly stamped, and prove it by calling one of the subscribing witnesses. Proof of the execution of the instrument may however be dispensed with by calling on the deft. to admit it by a judge's summons, which should be taken out for that purpose. In an action on a bond to which the deft. pleaded *non est factum*, the judge made it one of the terms of an order to change the venue that the deft. should admit the handwriting of the attesting witness on the trial of the cause. The cause was tried, and the plt. obtained a verdict, which the court afterwards set aside, and granted a new trial on payment of costs, giving the deft. leave to amend the oyer, and set out the condition more fully, which was accordingly done, and the deft. then pleaded a special plea, alleging that the condition had been altered since the execution of the bond; held, that the plt. was entitled to use the admission contained in the judge's order on the second trial, and that it was binding on the deft. (*Langley v. Oxford (Earl)*, 1 M. & W. 508; and as to proof of the bond, see title "DEED").

If profert be made in the declaration, no secondary evidence can be received of it (*Smith v. Woodward*, 6 East, 585; *ante*, p. 650; and *post*, "*Profert*"). Where profert is excused, the bond may be produced in evidence and proved as usual, if found between the time of pleading and trial (*Hawley v. Peacock*, 2 Camp. 557; as to proof of deeds generally, see *post*, title "DEED"). But where this plea alone is pleaded, and the plt. suggests breaches, the deft. cannot show anything to excuse performance (*Canterbury (Archb.) v. Robertson*, 1 C. & M. 690). Lunacy may be given in evidence under *non est factum* (*Yates v. Boen*, 2 Stra. 1104; *sed vide Thompson v. Leach*, 2 Salk. 675).

The evidence for the most part, will be found *post* title "DEED," especially as to producing and proving the bond. Where a bond was attested by a witness, in one room and was then taken into an adjoining room, and at the request of the deft.'s attorney and in the deft.'s hearing, was attested by another witness who knew the deft.'s handwriting, it was held, that the execution might be proved by the latter witness, the whole being but one transaction (*Parke v. Mcars*, 2 B. & P. 217; and see *Anon.*, Arch. Pl. and Ev. 1st ed. 378). A bond thirty years old proves itself (*Chelsea Water Works Company v. Cowper*, 1 Esp. 275). If the bond be for the performance of covenants in some other deed, the plt. must prove the execution of the latter deed, as well as of the bond, and the breach of covenant. If plt. sues in a representative, or a deft. is sued in such character, see the evidence, *post*, "EXECUTORS," "HUSBAND AND WIFE," "HEIR."

Stamp.] See title "STAMP." Bond conditioned for the payment to bankers of all sums of money not exceeding in the whole 1000*l.*, which from time to time should be and remain due from the obligor to the bankers, on the balance of his account current, *together with such interest and commission* as should be due to the said bankers, and all customary and incidental charges for stamps, &c. requires a stamp only on the 100*l.* principal (*Frith v. Rotherham*, 15 M. & W. 39). A bond conditioned for the due [*675] periodical *payment of rent reserved by a lease for one year, payable quarterly, is not liable to stamp duty under stat. 55 Geo. III. c. 184, schedule, part 1, as a bond for securing payment of "any sum or sums of money, at stated periods," so that the total amount "can be previously ascertained," but is properly stamped, as a bond, "not otherwise charged in this schedule, nor expressly exempted from all stamp duty" (*Corn Exchange v. Gillingham*, 4 Q. B. 475). A bond in a penalty of 100*l.* conditioned to indemnify a parish from all expenses incurred in the birth, education, and maintenance of a bastard child or children likely to be born, is sufficiently stamped with a 1*l.* 15*s.* stamp (*Bownes v. Marsh*, 2 New Mag. Cases, 48; 10 Jur. 905, C. B.).

As to when Liability discharged.] The condition of a bond, given by deft. to plt., after reciting that A. had been appointed agent for plt., which appointment he had accepted and undertaken to perform the trusts thereof, was declared to be that, if A. should, during his continuance in such employment, faithfully demean and conduct himself, and, when required, account for and pay to plt. all moneys which he had received, or should thereafter receive, for plt.'s use, the bond should be void. The declaration set out the condition, and averred that while A. remained in the employment of plt. as agent aforesaid, A. received for the use of the plts. moneys amounting, &c., but did not, when required, account. Plea, that A. did not, while he remained in the service of plt. as such agent, receive for the use of plt. the sums mentioned. Held, that the issue was not supported by proof that A. and B., as partners, were employed by plts. as agent, and in that character had jointly received money for plt.'s use, it appearing that A. had never been employed by plt., or received money for him solely, and that no difference would be made by proof that deft. knew that A. was to be employed only as partner with B. (*London Assurance Company v. Bold*, 6 Q. B. 514). A bond of guarantee reciting that W. and E. had entered into co-partnership, and had on the treaty therefor agreed that P. should be the acting partner, stated as the condition that P. should keep all the accounts in a certain indenture of co-partnership between him and W. and E., and also should, during such time as he should continue the acting partner, truly account for all moneys received as such partner to W. and E. By the indenture referred to, after reciting that W. and E. carried on the trade, &c., and had agreed to admit P. as partner therein, W. E. and P. covenanted to each other to become partners in the trade, &c., for a term of years, P. to superintend the business, perform the duties of an acting partner, and have the care and custody of the account books. Proviso, that if any of the parties, their executors, &c., should desire to withdraw from the co-partnership at the end of the seventh year, and should give notice, that at the expiration thereof such indenture should determine as to such party. Agreement that any one of the partners might transfer his share in partnership to his son, or bequeath the same by will to any person, or in case of the death of any partner, without having made such transfer, &c., his executors, &c., should be deemed a partner, &c., during the residue thereof, instead of such partner, and should hold such share during the remainder of the co-partnership, subject to indenture. After making of

the bond and indenture W. died, and after his death, P., as managing partner, rendered false accounts, whereupon E. declared against P.'s security in debt on the bond. Plea, performance. Replication, after setting forth indenture that P., while he continued such partner in the trade, &c., of said partnership, *and after decease of W., did not duly account, [*676] &c., but delivered false accounts. Rejoinder, that P. did not deliver false accounts in manner, &c. Issue. Verdict for plt. Held, that the partnership was determined by W.'s death, and the surety therefore not liable for P.'s default happening after that event; that the plt. having accepted issue, could not claim a nonsuit. But although the court, on motion for a nonsuit and rule nisi granted, discharged the rule, they arrested judgment (Chapman v. Peckinton, 3 Q. B. 703).

Breaches.] Where breaches have been assigned under the stat. 8 & 9 Will. III., c. 11, s. 8, plt. must prove the breaches which deft. has traversed. When they are not denied, the truth of them is not in issue. If the deft. pleads a plea of general performance, under which plt. assigns breaches in his replication, and deft. takes issue thereon, the burden of proving the breaches lies on plt., and which must be proved as assigned. If the deft. pleads a plea of special performance, and on which plt. takes issue, then, it should seem, the burden of proving performance lies on deft.

If the breaches are *suggested* on the roll, after a judgment by default, the plt. must prove the condition of the bond, and all the other facts suggested, including the breaches (1 Saund. 58 d). If the breaches have been suggested on the roll, after judgment for the plt. on demurrer, some evidence must be adduced that the bond produced, and in which the conditions are contained, is the same as that on which judgment has been obtained; and for which purpose it will suffice for the plt.'s attorney to swear that the bond produced is the instrument delivered to him to bring the action, and that he knows of no other of the same date, without calling the attesting witness (Hodgkinson v. Marsden, Pea. Ev. 287; S. C. 2 Camp. 122; see *ante*, p. 653). On *non est factum* pleaded to a bond conditioned for performance of covenants where breaches were assigned in a declaration, it was held that the jury who tried the issue might assess the damages on the *venire* to try the issue; without any award of a *venire* to assess the damages (Quin v. Ring, 1 M. & W. 42). The condition of a bond given by deft. to plt., after reciting that A. had been appointed agent for plt., which employment he had accepted, and undertaken to perform the trusts thereof, was declared to be that, if A. should, during his continuance in such employment, faithfully demean and conduct himself, and, when required, account for and pay to plt. all moneys which he had received or should thereafter receive for plt.'s use, the bond should be void. Declaration on the bond set out the condition, and averred that, while A. remained in the employment of plt. as agent aforesaid, A. received for the use of plt. moneys, amounting, &c., but did not, when required, account. Plea, that A. did not, while he remained in the service of plt. as such agent as in the declaration mentioned, receive for the use of plt. the sums mentioned: held, that plt. did not support the issue by proof that A. and B., as partners, were employed by plt. as agents, and in that character had jointly received money for plt.'s use, it appearing that A. had never been employed by plt., or received money for him solely, and that no difference would be made by proof that deft. knew A. was to be employed only as partner with B. (London Assurance Company v. Bold, 6 Q. B. 514).

Damages.] By the common law, the penalty or security on forfeiture became the debt, and not the principal, and interest, and costs (3 Burr. 1370);

to remedy which, the 8 & 9 Will. III., and 4 Anne, c. 16, were passed.

The plt. must prove the amount of the *debt and damages (2 [*677] Saund. 187 a; 2 N. R. 362, n. s). The amount recoverable must depend on the amount proved (see "DAMAGES"). The jury must assess them for the breaches, as in ordinary cases. On an engagement to replace stock, the plt. may estimate his damages either according to the price of stock at the day appointed for replacing it, or on the day of trial (1 Stark. 218). As to interest, see "INTEREST." It is in all cases payable on bond, though not reserved (7 T. R. 124). A bond conditioned for the payment of a smaller sum bears interest from the day of payment, though it be given voluntarily (1 Stark. 291; 7 T. R. 124); *aliter* in the case of a single bond (1 B. & P. 337). Where no day of payment is expressed, interest is payable from the day of execution (3 Stark. Ev. 310; see "INTEREST"). Replevin bonds are not an exception to the rule, that on a bond the plt. cannot recover more than the penalty and costs of suit on the bond. Therefore, proceedings may be stayed on payment of penalty and costs, though the plt.'s costs in the replevin suit exceed the penalty, &c. A judge at chambers may order the stay of proceedings (*Bruncombe v. Scarborough*, 6 Q. B. 13).

In general, if the default has happened, the plt. may recover on an indemnity bond the full amount of his liability thus incurred, though he has not actually discharged it (*Loosemore v. Radford*, 9 M. & W. 657). An indemnity against the wrongful payment of a legacy covers the obligee's costs in defending an equity suit brought by the legatee (*Lloyd v. Mostyn*, 10 M. & W. 478). A testator made D. and R. his devisees in trust, D. permitted R. to receive the trust funds, taking from him an indemnity bond. The legatees filed a bill against their representative, and obtained a decree declaring that D. and R. were jointly and severally liable. Held, that the representatives of D. were entitled to recover from R. in an action on the bond the whole amount of 10,000*l.* (the principal sum), and interest, and that their claim was not limited to the amount of costs actually incurred and paid by them in the chancery suit (*Warwick v. Richardson*, 10 M. & W. 284). The conditions of a bond, after reciting that one A. B. had filed a bill in chancery against several persons (naming them), and the now deft., as defts., was that the now deft. should pay all such costs as the Court of Chancery should award to *all* the said defts. Held, that the construction of this condition was that the deft. should pay the costs awarded to all or any of the defts. except himself (*Vesey v. Mantell*, 9 M. & W. 323). S. agreed with plt. to do certain works for a certain sum, and to receive from time to time three-fourths of the cost of the part completed, the first payment to be made after one-eighth was done, the remaining fourth one month after the whole was done. If S. should fail to perform the work, plt. might employ others and deduct the expense from the sum payable to S. Deft. gave a bond, conditioned for the performance of the agreement by S., who after doing part of the works abandoned the contract. Plt. at request of and upon new security given by him, had advanced to S. for assistance in the works, a sum exceeding the whole cost of the works performed at the time of the abandonment, but less than the whole contract price. Plt. had the works completed at an expense which, added to the cost of the part performed by S. was less than the whole contract price agreed on with S., but which, added to the sum actually advanced to S. exceeded that contract price; in an action on the bond, plt. suggested as a breach S.'s non-performance and plt.'s loss thereby. Plea, *non est factum*. Held, plt. was entitled to nominal damages only, the loss having arisen not from the non-performance of

S.'s contract, but from plt. having advanced more than the contract required, especially as the sum advanced exceeded *not only the three-fourths, but the whole of the work completed, and as the advances [*678] had been made on a fresh negotiation with security taken from S.; held also that this matter could not be pleaded, and was properly set up under *non est factum* to meet plt.'s evidence of damages (Lane v. Calvert, 7 Ad. & E. 143).

Escrow.] The plt. must prove the deed under this plea in the usual way; he must begin and prove the execution as if *non est factum* were pleaded, and then the deft. may prove his plea. The plt's possession of a deed is *prima facie* evidence of its not having been delivered as an escrow (Hare v. Horton, 5 B. & Ad. 715; see "ESCROW," *post*).

Infancy.] See "INFANCY."

Coverture.] See "COVERTURE."

Fraud.] As to the evidence under this plea, see the tit. "FRAUD."

Where a bond was given for the consideration of the sale of a business, and an action was brought upon it, to which the deft. pleaded fraud, which he endeavoured to support, by proof that the plt. represented the business to be worth 900*l.* a-year, and that it was not worth that sum: held, that it was not enough to prove that the business did not turn out to the deft. as valuable as was represented; but he must also prove that it was not as valuable to the plt. himself (D'Aranda v. Houston, 6 C. & P. 511). Where the deft. pleaded that the bond was obtained by fraud, &c., it was held at nisi prius that it was not competent to the deft. to show that he executed it with full knowledge of its contents; but in consequence of a previous fraudulent representation of an extrinsic fact (Mason v. Ditchbourne, 1 M. & Rob. 460). A second trial was granted, in order to raise the question of the admissibility of the evidence more distinctly, which was again received, and a verdict found for the plt., and the question was not again raised (2 C. M. & R. 720, n.). The fraud must be some concealment or deception, with reference to the instrument itself, and not mere illegality or false representation as to some extrinsic matter (Green v. Gosden, 3 Man. & G. 446). Where a surety who was sued on a bond pleads the fraud and collusion of the plt. and the principal, it must be shown that the plt. was a party to the fraud of the principal, and he is a party if he were cognizant of it before the execution by the deft. (Spenser v. Handley, 4 Man. & G. 414). The existence of fraud is a question for the jury (*ib.*).

Under Plea of Accord and Satisfaction.] See tit. "ACCORD AND SATISFACTION."

Under a Plea of Bankruptcy and Insolvency.] See tits. "BANKRUPTCY" and "INSOLVENCY."

Under Plea of Alteration.] See tit. "ALTERATION."

Under a Plea of Performance.] The evidence will depend on the issues joined.

Under Plea of Re'ease.] See tit. "RELEASE."

Set-off.] In an action of debt on a bond, where the interest of the sum

secured has not been paid on the appointed day, a set-off equivalent to the interest which existed before the commencement of the action, though not at the time of the interest falling due, may be pleaded under the 8 Geo. II. c. 24, s. 5 (*Lee v. Lester*, 18 Law J. 312, C. P.).

Under Plea of Tender.] See tit. "TENDER."

Under Plea of Set-off.] See tit. "SET-OFF."

Surety.] Debt on bond by the overseers of a parish against the defts. as sureties of an assistant-overseer. The condition was, that the principal should at all times, so long as he should continue in the office of assistant-overseer, pay, &c. By a resolution of the vestry by which he was elected, his salary was to be 8*d.* in the pound for sums collected by him, and 4*d.* for other sums, and his appointment was to continue from the 25th Mar., 1840, till the 25th Mar., 1841. Subsequently, two justices, by their warrant of the 9th July, 1840, reciting the above resolution, and that his salary had been fixed for the execution of his office until the 25th March then next, stated that, in pursuance of the stat. 59 Geo. III. c. 12, they appointed him assistant-overseer. On the 25th March, 1841, he was re-elected by the vestry, at an annual salary of 50*L.*, and was, as before, re-appointed by the justices, and continued to be so re-elected and appointed by the vestry and the justices annually on the same terms, until March, 1846. On ceasing to hold office, in 1846, he was guilty of a default in not paying moneys over to the overseers: held, that the sureties were not liable upon the bond (*Bamford v. Iles*, 18 Law J., M. C. 42, Exch.).

Debt on bond given by E. G., and the deft. and another as his sureties, to the London and Croydon Railway Company, for the due performance by E. G. of the duties of chief clerk to the booking office at a railway station. The condition was, that if E. G. should render to the L. and C. Railway Company, or to the committee for managing the London terminus of the L. and C., London and Brighton, and South-Eastern Railways, a true account of all receipts and payments, and should pay to the L. and C. Company, or to the said committee, all sums received by him on account of the company or committee, and also such sums as he should receive from the booking clerks, or on account of the said company or committee, the bond was to be void. Breaches were assigned in the replication. Upon the assessment of damages after judgment for the plt. on demurrer, the breach relied upon was, that E. G. did not pay over to the company what he had received from the booking clerks. It appeared that, instead of making up his accounts in the evening of each day, E. G. had allowed the clerks to be in arrear, and had balanced the accounts on the following day by appropriating a portion of that day's receipts to the deficiency of the previous day, but had in fact paid over all that he had received: held, that this was a breach of the conditions, for he had not paid it over truly (*London and Brighton Railway Company v. Goodwin*, 18 Law J., 337, Exch.). Held, also, that the opening of an additional line, whereby the duties of the clerk were increased, did not affect the liability of his sureties in respect of the duties as to the original lines specified in the bond and condition (*Ib.*).

The deft. entered into a bond as surety for the due and faithful performance by one C. of his duty as clerk to a provincial bank. C. being sent by the manager of the bank at the request of a customer to his residence about eleven miles distant from the bank, for the purpose of receiving a large sum of money to be placed to his account, a considerable portion of it being in gold and silver, on his way back dropped the money from his pocket and

lost it: held, that the money was received by C. in the course of his employment as clerk to the bank, that the deft. was liable as surety notwithstanding the finding of the jury that it was not the custom for bankers in that part of the country to send for their customers' money in the manner adopted, and that the loss of the money was *prima facie* evidence of gross negligence on the part of C. (Melville v. Doidge, 6 C. B. 350; 18 Law J. 7, C. P.).

**Under Plea that the Bond was cancelled.]* See *ante*, p. 670.

In order to rebut the presumption of payment of a bond, an affidavit made by the obligor before a Master in Chancery was produced, in which he swore that having applied to the obligee to assist him, the latter refused, saying, he had already had his share of the estate, that he might do as he pleased with what he had, as he would never call upon him for it: held, evidence of the bond having been cancelled, or otherwise legally discharged (Washington v. Brymer, Peak. Ad. Ca. 201).

Under Plea of Statute of Limitations.] See tit. "STATUTE OF LIMITATIONS."

Competency of Witnesses.] A person who has given a bond which is the subject of an action, is not a competent witness to impeach its validity, though he is not interested in the event of the suit (Walton v. Shelley, 1 T. R. 296; but see Jordaine v. Lashbrooke, 2 T. R. 601, and *post*, "WITNESS").

In an action upon a bond given to bankers, conditioned for the fidelity of a clerk, entries of the receipt of sums of money made by the clerk in books kept by him in the discharge of his duty as clerk, are, after his death, evidence against his sureties, of the fact of the receipt of the money (Whitmarsh v. George, 8 B. & C. 556).

A witness was objected to, on the ground that he was a co-obligor with the testator in the bond in suit, on the authority of Hogg v. Phillips, 4 Ad. & E. 852; but he was admitted on the authority of Russell v. Blake, 2 Man. & G. 374; Spencer v. Handley, 4 Man. & G. 416.

Admissions.] See "ADMISSIONS."

The recital in a bond that the parties had agreed to execute a bond in 500*l.* will not confine the bond to that sum, if actually executed in the penal sum of 1000*l.* (Mosley v. Suife, 10 Bing. 84).

Evidence for Defendant.

Judgment by Default, &c.] The deft. cannot, on the execution of a writ of inquiry, offer evidence in excuse for the non-performance of the condition (Canterbury (Archb.) v. Robertson, 1 Cr. & M. 404; 2 Ch. Arch. 8th ed. Bond).

Under General Issue.] In debt (or covenant) on specialty or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of *fact* only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable (R. G. H. T. 4 Will. IV.). A bond was executed by a person who could not write: held, that if there was no other plea but *non est factum*, the deft.'s counsel could not ask whether the bond was read over to deft. before he signed it, nor what was the transaction respecting which it was given (Craubrook v. Dodd, 5 C. & P. 402); nor can the deft. show under this plea that the consideration was an illegal one at common law

(Harmer v. Wright, 2 Stark. 35; Harmer v. Rowe, 2 Ch. Pr. 334; 6 M. & S. 146). Where a party who executes a bond is at the time competent to execute it, he cannot, under the plea of *non est factum*, show [*680] that he was misled as to the legal effect of the *bond (Edwards v. Brown, 1 Cr. & J. 307; 1 Tyrw. 182; 3 Y. & J. 423).

On this plea the deft. may rely upon a material variance between the deed and the description of it in the declaration, but in ordinary cases of variance, not material to the merits, the judge will amend at the trial, &c. (3 & 4 Will. IV. c. 42, s. 23; see "AMENDMENT"). But where the plt. declared against W. F. B., the elder, sued as W. B., the elder, and the bond, when produced, appeared to be executed by W. B., who at the time was well known, by that name: held to be no variance, and that if it were objectionable on any other ground, the objection was not available under the general issue (Williams v. Bryant, 7 Dowl. 502; 5 M. & W. 447). The plt. declared that the deft. became bound to J. S., then being treasurer of a benefit society, which addition was not in the bond when produced: held to be no variance, for it was not stated that the bond was given to him as treasurer (Cartridge v. Griffiths, 1 B. & A. 57). If the stamp be wrong, the bond cannot be given in evidence. A defect in the stamp is therefore available under the general issue (see title, "STAMPS"). The deft. was surety by a bond to plt. for the due performance of a contract by S., according to a certain agreement, whereby S. was to complete the works for a certain sum, and payment was to be made to him by the plt. during the continuance of the work by instalments. S. applied for and received advances from the plt. exceeding in amount the value of the work done by him, for some of which advances he gave security. The work not being done at the specified time, the plt. called in another builder to complete the work, and the amount paid to him and the advances made to S. greatly exceeded the original contract price. In an action on the bond, to which there was a plea of *non est factum*, held, first, that the deft. might show in reduction of damages that the advances made by the plts. were not according to the contract, and that as the work had been completed within the contract price, the plts. were only entitled to nominal damages; and, secondly, that it would have been improper to have pleaded *non damnificatur* (Warre v. Calvert, 2 N. & P. 126; 7 Ad. & E. 143; 1 Jur. 450). It seems doubtful whether an inconsistent contract can be set up on *non est factum* (Trott v. Smith, 12 M. & W. 688).

Under Plea of Payment on and after the Day.] See title, "PAYMENT." The deft. must prove the plea, which must be done by proof of actual payment before the day fixed, for it is evidence of payment *at* the day (B. N. P. 174); but payment after the day will not support it. So that where the plt. proved, in answer to this plea, payment by the deft. of interest two years after the day of payment mentioned in the condition, it was holden that the deft. could not, under this plea, avail himself of the presumption of payment arising from the lapse of time, though he might under the plea of *solvit post diem* (Moreland v. Bennett, 1 Stra. 652). If the deft. cannot prove actual payment, and the circumstances of the case will permit it, he may prove his plea by presumption from lapse of time: thus, non-payment of interest for twenty years. So, if twenty years elapsed since the day of payment, and no interest at all has been paid, a presumption of payment arises, upon which the deft. may rely, in support of his plea of *solvit ad diem* (B. N. P. 174). The burden of proof of *solvit post diem* is also on the deft., which may be proved in the same way as above. Payment of a bond is presumed after twenty years without demand made (Oswald v. Leigh, 1 T. R. 279; Bostock v. Hume, 7 Man. & G. 893; but even in less time if

*other circumstances concur to favour the presumption, as for instance the settlement of accounts in the mean time (*lb.*; see *Colsell v. Budd*, *supra*). The plea will be supported by proof of non-payment of interest for twenty years (*Oswald v. Leigh*, 1 T. R. 270; see *Moreland v. Bennett*, *supra*; but see *Colsell v. Budd*, 1 Campb. 27). But where the plt. produced in evidence a receipt, which was dated within twenty years, but given for interest due before, it was held sufficient to rebut the plea (*Saunders v. Meredith*, 3 M. & R. 116). The origin of the doctrine of twenty years' presumption is discussed in a note to this case. So, where a receipt for interest, or part of the principal, was indorsed on the bond by the obligee, it was held sufficient evidence of payment at the time mentioned in such receipt, though no proof was given when such receipt was written or signed (*Barrington (Lord) v. Searle*, in error, 3 Bro. P. C. 593; *Rose v. Bryant*, 2 Camp. 321). So, where in debt on a bond more than twenty years old, to rebut the presumption of payment the obligee gave evidence of payment of interest by the obligor to A. B., equal in amount to the interest that would become due on the bond; held, that an indorsement on the bond, in the handwriting of the obligee, and which appeared to have been made at or about the time when the bond was executed, but which was not proved to have been ever seen by the obligor, stating that the bond was given to the obligor, in trust for A. B., was admissible in evidence to connect the payment of interest with the bond (*Gleadon v. Atkin*, 1 C. & M. 410; 3 Tyrw. 289; see *Turner v. Crisp*, 2 Stra. 827). So, the presumption cannot arise, although more than twenty years have elapsed since an acknowledgment that any sum was due upon it, if the obligee have, ever since that acknowledgment, resided abroad (*Newman v. Newman*, 1 Stark. 101; 4 M. & S. 66). Payment is not to be presumed if the money was lent to enable the obligee to go abroad, where he died shortly after, and there is evidence that his administrator never received any assets (*Elliott v. Elliott*, 1 Moo. & R. 44). So, the presumption was rebutted by evidence that the obligor had no opportunity or means of payment (*Fladong v. Winter*, 19 Ves. jun. 196). So, where the obligor made an affidavit in Chancery, from which it might be inferred that the bond was then outstanding, the presumption was held to be rebutted (*Washington v. Brymer*, Pea. Ad. Ca. 201, *Grose, J.*). Upon objections to the presumption of payment of a bond, the declaration of credit, and the fact of the security remaining with the obligee, are circumstances of great weight (*Fladong v. Winter*, *supra*).

A payment by the obligor of a bond to the obligee, to whom the obligor is also otherwise indebted, cannot, without some circumstances to show that it was intended to be made in discharge of the bond, be so applied in favour of a security of the obligor in an action upon the bond under the plea of payment (*Plumer v. Long*, 1 Stark. 153). The plts., in an action against the co-obligor of the debt, on the joint and several indemnity bond of both of them, accepted from the former 215*l.*, the damages being at that time unliquidated, and gave a receipt for that sum, stating it to be in discharge of the damages and costs of that action: held, that this receipt did not show that the plts. had accepted the 215*l.* in satisfaction of the entire claim under the bond, and therefore that they were entitled to recover a further sum against the debt. (*Field v. Robins*, 2 Moo. & P. 226; 8 Ad. & E. 90; 2 Jur. 855).

The debt, is at liberty to controvert the truth of the breaches suggested or assigned; and he should be prepared with evidence accordingly (see 1 Saund. 58 *d.*).

Under Plea of Usury.] By 12 Anne, st. 2, c. 16, s. 1, no per-

*son on any contract shall take directly or indirectly for the loan of any moneys, wares, merchandise or other commodities whatsoever, above the value of 5*l.* for the forbearance of 100*l.* for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time, and all bonds, contracts, and assurances whatsoever, for payment of any principal or money to be lent, or covenanted to be performed upon, or for any usury whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the hundred as aforesaid, shall be utterly void (see 2 & 3 Vict. c. 37, s. 1; 4 & 5 Vict. c. 54; and tit. "USURY"). The onus of proof lies on deft.; he must prove a loan and that the plt. was to have interest for it, directly or indirectly, at or after the rate of 5*l.* per cent. (see *ante*, p. 667).

Duress.] If the deft. show that the arrest was illegal, as where there was no authority for it, although there was a debt existing, or where there was no cause of action, or that the arrest was under a warrant when no felony had been committed, or where there had been one committed, but the arrest was made to obtain the bond, he will sustain his plea (see the cases cited *ante*, p. 667).

BOUNDARIES.

See INDEX.

BROKER.

A person who hires or procures for another, persons to be employed by him, in the carrying out and surveying of a line of railway, is not a broker within the statutes 13 Edw. I. st. 5, and 6 Anne, c. 16, s. 4, which prohibit persons from acting as brokers within the city of London, unless licensed by the court of mayor and aldermen (*Milford v. Hughes*, 16 M. & W. 176; 10 Jur. 990).

Declaration on bill of exchange by drawer against acceptor. Plea, that deft. retained plt. to act as his broker in the city of London, and as such to enter into contracts there for deft. in purchase of stocks and shares, and to pay on such contracts certain moneys; that in pursuance of such retainer the plt. did, as such broker in the city of London, enter into certain contracts for the purchase of shares, and as such paid for deft., &c.; that plt. was not at the time of the retainer and employment, and making such contracts, &c., a broker duly licensed, &c.; and that the bill was accepted for such work: held, ill on general demurrer, the payment of money not being incidental to the character of a broker, and the plea being an answer only to so much of the plt.'s demand as consisted of remuneration for his services as broker (*Pidgeon v. Burslem*, 18 Law J., 193, Ex.).

Distinction between Broker and Factor.] A broker is not trusted with the possession of goods, and ought not to sell in his own name, but a factor, from its being usual for him to make advances upon the goods, has a special property in, and a general lien upon them, and may sell in his own name, and his principal will be bound by all the consequences of such sale, of

which one is the right of setting off a debt due from the factor (*Baring v. Corrie*, 2 B. & Ad. 137). It is not the duty of a broker, *qua* broker, not to deliver goods consigned *to him for delivery on payment till paid for them (*Boorman v. Brown*, 3 Q. B. 511; *Brown v. Boorman*, [*683] 11 Cl. & Fin. 1); but such a duty may result from express contract (*Ib.*)

London Brokers.] A stock broker must be licensed pursuant to the 6 Anne, c. 16 (*Clark v. Powel*, 1 N. & M. 492; 4 B. & Ad. 846); and, unless so licensed, cannot maintain an action for work and labour, and commission for buying and selling stock, &c. (*Cope v. Rowland*, 2 M. & W. 149; 2 Gale, 231). A ship-broker is not within this statute (*Gibbons v. Rule*, 12 Moo. 539; 4 Bing. 301). A sworn broker of the city of London is liable in assumpsit for charging his principal more than the cost price of articles purchased for him in addition to his commission (*Proctor v. Brain*, 2 M. & P. 284; 3 C. & P. 536); and being in the nature of a public agent, is compellable on motion to produce his books in order to enable his principal to inspect, &c. (*Browning v. Aylwin*, 9 D. & R. 801; 7 B. & C. 204; see "AGENT"; "PRINCIPAL AND AGENT").

A party who employs a stock-broker to transact business for him at a particular place, is bound by the established usage of that place relative to the mode of transacting that sort of business, whether he knew of the usage or not. By the usage of the Liverpool Stock Exchange, brokers are held responsible to each other for all engagements entered into by them on behalf of third parties. A person employed a broker there to sell railway scrip, but on the day of settlement made default, and the purchaser compelled the broker to pay the differences: held, that the broker might recover the amount of those differences in an action for money paid to the use of his employer, there being evidence that the employer knew of the usage. *Sed semble, per totam curiam*, that the action would have been maintainable without that evidence (*Bayliffe v. Butterworth*, 11 Jur. 1019; Ex.).

To an action for work and labour, *deflt.* pleaded that the work was done by the *plt.* as a broker within the city of London, and that *plt.* was not licensed to act as a broker: held, that *de injuriâ* was a good replication to the plea (*Bennett v. Bull*, 1 Exch. 593).

BY-LAWS.

Remedy on By-Law.] Where a by-law enacts a penalty to be incurred, when its restrictions are not complied with, debt may be supported for the recovery of it (1 Roll. 366, l. 48; 1 Saund. 312 d; *Feltmakers' Company v. Davis*, 1 B. & P. 98), or assumpsit (*Ib.*; *Surgeons of London v. Pilson*, 2 Lev. 252). But, where it is enacted that the penalty is to be recovered by debt, then debt alone can be maintained (*Com. Dig. By-law*, 21; or it may be recovered by a distress, where the enactment of the by-law is express (*Kirk v. Nowill*, 1 T. R. 118; 1 Roll. 367, l. 5; *Com. Dig. By-law*, D, 2).

Pleadings, &c.] In declaring on a by-law, the liability of the *deflt.* must distinctly appear. So, where the declaration stated merely that the penalty was incurred "under and by virtue of a certain by-law," without setting

forth the charter of the company empowering them to make by-laws, it was held bad on demurrer (*Feltmakers' Company v. Davis*, 1 B. & P. 98); as the deft. could not negative its validity (lb. 100). Where the right to make a by-law is exercisable in a select part of a corporation, that power must be shown to be in it (*The King v. Bird*, 13 East, 384; *The King v. Lyme Regis*, Doug. 158-9). So, the master, wardens, and commonalty of a company cannot sue for a penalty forfeited to the master and wardens, for the use of the master, wardens, and *company (*Feltmakers' Company* [*684] *v. Davis*, 1 B. & P. 98; *Bodwic v. Fennell*, 1 Wils. 235). But the deft.'s liability need not be particularly stated. So, where a by-law stated that deft. was to pay a certain sum quarterly, or incur a penalty of 5*l.* *per annum*, a general breach will be sufficient, even on demurrer or in arrest of judgment, without setting forth the non-payment on specific quarterly days (1 Wils. 281). Where a company is constituted by letters patent, which empowers them to make by-laws, such power is a condition precedent, and ought to be averred in an action of debt for the penalty (*Carter v. Sanderson*, 5 Bing. 79; 2 M. & P. 164). A declaration in debt for the infringement of a by-law of the Plumbers' Company of the city of London, set out the royal charter incorporating the company, in which it was directed that the persons of the livery of the company should have a voice in the election of wardens. Held, sufficient to show that the company had a livery; but that the court could not presume that it was the livery entitling to vote at the city elections (*Piper v. Chappell*, 9 Jur. 601; 14 M. & W. 624).

The Plumbers' Company of London were incorporated by a charter of James I., and empowered to make by-laws: they made a by-law that the master and wardens might call, &c., into the livery of the company such person free of the art or mystery of plumbing, as they should think fit, and that any person so chosen should immediately, upon notice thereof, prepare to serve the same place at the then next meeting of the master and wardens: and that every person so called, &c., and accepting the same, should bring in and pay at the next meeting unto the master and wardens, to the use, &c., of the company, and to the officers of the company, for entering the same, and for the warning given, such fees as formerly had been paid in like manner, and which of them soever so called, &c., refuseth to pay the said fees, or what person or persons so called, &c., and refuseth the same, shall forfeit and pay to the master and wardens for the time being, for every such default, the sum of 5*l.*, or less, at discretion and pleasure of the master, &c., so it be not less than 40*s.* In an action of debt on this by-law, held, first, that it was not bad for uncertainty in the amount of the penalty; secondly, that the declaration was not bad for not showing that the company was one that had a livery; thirdly, that it was not bad for not showing that the deft. was a freeman of the city of London, for that, the court could not take notice that none but freemen of the city were admissible into the livery of the company, unless certified by the Recorder of London; fourthly, that the master and wardens might alone sue for the penalty, though reserved to the use of the company generally (*Piper v. Chappell*, 14 M. & W. 624).

The breach alleged in the declaration was that the deft., although requested, and although a reasonable time had elapsed, and although he was and continued such freeman, did not nor would attend or serve the said place to which he had been so chosen, and did not nor would attend and serve the said place at the next meeting, or at any subsequent meeting of the master and wardens, but therein made default, and refused to prepare himself to serve the said place: held, that the breach was well assigned, for

that one refusal, to which by the by-law the penalty was attached, was the refusal to prepare to serve at the next court (*Piper v. Chappell*, 14 M. & W. 624).

A plea setting up a by-law as a defence must show the authority of the persons making it (*Vintners' Company v. Passey*, 1 Burr. 235). And, in debt on a by-law, any reasonable excuse might formerly have been given in evidence under the plea of *nil debet* (Carth. 483; *Cambridge v. Herring*, 1 Lutw. 402-5; **Vintners' Company v. Passey*, 1 Burr. 239). But this plea shall not be allowed in any action (Reg. Gen. 4 Will. IV. [*685] r. 2). In order to avoid a by-law, on account of its being unreasonable, it will not be sufficient to show a possible inconvenience to arise from it: the inconvenience must appear to be *probable* (*The King v. Ashwell*, 12 East, 29). Where the custom is relied upon as the foundation of an action on a by-law, it must be proved (*Hesketh v. Braddock*, 3 Burr. 1859); and, if it be not shown on the declaration, *def. may demur* (*Vintners' Company v. Passey*, 1 Burr. 235). Sixty years' usage has been considered as evidence of a custom (*Selw. N. P.* 1145).

Where the master, wardens, and assistants of a corporation were authorized by their charter to make by-laws, with penalties to the use of the corporation, and accordingly made a by-law, imposing a fine on any of the livery refusing to take upon himself a certain office, and reserving the penalty to the master and wardens only for the time being, for the use of the corporation; and for the penalty incurred by the breach of this by-law an action of debt was brought by parties who were the master and wardens at the time the fine was incurred, but who had ceased to be so at the time of action brought: held, on demurrer, that the plea that the plts. were not master, &c., was good, for *non constat* but that they were strangers to the corporation at the time of action brought (*Graves v. Colby*, 1 P. & D. 235). *Sentle* also, that the corporation at large could not have maintained the action on this by-law, nor the master nor wardens in office at the time, for the right of action did not pass to them by succession (Ib.) *Quære*, whether the action would have been maintainable by the late master and wardens who were in office when the penalty was incurred, if they had averred that they continued to be members of the corporation (Ib.).

To a count in trespass for removing and breaking down plt.'s booth, *def.* pleaded that before and at the time when, there was a public highway through, over, and along a close called A. for all the liege subjects, and that the booth had been and was wrongfully erected and standing in and across the said highway, and obstructing the same, wherefore *def.*, being a liege subject, and having occasion to use the said highway, committed the alleged trespasses, in order to remove the obstruction. Replication, that the said close is in the borough of B, which is an immemorial borough, and that an immemorial fair for the sale of all kinds of goods was for three weeks, from a certain day in every year, holden in the said close, that is to say, on certain parts thereof, used for that purpose, but leaving open a sufficient part of the said close, and also of the said highway, for the subjects to go, return, and pass in and along the same highway. And that there was an immemorial custom in the said borough, that every liege subject, using the trade of a victualler, bath, during the said fairs, been used, &c., for the purpose of carrying on his trade, to enter upon any part of the said close used for the purpose of such fair, but leaving, as aforesaid, and for carrying on his said trade, to erect a booth there, and to continue such booth until a reasonable time after the end of such fair, paying a reasonable compensation to the owner of the soil. And that plt., being a liege subject and a victualler, did, during such fair, erect his said booth on one of the parts of the said close

then and therefore used for the fair (leaving as aforesaid), according to the custom, and continued such booth there till deft., during the fair, committed the trespasses. Held, on demurrer, that the custom was reasonable, for that a highway might have been granted before legal memory, subject in parts to interruption for a beneficial public purpose, and for a limited time, and that the plt. was right in replying specially as above, and could not have traversed the existence of a *highway over the *locus in quo* [*686] because, consistently with the custom, that spot might sometimes be used as a highway and sometimes not, and it did not, by temporary occupation and the custom, cease to be a highway (*Elwood v. Bullock*, 6 Q. B. 383).

Evidence.] As to what is a good or bad by-law, see further Grady and Scotland's Cr. Pr., Quo Warranto, Mandamus; Selw. N. P. same titles. A corporation has an implied power of making by-laws; but, where the charter gives the company a power to make by-laws, they can only make them in such cases as they are enabled to do by the charter, for such power given by the charter implies a negative that they shall not make by-laws in any other cases (per Lord Macclesfield, 2 P. Wms. 209, cited *The King v. Bird*, 13 East, 379; *R. v. Cutbush*, 4 Burr. 2204; *Hoblyn v. R.* in error, 2 Bro. P. C. 329; *R. v. Cambridge*, 2 Sel. N. P. 1176). A corporation, created by letters patent, with a power of making by-laws, cannot make any laws to incur a forfeiture (*Kirk v. Nowill*, 1 T. R. 118); nor can one created by act of Parliament, unless such power be expressly given (*ib.*); and, though there be no express power by their charter to make them (*Com. D. By-law*, A.; sed vide *Kirk v. Nowill*, 1 T. R. 118). The power to make them may be upheld by an ancient custom; as, where the tenants of a manor make by-laws for the good order of the tenants (1 Roll. 366, l. 16); or without a custom, where the effect of it was the public good, as the repair of churches, highways, &c. (5 Co. 63 *d*); the evidence to establish which will vary according to the circumstances. Where in a by-law of a corporation making certain regulations, for breach of which parties are to be liable to be sued for a penalty, there is a separate proviso, making certain exceptions; a party suing for breach of the by-law need not aver in the declaration that the case was not within the exception in the proviso, but such fact, if it exist, must be shown by the deft. by way of excuse (*Shaw v. Poynter*, 4 Nev. & M. 290; 2 Ad. & E. 312). A deft. justifying the taking of goods as a distress for a penalty incurred by breach of a by-law of a corporate company must aver a previous demand and refusal of payment, and he must prove that averment, although the by-laws do not enact any such preliminary (*Davis v. Morgan*, 1 C. & J. 587; 1 Tyrw. 457; 1 Price, P. C. 77). A recital of a demand and refusal of penalties, incurred by a breach of a by-law, in the warrant of distress, put in evidence by plt., to prove the fact of distress, and the persons by whom it was ordered, is not evidence of the facts therein recited, although put in as part of the plt.'s evidence to support his action (*Davis v. Morgan*, *supra*).

In a company constituted by letters patent, with power to make reasonable by-laws; a by-law for the steward to provide a dinner for certain members of the company on Lord Mayor's day, with an allowance for so doing, or to pay a fine of 20*l.*, or excuse himself by swearing that he is not worth 300*l.*, is a bad by-law (*Carter v. Sanderson*, 5 Bing. 79; 2 M. & P. 164; and see *Button v. Green*, 1 Ld. Raym. 113). The power to make by-laws is incident to the whole body of every corporation, and therefore, if a charter give to a select body a power to make by-laws touching certain matters therein specified, that does not take away from the body at large their inci-

dental power to make by-laws touching other matters not specified in the charter (*R. v. Westwood*, 2 Dow & Clark, 21; 4 Bli. N. S. 213; 7 Bing. 1; 4 B. & C. 781). Every by-law may be repealed by the same body which made it (*R. v. Ashwell*, 12 East, 22).

The council of a borough made the following by-law, by virtue of a charter empowering them to make by-laws, and of statute 5 & 6 Will. IV. c. 76, s. 90; that no person should erect any booth for *the purpose of any show or public entertainment in any public place within the [*687] borough, without license from the mayor, which license should not be given at or for any other time than during the annual fairs, if three inhabitant householders, residing within 100 yards of the place intended to be used, should have previously memorialized the mayor in writing to withhold such license; and that any such license given at or for any other time than during the said fairs, should be revoked by the mayor, and become void, if and so soon as three inhabitant householders residing within 100 yards, should memorialize the mayor in writing to revoke the same, such last-mentioned memorial to be commenced, and the revocation to be notified forthwith to the party employed or interested in the building; and any person erecting or continuing a booth in contravention of the by-law to forfeit a sum not exceeding 5*l.*: held, an unreasonable by-law, and wholly void, though duly published and notified to a secretary of state, and not disallowed (*Elwood v. Bullock*, 6 Q. B. 383).

See respective titles, *post*, "CHARTER," "CORPORATION." Where a by-law is pleaded, and issue taken thereon, proof that from the time of the supposed by-law, the usage at elections has been according to such supposed law affords presumptive evidence that there was such a law, although it cannot be produced (*Rex v. Phillips*, 1749).

A power given by a local act to a canal company to make by-laws for the good government of the company, for the good and orderly using of the navigation, and of warehouses, wharfs, &c., and for the well government of the bargemen, does not authorize them to close the canal on Sundays by a chain suspended across it; and a by-law for so closing the canal on Sundays is illegal and void (*The Calder and Hebble Navigation Company v. Pilling*, 14 Law J. 223, Ex.; 14 M. & W. 76). By 5 Will. IV. c. 10 (local), the London and Croydon Railway Company was incorporated. By s. 106, they were authorized to make by-laws for the good government of their affairs, for regulating their proceedings, and for the management of the undertaking, and of the officers and servants of the company in all respects, "and to impose and inflict such reasonable fines and forfeitures upon all persons offending against the same as to the said company shall seem meet, not exceeding the sum of 5*l.* for each offence;" such by-laws to be "binding upon and be observed by all parties," provided they were not repugnant to the laws of England, or the directions of the act. By s. 148, the company were empowered to make orders for regulating the travelling upon and use of the railway, and for or relating to travellers passing thereon; such orders and regulations to be binding upon such travellers, on pain of forfeiting and paying a sum not exceeding 5*l.*, which the company shall attach to a default. By sect. 163, penalties and forfeitures imposed by the *act*, or by any *by-law*, order, or rule made in pursuance thereof, might be recovered in a summary way by adjudication of justices; one half the penalty to go to the informer, and the other half to the company. By sect. 165, any officer or agent of the company may seize and detain any person whose name and residence should be unknown to such officer or agent who shall commit any offence against the act, and may convey him, &c., before a justice without any warrant or other authority than that act. The company made a by-

law, under their common seal, by which each passenger, not producing or delivering up his ticket on leaving the company's premises, was required to pay the fare from the place whence the train originally started: held, that this was not a by-law imposing a "penalty or forfeiture;" so that the non-production of a ticket on leaving the company's premises, and the refusal to pay the fare from the place from which the train originally started, did not *authorize the arrest of the passenger. *Seemle*, the only power to [*688] apprehend given by section 165 is for an offence against the act itself. *Quere*, whether the by-law was reasonable (*Chilton v. The London and Croydon Railway Company*, 16 M. & W. 213).

Competency of Witnesses.] Corporators are not competent witnesses to prove a custom of excluding strangers from exercising trades within a town where a moiety of the penalty imposed by a by-law, for breach of the custom, goes to the corporation (*Davis v. Morgan*, *ante*, p. 685), even though the moiety may be granted away (*Ib.*).

It seems that the declarations of deceased corporators are evidence, by reputation, of a custom to exclude strangers from trading in a particular town (*Ib.*).

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**Form of Remedy.*

[*689]

Assumpsit lies against a carrier for the breach of his express or implied contract, to take due and proper care of goods entrusted to him to carry for the plt. (5 Mod. 92; *Boson v. Sandford*, 2 Salk. 440; *Ross v. Johnson*, 5 Burr. 2825). But, as the liability of carriers is founded on common law, as well as on the special contract, *case* is sustainable (B. N. P. 69), and, in many instances, is a preferable remedy, especially where there is any doubt as to the number of the persons to be made defts., for, by proceeding in case, a plea in abatement for the nonjoinder of parties may be avoided, and the joinder of too many defts. will form no ground of nonsuit (*Govett v. Radnidge*, 3 East, 62; *Ansell v. Waterhouse*, 2 Ch. R. 1; *Brotherton v. Wood*, 3 B. & B. 54; S. C. 6 Moo. 141, 154, 158; *Leslie v. Wilson*, ib. 171). Case is also preferable where there is evidence of a conversion, as a count in trover may be added (Ib.); and a defence of a set-off (*Fletcher v. Dyche*, 7 T. R. 36), or of deft.'s bankruptcy (*Parker v. Norton*, 6 T. R. 695; 1 Marsh. 184), may be sometimes thereby avoided. When the plt. sues in case, the action must be against deft. on his common-law liability (6 Moo. 45; 2 N. R. 345; 12 East, 94).

Trover lies against a carrier for an act done, though not for a mere omission; as, where by mistake he delivers goods to a wrong person, trover lies, but not if he lose them by accident (*Pinkerton v. Caslon*, 2 B. & Ad. 702; *Devereux v. Barclay*, 2 B. & P. 702; *Youl v. Harbottle*, Pea. 49; *Ross v. Johnson*, *supra*; *Williams v. Gearey*, 7 C. & P. 777; *George v. Wiburne*, 1 Vin. Abr. Action, L. Pl. 4). Trover lies, if the carrier refuse to deliver the goods when he has them in his possession, without just cause, or if he has tortiously converted the goods, as by unpacking them and stealing (*Anon.* Salk. 655). But, when the non-delivery arises from an inability to deliver the goods, as when they have been lost or destroyed by accident, however he may be liable to answer in another form of action, he cannot be liable in this; so, if he assert (falsely) that he has delivered the goods, it cannot be construed into a conversion (*Ross v. Johnson*, 2 Burr. 2525, *supra*); nor, where the goods have, in fact, never reached them, having been delivered to his servant, by whose negligence his master has been prevented from receiving them, since this cannot be construed into any conversion by him (*Taylor v. ———*, 2 Raym. 792).

By whom Action brought.] The action for the loss of goods should be brought in the name of the consignee of them, when they are sent at his risk (which is very usual), and not in the name of the consignor, although the carrier was to be paid by the consignor, and the consignee gave no particular directions by whom the goods were to be forwarded to him (*Dawes v. Peck*, 8 T. R. 330; *B. N. P.* 86; *Godfrey v. Furzo*, 3 P. Wms. 186; *Dalton v. Solomonson*, 3 B. & P. 582; *Brown v. Hodgson*, 2 Camp. 36; *King v. Meredith*, ib. 639; *Joseph v. Knox*, 3 Camp. 320; *Griffin v. Langfield*, ib. 255; 1 Ch. Pl. 6th ed. 6). And, although the consignee ordered the goods to be sent to him, "on an insurance being effected, and on a credit of three months from the time of arrival," the vendor having insured the goods (*Fragano v. Long*, 4 B. & C. 219; 4 D. & R. 283); unless indeed the terms of the agreement between the vendor and vendee precluded the vesting of the goods in the vendor. Thus, where they were sent for approval with the power of returning them if disapproved of, the consignor paying the carriage both ways (*Swain v. Shepherd*, 1 Moo. & R. 223); or

[*690] *the consignee is the agent of the consignor (*Sargent v. Morris*, 3 B. & A. 277); or the carrier has contracted to be liable to the consignor in consideration of the latter becoming responsible for the price of the carriage (*Moore v. Wilson*, 1 T. R. 659; *Davis v. James*, 5 Burr. 2680; see *Freeman v. Birch*, 1 Nev. & M. 420; see *Dunlop v. Lambert*, 5 Cl. & Fin. 600); or, where the consignee procured the goods to be consigned to him by a fraud on the consignor (*Stephenson v. Hart*, 1 M. & P. 357; 4 Bing. 476; *Duff v. Budd*, 3 B. & B. 177; 6 Moo. 469); the consignor may sue the carrier, as may also the person having a special property in goods, as, for instance, a laundress returning clothes by a carrier, who loses them, she may sue for the loss (*Freeman v. Birch*, 1 Nev. & M. 420). A person who ships goods in an English port, as the agent of the owner of the goods, resident abroad, and pays the freight for them, may, it seems, maintain an action in his own name for the non-delivery thereof according to the bill of lading, which creates a privity of contract between the consignor and owner of the vessel (*Joseph v. Knox*, 3 Camp. 320; see *Brown v. Hodgson*, 2 Camp. 36). The bill of lading will, in general, decide the question as to the party in whose name the action should be brought. If it be to deliver it to A. he should be the plt. If to A. for the use of B. (*Evans v. Marlett*, 1 Ld. Raym. 271, cited in *Sargent v. Morris*, 3 B. & A. 282), or for A. (the consignor), and in his name to B. (ib.), (and B., at the time of the shipment in the latter case, had no property in the goods, although he had insured them), in the former instance B. should be the plt., and in the latter, A. is the party to sue the carrier (Ch. Contr. 486). Goods exceeding 10*l.* in price, were verbally ordered of the plt., no particular mode of carriage was specified, nor was there any evidence of any particular course of dealing between the plt. and vendee. The plt. afterwards forwarded the goods by the deft., who was a common carrier, and the goods were lost whilst in the deft.'s custody: held, that the plt. was the proper party to bring the action for the loss of the goods, the property therein not having passed to the vendee (*Coates v. Chaplin*, 2 G. & D. 552; 6 Jur. 1123). If the consignee had no property in the goods at the time of delivery to the carrier, the consignor should sue (*Dalton v. Solomonson*, 3 B. & P. 582; *Sargent v. Morris*, 3 B. & A. 277). If a carrier's servant receive goods to be carried for hire, and the goods be lost, or injured, the action lies against the master (Comb. 118; 1 Salk. 282).

Where goods are delivered to a railway company as common carriers, and at the terminus the goods are handed over to the company's agents there, who deliver them to their (the agent's) servant for distribution or delivery

according to the address, the company receiving the charge for such delivery: held, that the company was liable for the felonious acts of such servant (Machu v. The London and South-Western Railway Company, 12 Jur. 501). By the 11 Geo. IV. & 1 Will. IV. c. 68, s. 8, carriers are responsible for losses arising from the felonious acts of their servants. The deft. a carrier, was sued to recover the value of a parcel lost, and slight evidence was given to raise a suspicion that his servant, who was still in his employ, had stolen the parcel; on a verdict found for the plt., a new trial was refused, on the ground that the deft. ought to have called the servant as a witness (Boyce v. Chapman, 2 Bing. N. C. 222; 2 Sco. 365). Where the plt. gave a parcel directed to F. in London to the carrier at B., who drove a mail cart between B. and M., at an inn where the deft.'s coach stopped to take in parcels, and received the carriage for it from the innkeeper, who was in the habit of booking parcels for the deft.'s coach, and did book this parcel to London, and deliver it to the *coachman of the deft.: held, that [*691] the carrier was the agent of the plt., and the innkeeper the servant of the defts., and therefore, that the plt. might recover damages from them for the loss of the parcel (Syms v. Chaplin, 1 Nev. & P. 129; 5 Ad. & E. 634). A parcel delivered to a guard of a mail coach, and by him to the porter of the inn where a mail coach stops, whose business it is to carry out the parcels brought by the coach, receiving for such duty a portion of the sum charged for carriage, does not make such porter personally responsible for its loss (Cavenagh v. Sach, 1 Pri. 328). Where a parcel is delivered to the driver of a stage coach to be carried, the master, and not the servant, is responsible (Williams v. Cranston, 2 Stark. 82). If the agent of the plt. go to the carrier's booking-office, and desire that a carrier's man be sent to the agent's house to fetch a package, and one of the carrier's men did accordingly fetch the package from the agent's house, and bring it to the booking-office, this is a delivery by the plt. to the carrier (Boys v. Pink, 8 C. & P. 361). If a parcel be given to a wagoner for hire, to carry for his own gain, and not for the profit of his master, the master is not liable for the loss of the parcel (Butler v. Baring, 2 C. & P. 613). If one who is not a common carrier, agree to carry goods for hire, he is liable for loss by negligence of his own servants, but not for that occasioned by thieves or force, nor if the owner accompanied the goods to take care of them, and was himself guilty of negligence (Brind v. Dale, 3 M. & Rob. 80; 8 C. & P. 207). The 11 Geo. IV. & 1 Will. IV. c. 68, s. 5, renders it sufficient to sue one of several carriers who are in partnership.

At common law a public carrier is liable absolutely for the loss of goods, except it be occasioned by the act of God, or the king's enemies (Jones on Bailment, 104; Cogg v. Bernard, 1 Ld. Raym. 918; Macklin v. Waterhouse, 2 M. & P. 319; Riley v. Herne, ib. 331).

Form of Pleadings.

In a declaration in *assumpsit*, it is not necessary to commence it with an inducement of the deft. being a common carrier, &c. (2 Ch. Pl. 227, n. (u)). The *termini* of the journey must be correctly described; therefore, where the contract which was declared upon was represented in the declaration to be for the conveyance of goods from W., in the county of Middlesex, to T., in Essex, when, in fact, it was from Aldgate, in the city of London, to that place, he was nonsuited (Tucker v. Crackling, 2 Stark. R. 385; 5 Taunt. 289). The delivery and receipt of the goods must be alleged in such a manner as to show the existence of the contract for the breach of which the plt. declares (Max v. Roberts, 12 East, 89). The plt. need only state the nature

of the goods delivered to deft., with a certainty of description to a common intent: thus, a "carrier's pack" has been held a sufficient description; and so, it was sufficient where the declaration stated so many "sets of gold buttons, and a set of Turkey stones and garnets;" for, to such as are conversant with those things, it is well known what a set is, and in what number the precious stones are usually placed in such sets (*Chamberlain v. Cook*, 2 Ventr. 78; 2 Saund. 74 a; *Jerem. Car.* 182). In stating the contract, if the carrier only limits his responsibility, that need not be noticed in pleading; but, if a stipulation be made that, under certain circumstances, he shall not be liable at all, that must be stated (per *Abbott, C. J.*, *Latham v. Rutly*, 2 B. & C. 22; 3 D. & R. 211); therefore, if the carrier excepts his liability from loss occasioned by fire or robbery, &c., it must be so stated (*lb.*); or,

[*692] if he give notice that he will not pay anything for loss of goods which *exceed 5*l.*, it must be set out; but, if he give notice that he will not pay more than 5*l.* for the loss of any goods, such exception need not be noticed (*lb.*; *Clarke v. Gray*, 6 East, 563). It is sufficient to allege the reward generally, without showing what reward (*Dalston v. Janson*, 1 Raym. 58; 13 East, 114, n. (a); 2 Ch. Pl. 263; 2 N. & R. 458; 2 Ld. Raym. 115). Where a count in a declaration against a carrier by water, alleged that in consideration that the plt., at the request of the deft., had caused to be shipped on board the deft.'s vessel, a quantity of wheat to be carried to a certain place, for freight to be therefore paid to the deft., he undertook to cary the wheat safely, and deliver it to plt., on a given day; but it appeared that the deft.'s undertaking to carry was made before the whole of the wheat had been shipped on board the vessel: held, that the count might be supported, although it was objected that the consideration for the promise was executory (*Streeter v. Herbert*, 7 Moo. 283; 1 Bing. 34). An averment of an undertaking to carry goods to R., to be delivered to C. B., to be paid for on delivery, shows with sufficient certainty that the price of the goods was to be paid for by C. B., the consignee, to the carrier (*Jacobs v. Nelson*, 3 Taunt. 423). The breach must be stated with precision (*Mayor v. Humphries*, 1 C. & P. 251). An allegation, that the deft. so carelessly and negligently conducted himself; that by means thereof the goods were lost, is of such a nature as to admit of proof of gross negligence (*Smith v. Horne*, 2 Moo. 18; S. C. 3 Taunt. 144).

In a declaration in *case*, it is not necessary to state the custom of the realm as to carriers, as the action is founded on the general obligation of the law, and *ex delicto* for acting against it (*Ansell v. Waterhouse*, 2 Ch. R. 3, 4). But the declaration should show the deft. was a common carrier, or some other fact, to show his common-law duty and liability (*ante*, p. 689; see *Brotherton v. Wood*, 3 B. & B. 58; 6 Moo. 141; *Price*, 408).

The declaration must show a duty. Several counts for the same cause of action are prohibited by R. G. H. T. 4 Will. IV. r. 5, but a count in *trover* may be added to a count in *case*. The declaration must state the particular contract, or particular duty, or consideration from which the liability results, and on which it is founded, and a variance in the description of a contract may be as fatal as in an action against contractor (*Max v. Roberts*, 12 East, 89; *Bowman v. Brown*, 4 P. & D. 401; *Ireland v. Johnson*, 1 B. N. C. 162; *Brotherton v. Wood*, 6 Moo. 34; 9 Pri. 408).

The declaration stated that the plt. delivered to the defts., and the defts. accepted a package to be taken care of and carried from L. to B., and there delivered to B. B., for reasonable reward, and thereupon it became the duty of the defts. to take care, &c., in the conveyance of the said package. Plea, that the plts. did not deliver to the defts.; at the trial the jury found a verdict for one of the defts. and against the other: held, that the declaration might

be read as charging the defts. in tort on the general custom of the realm, and not on a contract, and the court were bound so to read it after verdict, and to support the finding, though against one only of the defts. (*Pozzi v. Ship-ton*, 1 P. & D. 4; 8 Ad. & E. 963). The court, however, doubted if it would be good on special demurrer. In an action of case against a carrier for the loss of a trunk: held, that the *terminus a quo* was immaterial, as the gist of the action was the non-delivery at the place it ought to have gone to (*Woodward v. Booth*, 7 B. & C. 301). By the 1 Will. IV. c. 68, s. 5, any one or more of mail contractors, stage-coach proprietors, or common carriers, may be sued by his, her, or their name or names only; and no action or suit for damages for loss or injury to any parcel, package, or *person, shall abate by the want of joining any co-proprietor, or [*693] co-partner. A. and B. are partners in the business of public carriers; by contract between them A. finds horses and drivers for certain stages, and B. supplies them for the remaining stages; they are, notwithstanding this division of the concern between them, responsible for the misconduct and negligence of the drivers and servants throughout the whole distance, and it is no defence to B. that the servant by whom an injury is committed, was the special servant of A., and hired and paid by A. alone (*Weyland v. Elkins*, Holt, 227; 1 Stark. 272). The first count of a declaration stated that the defts. were owners and proprietors of a railway from W. to S.; that they were common carriers for hire in and upon the said railway, from, &c., to, &c., and being such carriers as aforesaid, one R., at defts.' request, became and was a passenger in, upon and along the said railway of the defts., and the defts. then received the said R. as a passenger, &c., together with his luggage, also to be carried and conveyed from, &c., to the station or terminus at S., there safely to be delivered for reward. Breach, that the defts., not regarding their duty, took so little and such bad care in and about the carrying and conveying of the said luggage that, by and through the carelessness, &c., the said luggage became and was wholly lost. Held, sufficiently assigned, and to support the count it was enough if the evidence showed that the luggage was placed in defts.' custody, and whilst so under their care was lost, it being their duty as common carriers safely to deliver, as well as carry and convey, the luggage (*Richards v. London and Brighton and South Coast Railway Company*, 13 Law T. 139, C. P.).

The other points as to a declaration in assumpsit will be here applicable (*supra*).

Plea.] See further, with reference to pleas, *ante*, p. 694.

Precedents.

Against a carrier for losing a parcel.

[*Commencement of Declaration, post*, "DECLARATION."] For that whereas the deft. before and at the time of the delivery of the parcel goods and chattels to him as next hereinafter mentioned was and thence hitherto hath been and still is a common carrier of goods and chattels for hire to wit from C. to L. And the plt. then caused to be delivered to the deft. as such carrier and he then accepted and received a certain parcel containing divers goods and chattels to wit, &c. (*here specify the articles fully and particularly*) of the plt. of great value to wit of the value of £ to be safely and securely carried and conveyed for the plt. by the deft. as such carrier from C. aforesaid to L. aforesaid and there at L. aforesaid to be safely and securely delivered by the deft. for the plt. within a reasonable time in that behalf for a certain reward to the deft. and it then became the deft.'s duty safely and securely to carry convey and deliver the said parcel and its contents aforesaid. Yet the

deflt. not regarding his duty as such common carrier as aforesaid did not safely or securely carry or convey within such reasonable time as aforesaid or at any other time the said parcel and its contents aforesaid from C. aforesaid to L. aforesaid nor to wit at L. aforesaid safely or securely deliver the same for him the plt. but although such reasonable time as aforesaid had elapsed before the commencement of this suit then so carelessly improperly and negligently behaved and conducted himself in that behalf that by and through the carelessness negligence and default of the deflt. in the premises the said parcel and its contents aforesaid being of the value aforesaid became and were and are wholly lost to the plt. Whereby &c. (*adding special damage, if any, to the plt.*). To the plt.'s [*694] damage of £ and thereupon he brings suit &c. [*Add a count in trover, *if there be any evidence of a conversion (3 East, 70, ante, p. 325); or if the parcel were lost by the wilful negligence of the deflt. (Wyld v. Pickford, 8 M. & W. 443).*]

Assumpsit against a railroad company for losing a box.

[*Commencement as ante, p. 693.*] For that whereas the deflt. before and at the time of making of his promise next hereinafter mentioned was a common carrier of parcels goods and chattels for hire in and by certain carriages running upon a certain railroad from a certain place to wit from to a certain other place to wit to and the deflt. being such carrier as aforesaid the plt. heretofore to wit on the day of A. D. 18 at the request of the deflt. caused to be delivered to him as such carrier a certain box containing certain goods and chattels to wit (*describe them fully and particularly*) of the plt. of great value to wit of the value of £ to be taken care of and safely and securely carried and conveyed by the deflt. and as such carrier as aforesaid in and by the said carriages from aforesaid to aforesaid and there within a reasonable time in that behalf to be safely and securely delivered by the deflt. for the plt. for reward to the deflt. in that behalf and in consideration thereof he the deflt. then undertook and promised the plt. to take care of the said box and its contents and safely and securely to carry and convey the same, in and by the said carriages from aforesaid to aforesaid and there within a reasonable time in that behalf safely and securely to deliver the same for the plt. and although the deflt. as such carrier as aforesaid then had and received the said box and its contents for the purpose aforesaid yet the deflt. not regarding his said promise did not take care of the said box and its contents or safely and securely carry or convey the same from aforesaid to aforesaid nor there within a reasonable time in that behalf or at any time safely or securely deliver the same for the plt. although a reasonable time for such delivery had elapsed before the commencement of this suit and the deflt. being such carrier as aforesaid so carelessly and negligently behaved and conducted himself with respect to the said box and its contents that by and through the mere carelessness negligence and improper conduct of the deflt. and his servants in that behalf the said box and its contents being of the value aforesaid afterwards to wit on the day and year aforesaid became and were and are wholly lost to the plt. To the plt.'s damage of £ and thereupon he brings suit &c.

See other forms of declarations, Index to 2 Ch. Pl. 103.

Pleas.

Abatement.] In an action on the case against the proprietor of the coach, as a common carrier for not safely conveying a passenger, held that he could not plead in abatement the non-joinder of a co-proprietor (*Ansell v. Waterhouse*, 2 Ch. R. 1; 6 M. & S. 385; and see *Beale v. Bird*, 2 D. & R. 419, *contra*; *Puddle v. Willson*, 6 T. R. 369; see also *Powell v. Layton*, 2 N. R. 365; *Mitchell v. Tarbut*, 5 T. R. 649). But by the 1 Will. IV. c. 68, s. 8, no action or suit for damages for loss or injury to any parcel, package, or person shall abate for the want of joining any co-proprietor or co-partner.

Non Assumpsit as in the ordinary case of assumpsit; *ante*, "ASSUMPSIT."

Not Guilty as in the ordinary case of the general issue; see Index, General Issue.

Special Pleas.] Assumpsit against the deft. as common carrier, to recover the value of goods delivered to him, and to be taken care of and safely carried by him, as such carrier, in his cart from N. [*695] to B. *and there safely to be delivered by him for the plt., but which were lost by his negligence. Plea, that when the deft. received the goods an express condition and agreement was made between him and the plt., that the plt. should accompany the cart, and watch and protect the goods from being lost or stolen, and that he neglected and refused so to do, and by reason whereof, and not by reason of any negligence of the deft., the goods were lost: held bad, on special demurrer, as amounting to the general issue (*Brind v. Dale*, 2 M. & W. 775; 1 Jur. 847).

Declaration in case against the Grand Junction Railway Company for the loss of goods delivered to them as common carriers to be safely and securely carried and conveyed. Plea, that the delivery and receipt of the goods were and happened after the 4 Will. IV. c. 4, and that at the time of such delivery the plt. became and was a passenger by the railroad, and that the goods were delivered to be conveyed with him, as such passenger, and that no part thereof were articles of clothing of the plt. To this plea there was the general replication *de injuriâ*: held, on special demurrer, that the replication was ill, as the plea did not consist of matter of excuse, but amounted to the general issue, being an argumentative traverse that the goods were delivered to the defts. as common carriers (*Elwood v. Grand Junction Railway Company*, 5 M. & W. 669; 8 Dowl. 225). Declaration on a contract by the master of a steam-vessel to convey goods from Dublin to London, and to deliver the same at the port of London to plt., or assigns; a plea that after the arrival of the vessel at London, deft. caused the goods to be deposited on a wharf, there to remain until they could be delivered to the plt., the wharf being a place where goods from Dublin were accustomed to be landed, and a fit and proper place for such purpose; that before a reasonable time for delivery elapsed, they were destroyed by fire which broke out there by accident: held ill, as they neither alleged a delivery of the goods to the consignee or his assigns, nor that a delivery at the wharf was a delivery to him or them according to the usage of the port of London with respect to goods on such voyage, nor that the plt. below had notice of the arrival of the goods, nor that a reasonable time had elapsed for them to come and receive them, when the goods were landed or when they were destroyed, nor that the plt. below had notice that the defts. below were ready and willing to deliver the goods, nor that if, as the goods were deliverable to the plt. below or his assigns, the defts. below were not bound to deliver them until they had notice that the plt. below, or some assignee would receive, or until the party entitled should come to receive them, still the defts. below were bound to keep the goods on board (or on the wharf, at their own risk) for a reasonable time to enable the consignee or his assigns to come and fetch them, and they would be liable until such reasonable time had elapsed (*Gatliffe v. Bourne*, 4 Bing. N. C. 314; 5 Sco. 667; *Bourne v. Gatcliffe*, 3 Sco. N. R. 1; 7 M. & Gr. 850; 8 Sco. N. R. 604).

In a count on a promise in consideration of a previous delivery, to be carried to London for freight, and of the employment of the defts. below by the plt. below, for other reward, to take care of the goods at the wharf where they should be landed, and to carry and convey the same from such wharf to the place of business of the plt., and there to deliver them to the plt. below, within a reasonable time after landing, and assigning for breach the non-delivery of the goods although reasonable time for that purpose had elapsed. Plea, that after the arrival of the steam-vessel in London with the goods on board, and after the goods had been safely landed on the wharf,

the defts. below had caused the same to be safely deposited and stowed upon the wharf, until they could be carried and conveyed ^{therefrom}, [*696] and delivered to the plt. below, the said wharf being an usual and fit and proper place for that purpose, and that the defts. below took care of the goods whilst they remained upon the wharf until afterwards, and before they could be conveyed from the wharf and before a reasonable time for their being so conveyed or for the delivery thereof to the plt. below had elapsed, the goods were destroyed by an accidental fire, by means whereof, and from no other cause, and without any carelessness, negligence, or improper conduct, or want of due care in the defts. below, they were prevented from delivering the goods to the plt. below: held, (reversing the judgment of the court below), that the plea was a good answer to the count, and the contract to carry from the wharf for other reward not being of the same nature as the contract to carry to it, there being no averment in the count that the defts. below were common carriers whilst the goods were in the warehouse all that they were bound to do by the contract, as alleged in the declaration, was to take reasonable care of the goods whilst there (Bourne v. Gatcliffe, 3 Sco. N. R. 1; 8 Sco. N. R. 604).

Evidence being admitted on the part of the plt. (written and parol) of former dealings between himself and the defts., as to the carriage of goods from deft.'s wharf to the plt.'s place of business: held, that such evidence was properly admitted, not for the purpose of superseding any condition or in any manner varying or altering the written contract, but for the purpose of ascertaining the course and usage of delivery in the port of London (Bourne v. Gatcliffe, 3 Sco. N. R. 1). Held also, upon a bill of exceptions, that the judge was warranted in declining to tell the jury that a delivery at F.'s wharf was in point of law a sufficient delivery, and discharged the defts. from all further responsibility, and that no contract could be inferred from the course of dealing to vary or superadd to the written contract in the bill of lading, and that the jury were properly directed that the question whether or not there had been a delivery of the goods was a question for their consideration, and that it was for them to say whether upon the whole of the evidence a delivery at F.'s wharf was a delivery according to the usage and practice in the port of London (Ib.); and *semble* that the judge was not bound to tell the jury that if the goods were in the deft.'s hands after they were landed upon the wharf, they were upon their hands as warehousemen only and not as carriers (Ib.).

In case against carriers the first count stated a delivery to the defts., at their request, of a case containing certain maps, to be carried, &c., alleging a receipt thereof by the defts., whereby it became their duty to take due and proper care thereof, but that they did not take due and proper care of them, whereby the goods were lost. Second count, in trover. Plea to first, that at the time of the delivery of the case and its contents the defts. were common carriers for hire, and then gave notice to the plt. who then had notice and knowledge that the defts. would not be responsible for the loss of or damage done to certain goods and chattels delivered to them for the purpose of carriage, and amongst others maps in packages or otherwise, unless the same were insured according to their value and paid for at the time of delivery; that the said case was the package in which the said maps were contained; that they received the case and maps to be carried as aforesaid, upon the terms and conditions of the said notice, and upon no other terms whatsoever, of which the plt. at the time of the delivery had notice, and that the maps were not at the time of the delivery insured according to their value, or paid for. To the count in trover, a similar plea alleging the conversion to have been by mis-delivery through mistake and inadvertence. On spe-

cial demurrer to both pleas: held, first, that *the action being founded on a breach of duty *ex contractu* the allegation in the plea of a special contract was sufficient, and that as the defts. accepted of the goods only on terms of the notice, a special averment of the plt.'s consent was unnecessary: secondly, that the third plea was not an argumentative traverse of the facts in the declaration from which the breach of duty was implied: thirdly, that as the declaration might apply to any kind of negligence it was not necessary to allege in the third plea that the loss was occasioned by such negligence as the defts. were not responsible for, and that if the defts. had committed negligence for which they were liable, notwithstanding their notice the plt. should have new assigned it; fourthly, that the case was not separable from the maps: fifthly, that the plea to the count in trover could not be supported, inasmuch as it admitted a conversion by inadvertent delivery, and did not show that the inadvertence was such as was protected by the notice (*Wyld v. Pickford*, 8 M. & W. 444).

The declaration stated, that defts. were common carriers for hire from Southampton to Gibraltar, which was stated to be a place beyond sea. Plea, that they were not carriers as in the declaration alleged. Held, that the fact of their being common carriers, undertaking to carry for any one who chose to employ them was only put in issue, and not their liability as common carriers according to the custom of England (*Benett v. Peninsular and Oriental Steam-Boat Company*, 18 Law J. 85, C. P.; 13 Jur. 347).

In an action against a carrier for the loss of a parcel of more than 10*l.* value, if the deft. wish to avail himself of the want of notice of value under the 11 Geo. IV. & 1 Will. IV. c. 68, he must plead it specially (*Syms v. Chaplin*, 8 D. 429; 5 Ad. & E. 634; 1 Nev. & P. 129).

In an action against the proprietors of a mail coach for the loss of a parcel, which was sent to an inn at Melksham, where the deft.'s coaches stopped to take up parcels, and the booking was paid for there, the defts. having no regular booking-office; the defts. pleaded the general issue, and also that the parcel contained property within the description in 1 Will. IV. c. 68, s. 1, above the value of 10*l.*; that it was not delivered at a receiving-house of the defts., but to their servant, and that plt. did not at the time of delivering the same to such servant declare the value of the parcel, nor did he ever pay an increased rate of charge for it. To the latter plea the plt. replied *de injuria*. The jury found that the receiving-house was a receiving-house of the defts., and it appeared the plt. had not declared the value of the goods: held, that the plt. was entitled to a verdict on the second plea, and that the deft. could not treat the plea as one relying only on the declaration of value, and reject the rest of it, and that such a defence could not be shown under the general issue (*Syms v. Chaplin*, 5 Ad. & E. 634).

Payment of Money into Court.] Money may be paid into court in all actions for loss or injury. In an action for not carrying goods safely, if deft. have restricted his liability by a notice that he will not be accountable for more than 5*l.* unless entered and paid for accordingly, the payment of 5*l.* into court does not admit a liability beyond that sum (*Clarke v. Gray*, 6 East, 570; *Yate v. Willan*, 2 East, 128). See this title, *post*.

Evidence for Plaintiff.

Proof of contract is not necessary to support an action against common carriers (*Brotherton v. Wood*, 6 Moo. 141; 3 B. & B. 54); *their duty is to carry safely, independent of any contract, and none need [*698]

be proved in an action on the case founded on the custom of the realm (Pozzi v. Shipton, 1 P. & D. 4; 8 Ad. & E. 963).

Proof of Defendant's being a Carrier.] It has been held, that any person undertaking for hire to carry the goods of all persons indifferently is to be considered a *common carrier* (Gisbourn v. Hurst, 1 Salk. 249; Cro. Eliz. 596); as the owners and masters of vessels (Morse v. Slue, 2 Lev. 69; Trent and Mersey Navigation Company v. Wood, 3 Esp. 127; 4 Doug. 287; see the stat. 26 Geo. III. c. 86, which limits the liability of owners of ships; the liability of a ship-owner, though master, was in some respects apparently like that of a charterer, Colvin v. Newberry, 8 B. & C. 166; and see Fenton v. Dublin Steam Company, 1 P. & D. 103), a wharfinger conveying goods from his wharf to the vessel in his own lighters (Maving v. Todd, 1 Stark. 72), hoymen (Wardell v. Mousillyan, 2 Esp. 693), bargemen (Rich v. Kneeland, Cro. Jac. 330), the proprietors of stage coaches, or of mail coaches, carrying goods, passengers, &c. (White v. Boulton, Pea. 80), or of common wagons (Jer. Car. 11, &c.; Coggs v. Bernard, Ld. Raym. 918; Morse v. Slue, T. Raym. 220; 1 Salk. 249, 282), or of a stage van (Rex v. Middleton, 3 B. & C. 164), and a railway company (see Palmer v. Grand Junction Railway Comp. 7 D. 223; 4 M. & W. 749). But a town carman not conveying goods from one known terminus to another, nor at any fixed rate, nor the goods of several persons at the same time, but plying in the streets and undertaking jobs as he can get them, is not a common carrier (Brind v. Dale, 2 M. & R. 80; 8 C. & P. 20). A person who conveys passengers only is not a common carrier (Aston v. Harmer, 2 Esp. 533; Christie v. Greggs, 2 Camp. 79; see Sharpe v. Grey, 9 Bing. 460); nor is a cab or coach proprietor a common carrier so as to be liable to the same extent (Ross v. Hill, 2 C. B. 877). Where the deft. is not a *common carrier*, but has expressly undertaken to carry the goods safely, it is necessary for the plt. to prove what the terms of the deft.'s undertaking were; and he will be liable for any damage which the plt. sustains, arising out of a breach of such undertaking (Robinson v. Dunmore, 2 B. & P. 416; Coggs v. Bernard, 2 Ld. Raym. 999). These facts are generally matter of parol evidence, and may generally be proved by the agents or servants who received or assisted in conveying the goods.

Where the only proof of the deft. being a carrier from London was that he kept a booking-office, and that on a board at the door were painted the words "Conveyances to all parts of the world," Lord Tenterden was of opinion that this was not sufficient, there being in London booking-offices not belonging to carriers (Upston v. Hack, 2 C. & P. 598; and see Gilbert v. Dale, 5 Ad. & E. 543). Declaration in case against the owners of a ferry stated that the owners were possessed of a ferry across the Mersey from Woodside to Liverpool, and that the plts. delivered to them certain goods, to wit, a phaeton, and certain jewellery and watches contained in it, to be by the defts., for reward to them in that behalf, taken care of and carried in a certain steam-boat from Woodside to Liverpool, and there landed for the plts., alleging acceptance and receipt of the carriage, &c.; and that it became their duty to take proper care of them while they remained in their custody, and in and about the carriage, conveyance, and landing of the same as aforesaid; breach, that the defts. took such bad care of the carriage, jewellery, and watches, and so negligently conducted themselves in and about the carriage, &c. that they were injured. Plea, traversing the delivery, acceptance, &c., to be carried, &c., from Woodside to Liverpool, and there

[*699] landed *for reward. Held, that a contract to carry and land the carriage, jewellery, &c., as stated in the declaration, could not be

implied from the mere character of the defts., as owners of the ferry, but it was a question for the jury whether there was in fact a contract between the parties, either express or implied from usage, to receive the carriage on board and to land it again at the end of the transit across the river (*Walker v. Jackson*, 10 M. & W. 161).

Termini.] The termini of the journey must be proved as laid (*Tucker v. Craklin*, 2 Stark. 285). But where the declaration in case stated that the plt. delivered a trunk to the plt. to be put in a coach at Chester, in the county of Chester, to wit, at, &c.; proof that it was delivered at Chester, in the county of the city of Chester, was held to be no variance, there being no other place of the same name (*Woodward v. Booth*, 7 B. & C. 301). So, where the declaration alleged that the deft. was the owner of a stage coach for the conveyance of passengers from London to Blackheath, and that the plt. had agreed to become a passenger, and the deft. to receive him as such passenger, to be carried from London to Blackheath, and the evidence was that the words "London and Blackheath" were painted on the coach door, and that the coach was licensed to run from Charing Cross only, and that the plt. was taken up at the Elephant and Castle, in St. George's Fields: held, that as Charing Cross and St. George's Fields are both in common parlance styled "London," the variance was immaterial, and the allegation sufficiently proved (*Ditcham v. Chives*, 1 M. & P. 735; 4 Bing. 706). Averment of a contract to carry goods from London to Bath is supported by evidence of a contract to carry from Westminster to Bath. London must be taken in the enlarged and popular sense of a collective name, and not, in a limited sense, applicable to the City only (*Beckford v. Crutwell*, 1 M. & R. 187; 5 C. & P. 242; see also *Haymer v. Raymond*, 5 Taunt. 789). A mistake would be amendable at the trial.

Ownership.] To prove the ownership of several defts., and their liability as common carriers for the loss of a parcel sent by their coach, the registry-book, kept in Somerset House, of licences granted is insufficient, unless they be shown to be connected therewith (*Strother v. Willan*, 4 Camp. 24). Declaration in *assumpsit* stated that the defts. were the owners of a vessel lying in a certain river, and bound to Liverpool; that the plt. caused to be shipped on board her a quantity of potatoes, to be safely carried by the defts., as owners of the said vessel, to Liverpool, and in consideration thereof and of certain freight, the defts. promised the plt. to take proper care of, and safely carry the said goods as aforesaid; breach, that through the defts.' negligence they were damaged. Plea, *non assumpsit*: held, that the ownership of the defts. was not admitted by the plea (*Bennion v. Davison*, 3 M. & W. 179). The inscription on a stage coach of the name of the party licensed to use it, is evidence against him of ownership, as well in an action as on summary proceedings (*Barford v. Nelson*, 1 B. & Ad. 571). Though, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the latter is the proper person to bring the action; yet if the consignor make a special contract with the carrier, such contract supersedes the necessity of showing the ownership in the goods, and the consignor may maintain the action, though the goods be the property of the consignee. The question whether the goods were delivered to the carrier at the risk of the consignor or consignee, is a question *for the jury. The delivery [*700] of goods to a carrier by a consignor does not necessarily vest the property in them in the consignee (*Dunlop v. Lambert*, 6 Cl. & Fin. 600).

Proof of Delivery of Plaintiff's Goods, &c.] Plt. must prove the deli-

very to the carrier of the goods lost, either in person, or to the servant regularly employed by him in the business (see *Boys v. Pink*, 8 C. & P. 361). In an action against the proprietor of a stage coach for the loss of a parcel, it is sufficient to prove a delivery of it to the driver (*Williams v. Cranston*, 2 Stark. 82; *Butler v. Baring*, 2 C. & P. 613), unless the delivery was for his own gain (*Butler v. Clark*, 2 C. & P. 313). A delivery of goods on board ship must be to some officer accredited for that purpose, as the mate (*Cobban v. Downe*, 5 Esp. 41). It is the duty of the book-keeper to deliver to the carrier, but he is not liable for loss by the carrier (*Gilbart v. Dale*, 5 Ad. & E. 543). A promise made by the book-keeper of a carrier at the office, to make compensation for the loss of a parcel, cannot, however, be adduced against the carrier as evidence of the delivery, unless the book-keeper be shown to be his general agent (*Olive v. Eames*, 2 Stark. 181). Where the goods are left for a carrier in an inn-yard or warehouse, at which other carriers put up, or on a wharf piled up with other goods, or with a book-keeper, it will not be considered a delivery, so as to charge him, without a special notice of their being so delivered, or some previous instructions to that effect (*Selway v. Holloway*, 1 Ld. Raym. 46; *Buckman v. Levi*, *infra*; *Gilbart v. Dale*, 5 Ad. & E. 543); as, that the carrier advertised or notified that they were to be delivered there, or that deft. was in the habit of receiving goods there (*Selway v. Holloway*, 1 Ld. Raym. 46; *Edwards v. Sherratt*, 1 East, 604), or unless the goods be booked, or receipt taken (*Buckman v. Levi*, 3 Camp. 414). A special contract with a keeper of a booking-office, who was also a part owner in a stage-coach, binds the other owners of the coach (*Helsby v. Mears*, 5 B. & C. 504; 8 D. & R. 259). A booking-office keeper who also keeps wine vaults is liable if he allow even bulky goods to remain exposed at the bar of the latter (*Dover v. Mills*, 5 C. & P. 175). If the master receive goods at the quay or beach, or send his boat for them, the owner's responsibility commences with the receipt (*Ab. Sh. by Shea*, Serjt.; *Fragano v. Long*, 4 B. & C. 219), unless he sends his own servant, who has the exclusive management of them (*East India Company v. Pullen*, 2 Stra. 600). If a servant leave a message at the booking-office of a carrier from N. to L., for his van to call for the plt.'s luggage at another inn, for the purpose of its being carried to N., and the carrier's servant and van go into the other inn, and the plt.'s luggage be then put into the carrier's van, and afterwards lost therefrom, the carrier is liable for the loss just as he would be if the luggage of the plt. had been taken to the deft.'s regular booking-office (*Davey v. Mason*, 1 C. & M. 45). Where the carriage is by means of the post-office, it will not be a sufficient delivery to make the consignee liable for the loss, if the letter was only given to a bellman (*Hawkins v. Rutt*, Pea. 186). If goods be delivered to A. under a contract that the owner should go with them, and take care of them, it is not a delivery to A., as common carrier (*Brind v. Dale*, 8 C. & P. 207). Where the plt. received a parcel from G., to book for London, at the office of the deft.'s and instead of doing so, he put the parcel into his bag, intending to take it to London, as part of his luggage, held, that defts. were not liable for the loss of the parcel (*Mills v. Cattle*, 6 Bing. 743; 4 M. & P. 630). The delivery may be proved by the *witness who left or delivered them

[*701] and he must say where he delivered them. If he got a receipt for them, he should be subpoenaed to produce and prove it; and, if they were entered in a book kept by the carrier, notice should be given him to produce it. If the goods were sent by a coach, notice to produce the way-bill should be given. It should also be proved what orders were given at the time as to the carriage of the goods and place of destination, and what was the written direction upon them. Under the 11 Geo. IV. & 1 Will. IV.

c. 68, a delivery at an office, &c., *fixed or appointed* by the carrier for receiving his parcels, is sufficient (*Syms v. Chaplin*, 1 Nev. & P. 129; 5 Ad. & E. 634). Where the carriage of goods does not exceed 20*l.*, the receipt of the carrier will be received in evidence without a stamp, though the value of the goods exceeded that sum (*Latham v. Rutley*, R. & M. 13; *Chadwick v. Sills*, ib. 14).

Proof of Delivery, &c.] If, in an action against a carrier for the loss of a parcel, the deft. pleaded that it was not delivered to him to be carried, it is sufficient for the plt. to show that it was delivered to a person and at a house where parcels were in the habit of being left for the carrier; and it is immaterial whether this person was paid any money or not; and in such an action the person who so left the parcel may be asked, on cross-examination, what direction was on the parcel (*Burrell v. Forth*, 2 C. & K. 681, Erle).

Every person employed by a common carrier, whether by the name of sub-contractor, agent, servant, or otherwise, to perform any part of the work which the carrier has undertaken to perform; and every person employed by such person for that purpose, is "a servant in the employ of the carrier," within the 8th section of the 11 Geo. IV. & 1 Will. IV. c. 68, which renders common carriers liable for the felonious acts of servants in their employ (*Machu v. London and South-Western Railway Company*, 12 Jur. 501; 17 Law J. 271, Exch.; 2 Ex. 415).

The declaration stated that the defts. were common carriers for hire on a railway from W. to S.; that the plt.'s wife was received by them as a passenger, with her dressing-case, &c., to be conveyed from W. to S., and there safely delivered to the plt., for reasonable reward. Breach, that the defts. did not use due care in the conveyance, but that, by their carelessness, &c., the dressing-case was lost. The evidence was, that the plt.'s wife was received at W. as a passenger to S., and the dressing-case was placed in the same carriage with herself; that, on arriving at S., she, being in a weak state of health, was carried to a hackney-coach, and her luggage was removed thither by the defts.'s servants, and the dressing-case was never seen after her leaving the railway carriage: held, that the evidence supported the declaration; that the duty of the defts. to deliver was alleged, and they had not delivered (*Richards v. London and South-Coast Railway Company*, 13 Jur. 986; 18 Law J. 251, C. P.). Held, also, that it was not necessary to prove negligence, though it was alleged (Ib.).

Proof of Plaintiff's Property in the Goods.] In the case of an implied contract, property in the goods must be proved to be in the plt., which may be done in the usual way, by evidence of possession and acts of ownership, as, by producing the bill of lading (*Brown v. Hodgson*, 2 Camp. 36); because, by delivery to a carrier, the property in the goods is generally held to vest in the vendee or consignee, when he alone would be entitled to sue (*Dawes v. Peck*, 8 T. R. 300; 3 B. & P. 584; see *infra*). But where, on the production of the bill of lading, it appeared that the shippers of the goods were the agents of the consignees and had paid the freight, Lord Ellenborough held that a sufficient privity of contract was established to enable the plts. to recover (*Joseph v. Knox*, 3 Camp. 321). Where, however, no freight was paid by the consignor, and the terms of the bill of lading were that the goods were shipped "for and on account of the consignee," the consignor could not maintain an action for the loss, no property being recognized in him (2 Camp. 36; *Jacobs v. Nelson*, 3 Taunt. 423; 5 Burr. 2681). The payment of freight seems to have been considered by Lawrence, J., in 3 Camp. 640, as making no difference in the right of the consignor to maintain an action against a

carrier. In *Moore v. Wilson*, the plt. averred, that the hire of the carrier was to be paid by him; but the proof was that the hire was to be paid by the consignee. Buller, J., said, "That, whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the vendor and the carrier, the former of whom was by law liable;" and the plt. recovered (1 T. R. 659). When, by a bill of lading, the captain was to deliver the goods for the consignor, and, in his name, to the consignee, and, at the time of shipment, the consignee had no property in the goods, it was held, that an action against the shipowners, for damage done to the goods, must be brought in the name of the consignor, and that, although the consignee had insured the goods, and advanced the premiums of insurance before the arrival of the ship (*Sargent v. Morris*, 3 B. & A. 277). And, where the plts. consigned goods, according to an order received, to a person they did not know, and who afterwards appeared to be a swindler, but who got possession of them by the carrier's negligence, it was held that they might maintain an action against the carrier, as the property had not passed to the consignee (*Duff v. Budd*, 6 Moo. 469).

When an express contract has been entered into, after proof of such contract, no evidence of property or ownership is requisite (*Gibbon v. Paynton*, 4 Burr. 2064; *Dawes v. Peck*, 8 T. R. 330).

[*702]. **Proof of Carrier's Duty and Liability.*] Common carriers are, by the common law, bound to receive and carry the goods of the subject for reasonable hire or reward (2 Show. 327, 81, 129). They are bound to carry safely, independently of any contract made by them, and no contract need be proved in an action on the case founded on the custom of the realm (*Pozzi v. Shipton*, 1 P. & D. 4; 8 Ad. & E. 963); and their liability is like that of insurers (*Macklin v. Waterhouse*, 5 Bing. 212; *Riley v. Horne*, 5 Bing. 217); and they are bound to take due care of goods in their passage, and also to deliver them safely (*Golding v. Manning*, 2 Bl. R. 916); and, even if they were not so bound by any general course of trade, they would undoubtedly be bound to give notice of the arrival of the goods to the persons to whom they are consigned (*Ib.*). Hence it will be considered a gross negligence, wherever damage is occasioned by the goods lying in their warehouses, whether they receive the portorage to their own use or not (said per Buller, J., in *Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 389). Thus, where a parcel of goods was directed to "Mr. James Parker, High Street, Oxford," who, on being applied to, said he expected no such parcel, and it was afterwards given to a person who called at the deft.'s office, claiming it as his, and who paid the carriage for it, it was held, however, that the carrier was responsible (*Duff v. Budd*, 6 Moo. 469). And even the known usage of a hoyman to ply at a particular wharf will not render a delivery of the goods at that wharf a discharge of his duty (*Wardell v. Thourillyan*, 2 Esp. 693; *Cobban v. Downe*, 5 Esp. 41). If a man travel in a stage coach, and take his portmanteau with him, though he have his eye on the portmanteau yet the carrier is not absolved from responsibility, but will be liable if the portmanteau be lost (*Robinson v. Dunmore*, 2 B. & P. 419; see *Middleton v. Fowler*, 1 Salk. 282; *Brooke v. Pickwick*, 4 Bing. 218; 12 Moo. 447); unless the owner undertook to watch, which would be a defence under the general issue (*Brind v. Dale*, 2 M. & W. 775). And, when the carrier acts under a bill of lading, he must conform to the terms of it. Thus, where goods have been brought by ships from foreign countries, the bill of lading is merely a special undertaking to carry from port to port: according, therefore, to the established usage of trade, a delivery on the usual wharf is such a delivery as will discharge the owners (*Hyde v. Trent Navi-*

gation Company, 5 T. R. 389). In the Thames, the master's liability, by the custom of the trade, continues whilst the goods are delivering into a lighter sent by the consignee to receive them, until the lading is completed (Catley v. Wintringham, Pea. C. 140). Where a parcel is booked at defts.' railway station for carriage to D., a place on another railway communicating with the first, but a distinct concern, this is evidence of a contract to convey it to D., unless the defts. expressly limit their contract to their own railway (Muscamp v. Lancaster and Preston Railway Company, 8 M. & W. 421). Where carriers undertake to keep their goods in their warehouse, to await the orders of the plt.: held, they were not gratuitous bailees during that time, and were liable in *assumpsit* for the loss of the goods (Cairns v. Robins, 8 M. & W. 258). It is said, that every thing is a negligence which the law does not excuse; and that, to prevent collusive litigation and the necessity of going into circumstances impossible to be unravelled, the law always presumes against the carrier, unless he shows that he is excepted from the liability he would otherwise incur, by proof of the injury having been done by the act of God, or by the king's enemies. It is the duty of the book-keeper to deliver to the carrier, but he is not *liable for loss [*703] by the carrier (Gilbart v. Dale, 5 A. & E. 543). If a cab owner is charged on an implied contract to carry passenger's luggage safely and securely, it is no variance, for it means such obligation to use ordinary care as arises out of the relation between a cab owner and his employer, and not the more extended liability of a common carrier (Ross v. Hill, 2 C. B. 877). Declaration in case, stated that defts. were proprietors of the Y. and N. M. Railway Company, and of certain carriages for the conveyance of passengers, cattle, goods and chattels, for hire; that they received nine horses of plt., to be safely and securely carried, &c., for hire; and that, thereupon, it was the duty of the defts. safely, &c., to carry and deliver, &c.; averment of the loss of one of the horses, by reason of the insufficiency of the carriages. It appeared that, when the horses were received, a ticket was given to plt., stating the sum paid, &c., and having at the bottom the following memorandum: "N. B. This ticket is issued subject to the owners undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage, however caused, occurring to horses or carriages while travelling, or in loading or unloading." Held, part of the contract, and that the alleged duty of defts., safely and securely to carry and convey the horses, did not arise upon that contract (Shaw v. York and North Midland Railway Company, 13 Jur. 385, Q. B.).

How far a carrier is liable for unavoidable accident, not coming within the description of accidents happening from the act of God or the king's enemies, see *Trent Navigation v. Wood*, 3 Esp. 127; *Ab. Sh.*, by *Shee*, Serj., 256; 1 T. R. 28, n. Where a carrier received a parcel of bank notes to be carried from London to Dover, under a contract to deliver them the next day (fire and robbery excepted), and the parcel, having been deposited by one of the defts. in a desk at their office in London, was missing a short time after he left the office: held, not to be a loss within the exemption in the contract, as it could not be considered to be a loss by robbery (*Latham v. Stanbury*, 3 Stark. 143). Where the declaration stated that for certain hire and reward the defts. undertook to carry goods from London, and deliver them safely at Dover; the contract proved was to carry and deliver safely (fire and robbery excepted): held, that this was a variance (*Latham v. Rutley*, 2 B. & C. 20; 3 D. & R. 211). A stage coachman is responsible for the loss of a parcel which he insures to carry without reward, if it be lost through gross negligence on his part (*Beauchamp v. Powley*, 1 Moo. & R. 38). Where an order is given to a carrier antecedently to the delivery

of the goods, who assents to deal with them accordingly when delivered, a duty is imposed on him on receipt of the goods to deal with them according to the order previously given, and the law implies a promise by him to perform such duty (*Streeter v. Horlock*, 7 Moo. 283; 1 Bing. 34). If A. send goods by B., who says, "I will warrant they shall go safe," B. is liable for any damage sustained by the goods, although A. send one of his own servants in B.'s cart to look after them (*Robinson v. Dunmore*, 2 B. & P. 416). The liability of a wharfinger who undertakes to convey goods from his wharf to the vessel in his own lighters, is similar to that of a carrier (*Maving v. Todd*, 1 Stark. 72; 4 Camp. 225; see "*Evidence for Defendant*," *post*).

On the general question, whether a carrier is bound to make an actual delivery at the residence of the consignee, it was held by three judges, *contra* Lord Kenyon, that he was (*Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 394; and see *Storr v. Crowley*, McClel. & Yo. 129; *Stephenson v. Hart*, 1 M. & P. 357; 4 Bing. 476; *Duff v. Budd*, 3 B. & [*704] B. 177; 6 Moo. 469); particularly *where it is his course of trade to do so (*Golden v. Manning*, 2 Bl. R. 916). But the master of a foreign ship is discharged by a delivery at the usual wharf, and giving notice to the consignee (*Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 394; see *Stock v. Harris*, 5 Burr. 2709); and he is bound to keep them a reasonable time until fetched, and is liable during that time (*Gatliffe v. Bourn*, 4 N. C. 314; affirmed, 3 Man. & G. 643; *ante*, p. 695). If a carrier deliver the goods to a wrong person, he is liable in trover (*Ross v. Johnson*, 5 Burr. 2835; *Stephenson v. Hart*, 4 Bing. 476; *post*, "*Trover*").

A carrier is liable, even without reward, if he is guilty of gross negligence (*Beauchamp v. Powley*, 1 Moo. & R. 38).

Proof of Loss of Goods, and Defendant's Negligence.] The plt. having proved the deft.'s receipt of goods, on a contract to deliver them safely at some other place, it seems to be incumbent on the deft. to prove the performance of his promise. To support an averment of loss, it is enough for the plt. to show that the goods, in fact, have not arrived (*Tucker v. Cracklin*, 2 Stark. 325; *Samuel v. Darch*, *ib.* 60). At all events, slight evidence of that fact would be sufficient, in the absence of all proof on the part of the deft. Thus, where the plt.'s shopman was called, who stated that he did not know of the delivery, and that the parcel could not have been delivered without his knowledge, Hullock, B., held it sufficient to call on the defts. to prove a delivery (*Griffiths v. Lee*, 1 C. & P. 110); but where they were bailed to a booking-office keeper, to be delivered to a carrier, the plt. must show by direct evidence that they were not delivered to one (*Gilbart v. Dale*, 5 Ad. & E. 540; *Griffith v. Lear*, 1 T. R. 659).

The declaration stated the receipt of goods by deft., and a duty to deliver, and alleged non-delivery, though a reasonable time had elapsed. Plea, not guilty. Plt. proved a non-delivery *within a reasonable time*: held, that he was entitled to recover, though it was objected that neither the duty nor the breach was properly adapted to a case of non delivery (*Raphael v. Pickford*, 5 M. & Gr. 551). A greyhound was delivered to a carrier, who gave a receipt for him, but he was afterwards lost: held, that the carrier could not set up as a defence that the dog was not properly secured when delivered to him (*Stuart v. Crawley*, 2 Stark. 323).

Before the passing of the 11 Geo. IV. & 1 Will. IV. c. 68, s. 1, a carrier was obliged for a reasonable reward to carry any goods to a place to which he professed to carry goods which were offered him, if his carriage would hold them, and he was informed of the quality and value. He was not

obliged to take a package if the owner would not inform him what were its contents and value. If he did not ask for the information, or if, when asked and he was not answered, he took the goods, he was answerable for the amount. He might limit his responsibility by notice, but that notice would not protect him against the consequences of loss by gross negligence (*Macklin v. Waterhouse*, 2 Moo. & P. 319; 5 Bing. 212; *Riley v. Horne*, ib. 331, 217). A travelling trunk, containing apparel and jewels, was lost by the deft., either through his having omitted to place it on his coach, or having fastened it there insecurely: held, that he was liable to make compensation to the owner, a gentleman travelling by his coach, though no disclosure was made of the value of the contents of the trunk, and though there was a notice in the carrier's office, limiting his liability to five pounds in the absence of such disclosure, which notice the owner of the trunk, having been in the office, had the opportunity of seeing (*Brooke v. Pickwick*, 4 Bing. 218; 12 Moo. 447); *and, under the above circumstances, the [*705] jury were properly directed to consider generally whether the carrier had been guilty of gross negligence, without reference to the nature of the articles conveyed (ib.). A common carrier must make good a loss, though not in fault, as if he be robbed (*Gibbon v. Paynton*, 4 Burr. 2298; but see *infra*). In action for negligence against carriers, it lies on plt. to prove it, and not on deft. to show reasonable care (*Marsh v. Horne*, 5 B. & C. 327).

A carrier, who undertakes for hire to carry goods, is bound to deliver them at all events, except damaged or destroyed by the act of God, or the king's enemies, even though the jury find that they were destroyed without any actual negligence in the deft. (*Forward v. Pittart*, 1 T. R. 27; *Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 389; *Dale v. Hall*, 1 Wils. 281). Where a declaration stated an undertaking to carry safely certain goods by water, with an exception of all accidents arising from the act of God, the king's enemies, fire, pirates, and all other dangers and accidents of seas, rivers, and navigation of whatever nature or kind soever: held, that this exception being beyond the common-law exception, must be specially proved (*Richardson v. Sewell*, 2 Sm. 205). How far a carrier is liable for an unavoidable accident, see *post*, p. 712.

Proof of the Value of the Goods, and Damages.] By the 1 Will. IV. c. 68, s. 7, where any parcel or package, which has been delivered, the value declared, and the increased rate of charges paid, has been lost or damaged, the party entitled to recover damages, in respect of such loss or damage, shall also be entitled to recover back the increased charges so paid, in addition to the value; and by the 9th section, carriers are not to be concluded by the declared value; they are entitled to require proof of the actual value of the contents by the ordinary legal evidence, and are only to be liable to such damages as are proved, not exceeding the declared value, together with the increased charges.

If a box of clothes, packed by the party's own hands, be sent by a carrier, and lost, the judge will recommend the jury to give the fair value of it in damages, although what particular articles the box contained cannot be proved (*Butler v. Baring*, 2 C. & P. 613). Plt. must prove of what the goods consisted, and their value, which may be done by the person who packed them.

The amount of damages depends upon the extent of the carrier's liability being established to answer for the whole value, or to the extent to which he has succeeded in limiting his responsibility by the terms of his notice (*Hutton v. Bolton*, 1 H. Bl. 229). If no fraud be established on the part of the

carrier, the presumption will be against the plt.'s demand, unless there be clear proof of the value of the goods lost; but, if the conduct of the carrier be at all tainted with fraud, a contrary rule will hold (*Clunnes v. Pezzey*, 1 Camp. 8, and note. See *post*, "*Goods Sold and Delivered*."

Where goods were given to a carrier to be delivered within a reasonable time, the plt. intending to have them ready for sale on a certain market day, and they were delivered so late that plt. was obliged to remove them for sale to another market: held, that he might recover the expense of removal from the carrier, though the deft. did not know of the plt.'s intention (*Black v. Banendale*, 1 Ex. 410; 17 Law J. 50, Ex.).

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**Evidence for Defendant.*

Under non assumpsit.] In actions against carriers and other bailees for not delivering, or not keeping goods safe, or not returning them on request; and in actions against agents for not accounting—the plea of *non assumpsit* will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach (R. G. 4 Will. IV. r. 2). Under this plea the deft. may show that he is exempted from liability in respect of the particular goods by act of parliament; and when the act makes the deft. liable for articles of clothing only, the plt. must show that the goods lost were such articles, or that there was a special contract (*Elwell v. Grand Junction Railway Company*, 5 M. & W. 669).

Not guilty.] By R. G. H. T. 4 Will. IV., the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the deft. as a carrier for him, or of the purpose for which they were received. Under a plea of the general issue, the deft. cannot show the non-declaration of value (*Syme v. Chaplin*, 5 Ad. & E. 634).

Deft. may prove that his responsibility and control over the goods as a carrier has ceased, by showing that they have reached their place of destination. Thus, where a carrier, having conveyed the goods to the place where another carrier was to take them up, deposited them in his own warehouse, for the convenience of the owner of the goods, the latter carrier not having arrived, it was held, that the former was not liable for a loss occasioned by the destruction of the goods by fire whilst in the warehouse (*Garside v. The Trent and Mersey Navigation Company*, 4 T. R. 581). But, in order to discharge a wharfinger, who undertakes to ship goods, from responsibility for goods left with him to be sent coastwise, he must prove a delivery to the mate, or some other officer of the ship, by which they are to be conveyed (*Leigh v. Smith*, 1 R. & M. 224; 1 C. & P. 638). A carrier's liability continues until delivery to the plt., and when goods therefore are destroyed by fire, until after they are deposited in the deft.'s wharf, and before a reasonable time has elapsed for the plt. to fetch them, the deft. is liable (*Bourne v. Gatcliffe*, 3 M. & Gr. 643; 7 M. & Gr. 850; *ante*, p. 695); and evidence is receivable to show what constitutes a receipt in London according to the usage of that port, and former dealings between the plt. and deft. are evidence of such usage (lb.).

In case, for negligently conveying goods whereby they were lost; plea, not guilty. It appeared that the deft.'s cart was unfit for the carriage, and that the packing was improper; but the deft. offered to show that they were packed by the plt. himself, that the cart was sufficient for a less weight, but that the plt. had misrepresented the real weight, and that the loss was there-

fore attributable to the plt. himself: held, inadmissible (Webb v. Page, 6 M. & Gr. 196).

Fraud by Plaintiff.] Whenever the carrier can show that the consignor of goods is guilty of fraud, he will be thereby discharged for the loss of the property sent by his conveyance (Tyly v. Morrice, Carth. 485; Gibbon v. Paynton, 4 Burr. 2299; Kenrigg v. Eggleston, Ayl. 93; Tichbourne v. White, 1 Stra. 145; Mayhew v. Eames, 3 B. & C. 601; Bradley v. Waterhouse, 3 C. & P. 318). But, at *common law there is [*707] no necessity to state the value unless asked, and there be no fraud (Ib.); particularly if the suppression did not occasion the loss (Sleat v. Fagg, 5 B. & A. 342). And the maxim, *ex dolo malo actio non oritur*, has been so strictly adhered to by the courts (Batson v. Donovan, 4 B. & A. 21), that it has been considered unfair on the part of the plt. to refrain from disclosing the value of a parcel, the risk of conveying which the carrier has endeavoured to guard himself against by a public notice (Bignold v. Waterhouse, 1 M. & S. 255; Harris v. Packwood, 3 Taunt. 264; Mills v. Cattle, 6 Bing. 473; see 4 Burr. 2301; B. N. P. 71; *infra*). And, where it appears that the contract is made under such circumstances, and at such a times, as would negative that the goods were delivered in the usual course of dealing as a common carrier, he will be discharged from liability in that character (Edwards v. Sherratt, 1 East, 604. And see further, *post*, 713, as to plt.'s negligence).

Notice, &c., restricting Carrier's Liability.] Deft. may also give in evidence as a defence, that plt. had previous notice that the deft. had restricted his liability, and that he would not be answerable for the whole or part of the value of any goods, or of goods of any particular description, delivered to him, unless informed of their value, and paid for accordingly; in which case it will be presumed that the owner of the goods agreed to such limitation of deft.'s liability, and the carrier will not be liable in case of a loss not occasioned by his fraud, misfeasance, or carelessness, but arising from one of the various accidents to which his employment is subject (Clay v. Willan, 1 H. Bl. 298; Izett v. Mountain, 4 East, 371; Ch. Con. 488; Maving v. Todd, 1 Stark. C. 73). The general rules upon this subject were stated by the court in Macklin v. Waterhouse, and Riley v. Hone, *ante*, p. 704.

The burden of proof of the plt.'s knowledge of deft.'s notice lies on the deft. In order to affect the plt. with the deft.'s notice, it is not essential that there should be any direct and immediate communication, if the notice be a general one (Gibbon v. Paynton, 4 Burr. 2298), if the means adopted are such whence a jury may reasonably infer that a knowledge of its contents was notified to the person dealing with deft. (Evans v. Soule, 2 M. & S. 1; Clay v. Willan, 1 H. Bl. 298). The deft., however, must fix the plt. with a knowledge of a particular notice set up, by clear and explicit evidence (Clark v. Gray, 4 Esp. 177); and it will be sufficient for the deft. to show that the notice was affixed in a conspicuous situation in the office to which the goods were brought by plt. or his servant (Leeson v. Holt, 1 Stark. 186), provided the party can read (Davis v. Willan, 2 Stark. 279; *ib.* 53); and did in fact read the notice (Ker v. Willan; and see Brooke v. Pickwick, 4 Bing. 222); and the notice must be in *such large characters*, that the person delivering the goods cannot fail to read it, without gross indifference and negligence (Clayton v. Hunt, 3 Camp. 26). Nor is the notice sufficient, if a bill be posted up, blazoning the advantages of his conveyances, and stating the notice restricting his liability in small characters at the bottom of such bill (Butler v. Heane, 2 Camp. 415). A notice in the office will not be regarded as the terms of the contract, if the carrier circulate hand-bills less restrictive

of his liability (*Cobden v. Bolton*, 2 Camp. 108; and, where two notices are given, the carrier will be bound by that which is least beneficial to himself (*Munn v. Baker*, 2 Stark. 255). A notice in the coach-office will [*708] be insufficient, if the *goods were not delivered at the office where the notice is exhibited, but are delivered into a cart sent round to receive goods (*Clayton v. Hunt*, 3 Camp. 27); or at an intermediate stage between two places, from each of which the carrier conveys goods to the other, although notices are suspended at each extremity of the journey (*Gouger v. Jolley*, Holt, C. 317).

Notice to the vendor of goods, that the carrier by whom he sends them limits his responsibility, is equivalent to notice to the vendee who directs them to be sent (*Maving v. Todd*, 1 Stark. 72); the former having, in such cases, an implied authority to insure the goods as may be necessary (*Clarke v. Hutchins*, 14 East, 475). So, if an agent send a parcel by a common carrier, who has previously given a notice restrictive of his liability to the principal, the carrier is not responsible, though the agent was not apprised of such notice (*Mayhew v. Eames*, 3 B. & C. 601; 5 D. & R. 484; *Alfred v. Horne*, 3 Stark. 136). A notice may also be sufficiently conveyed by hand-bills (2 Camp. 107, 415), printed cards, or by advertisements in the newspapers; and, in the case of the hand-bills or printed cards, delivery to the person should be proved. Where there was contradictory evidence whether a ticket, limiting the liability to carriers, had been delivered by them to the consignor at the time they took the goods in charge, it was held to be properly left to the jury whether such ticket had been delivered, and that it was unnecessary to leave to them, whether or not it had been read over and explained to him (*Palmer v. Grand Junction Railway Company*, 4 M. & W. 749; 7 Dowl. 252). But, where the notice was conveyed by an advertisement contained in the newspaper, it must be proved that he read such advertisement, as it will not be presumed that he knew of such notice, though it be proved that he had taken in the paper for three years, wherein the notice had been advertised weekly (*Rowley v. Horne*, 3 Bing. 2; *contra*, *Leeson v. Holt*, 1 Stark. 186; but see *Mun v. Baker*, 2 Stark. 255). Proof must be given that he took in the paper in question (*Norwich Navigation Company v. Theobald*, Moo. & M. 153; and see *Boydell v. Drummond*, 11 East, 144).

Knowledge of a notice may be brought home to a party by other means. Thus, an acquiescence in the loss of parcels sent by a carrier, who had published a general notice, and a direction to the person sending the parcels to insure them for the future, would be sufficient evidence to show a knowledge of the notice (*Roskell v. Waterhouse*, 2 Stark. 461). The effect of a notice will not be destroyed, where it restrains the liability of the defts. to 5*l.* unless the goods be entered and paid for accordingly, though the goods were known to the carrier to be of greater value, and though the additional rate of carriage was not demanded by him (*Marsh v. Horne*, 5 B. C. 322; *Levi v. Waterhouse*, 1 Pri. 280); nor though on occasion of other losses the carrier made allowances to the plt. for damages, without inquiring into the cause (*Evans v. Soule*, 2 M. & S. 1). To prove the contents of a notice painted on a board, inlaid in the wall, an examined copy is sufficient (*Cobden v. Bolton*, 2 Camp. 108).

Extent of Notice.] The extent of the carrier's defence must be limited by the terms of his notice, which may be collected from the following. Where the notice was, "Valuable goods will not be accounted for, if lost, of more than 5*l.* value, unless entered as such, and one penny insurance for each pound value paid on the delivery," &c., &c., the court held, that the tenor

of these conditions seemed to be, that the defts. were not liable to any extent, *unless the parcel had been entered and paid for as valuable; and the plt. neither recovered to the extent of 5*l.*, nor yet [**709*] the price paid for carriage and booking (Clay v. Willan, 1 H. Bl. 298). Where the notice was, that the carrier would not be answerable for any goods committed to his care above the value of 20*l.*, unless he was paid in proportion to the risk, his liability to that extent was held to be admitted, and he was allowed to pay that sum into court (Yate v. Willan, 2 East, 128, *infra*). Where the notice purported, that the proprietors would not be answerable for more than 5*l.*, unless booked and paid for accordingly, it was held, that the payment of that sum into court was to be considered an admission of the contract to be liable to that extent (Izett v. Mountain, 4 East, 371). Where the general notice was, "The proprietors will not be accountable for any parcels, &c., of more value than 5*l.*, unless entered as such, and paid for accordingly," it was held, that the plt., under the terms of such a contract, was not entitled to recover anything, the goods being above the value (Nicholson v. Willan, 5 East, 507, *supra*). Where the notice was, "Take notice, that no more than 5*l.* will be accounted for, for any goods or parcels delivered at this office, unless entered as such, and paid for accordingly," the plt. was allowed to retain his verdict for 5*l.*, as a limited amount of damages recoverable by him under the conditions of this contract (Ellis v. Turner, 1 T. R. 531). Where the notice was, "Take notice, that the proprietors, &c., at this office, will not be accountable, &c., for any goods, or any package whatever, if lost or damaged, above the value of 5*l.*, unless insured and paid for," &c., the court said they could not withhold giving effect to those terms in the notice, by which, inasmuch as the goods in question were above the value of 5*l.*, and not insured or paid for at the time of the delivery, the defts. could not be held accountable at all; and the verdict even for 5*l.* was set aside, and a nonsuit entered (Clarke v. Grey, 6 East, 564). And a notice, that a carrier will not be liable for goods of a certain description, or any other goods, above the value of 5*l.*, unless insured, and their value be stated to him, does not apply to articles which do not fall within the goods described, and, from their appearance, evidently exceed the small specified value (Beck v. Evans, 3 Camp. 267). And a strict compliance with the notice is dispensed with, by his being informed of the nature of the goods, and their value, and told to charge what he pleased, provided they were taken care of (Wilson v. Freeman, 3 Camp. 527). *Seem*, where carriers run a coach from A. to B. and back, notice that they limit their responsibility from A. to B., was notice that they limited it likewise from B. to A. (Riley v. Horne, 5 Bing. 217).

But the common law with regard to notice has been materially varied. By the 11 Geo. IV. & 1 Will. IV. c. 68, the first section of which enacts that no mail contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article of property of the following description, viz., gold and silver coin of the realm or of any foreign state, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, watches, clocks or time-pieces of any description, trinkets, bills, notes of any bank in England, Scotland, or Ireland, orders, notes or securities for payment of money, English or foreign stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured or unmanufactured state and whether wrought up or not with other materials, furs, lace, or any of them, *contained in any packages delivered, either to be carried for hire, or to accompany the person of any passenger, if [**710*] the value exceed 10*l.*, and an increased charge, or engagement to

pay the same, be accepted. By section 2, the rate of such increased charge is to be notified by a public notice, affixed in some conspicuous part of the office, warehouse, or receiving-house, which shall bind the parties sending, without further proof of its having come to their knowledge. And by section 3, carriers are to give (if required) receipts for packages, acknowledging the same to be insured; and if not given when required, or the notice be not affixed, they are not to have the benefit of the act. By section 6, nothing in the act is to extend or be construed to annul, or in anywise affect, any special contract between parties for the conveyance of goods. And by section 8, nothing is to be deemed to protect carriers from liability to answer for loss or injuries arising from the felonious acts of servants, nor to protect servants from liability for loss or injury occasioned by their own personal neglect or misconduct. This act extends to all the articles enumerated in the 1st section, although not within the words of the preamble, "an article of great value in small compass" (*Owen v. Barnett*, 2 C. & M. 352; 4 Tyrw. 133; see *Hendon v. Dibden*, 2 Q. B. 646); and to entitle a plt. to recover for the loss or injury to any article of such description, he must give express notice to the carrier of the value and nature of the article (*Ib.*). It is not sufficient if the carrier have a mere conviction as to what the contents are (*Boys v. Pink*, 8 C. & P. 361). But a declaration to be made by the consignor of the goods, is not a condition precedent to his recovering for their loss, and is unnecessary, unless the notice required by section 2 be affixed in the office when the goods are delivered to or for the carrier (*Syms v. Chaplin*, 1 N. & P. 129; 5 Ad. & E. 634). It has been held that to rebut evidence of usage to take on board and land the carriages of passengers, a notice stuck up at the door of entrance for foot passengers to the slip at Woodside, but not visible to those who came with carriages, and not shown to have been known to the plt. that the deft. did not undertake to load or discharge horses or carriages, and would not be responsible for loss or damage thereto, was not admissible (*Walker v. Jackson*, 10 M. & W. 161). A looking-glass of greater value than 10*l.* was packed in a case, and sent to a carrier's office, to be conveyed from A. to the house of S., near L., a notice was fixed upon the office, pursuant to the second section of the act. The words "plate-glass looking-glass, keep this edge upwards," were written on the case, but no declaration was made of the nature and value of the article, and increased rate of carriage paid. The parcel was conveyed from L. to the place of its ultimate destination on a brewer's truck, that being the usual mode of conveying parcels in that part of the country. When the glass was unpacked, it was found to be broken: held, that the carrier was not liable for the damage occasioned by the breakage of the glass (*Ib.*). *Seemle*, the carrier would have been liable if he had been guilty of gross negligence (*Ib.*). Whether the above act protects carriers in cases of gross negligence, and as to what amounts to gross negligence, *quare* (*Boys v. Pink*, 8 C. & P. 361). There is no distinction between gross and ordinary negligence, the carrier being equally protected in either case (*Hendon v. Dibden*, 2 Q. B. 646). But notwithstanding the statute, he would be liable for delay or negligence in delivering the goods (*Boys v. Pink*, *supra*), or for willful misfeasance; but in such case the declaration should be framed in trover (*Ch. jun.*, Pl. by Pearson, 102, Obs.). Looking-glasses are *within the act (*Owen v. Bennett*, *supra*). But hat-
 [*711] bodies made partly of rabbit's fur and partly of sheep's wool, do not come within it (*Mayhew v. Nelson*, 6 C. & P. 59). Silk dresses made up for wearing are not silk within the act; nor is an eye-glass, with a gold chain, to wear round the neck, "trinkets" (*Davy v. Mason*, 1 C. & M. 45).

By the 5th section, the office, &c., used or appointed by the carrier for the receipt of goods to be conveyed, is to be deemed *his* office for this purpose. An inn where the mail stops, but does not change horses, and where there is a booking-office, and where other coaches stop for the like purpose of taking in parcels, is a receiving-house within the meaning of the act (*Syms v. Chaplin*, 5 Ad. & E. 634). A railway company may also restrain their common-law liability (*Palmer v. Grand Junction Railway Company*, 4 M. & W. 749); and the usual clauses in railway acts, requiring notices of actions, do not apply to actions against them as carriers (*Ib.*).

Since the passing of the Carriers Act, carriers by *land* are unable to avail themselves of a general public notice restricting their liability, but other carriers are still at liberty to do so (see *Wyld v. Pickford*, 8 M. & W. 443). And where the carrier gives notice to the customer that he will not be answerable without payment of a higher charge, and the latter delivers the parcel without payment, this amounts to a special contract to carry on the terms of the notice within section 6 (*semble*, *Wyld v. Pickford*, *supra*). Where it appeared that the plt. went on board the deft.'s steam-boat, with his horse and carriage, paying the deft.'s charge for a light four-wheeled phaeton; that jewellery and watches of great value, which much increased its weight, were contained in a box under the seat, and that he made no communication of that fact to the deft. The carriage was taken safely across the river, and on the arrival of the boat at the pier head at Liverpool, two of the deft.'s servants put the carriage out on the slip, and commenced drawing it up the slip towards the quay, but in doing so were overpowered by its weight, and it ran down into the river, whereby the jewellery and watches were injured: held, that the plt.'s right of action for this injury was not affected by his not having communicated the fact of the jewellery and watches being contained in the carriage, as also that it was a question of fact for the jury whether (supposing a contract to land were established) the landing was complete under the above circumstances (*Walker v. Jackson*, 10 M. & W. 161).

The notice will afford no defence to the carrier in cases where he is guilty of fraud or gross negligence (*Lyon v. Mells*, 5 East, 428; *Beck v. Evans*, 16 East, 244; *Birket v. Willan*, 2 B. & A. 356; *Duff v. Budd*, 3 B. & B. 177; *Brooke v. Pickwick*, 4 Bing. 48; *Langley v. Brown*, 1 Moo. & P. 583; *Stephenson v. Hart*, *ib.* 357; 4 Bing. 476). Where there were seven horses to the wagon and only one man, it was left to the jury to say whether that was gross negligence, and they found that it was (*Beckford v. Crutwell*, 5 C. & P. 242; 1 Moo. & R. 187). A carrier is not bound to convey goods, except on payment for the full price for the carriage, according to their value, and if that be not paid it is competent for him to limit his liability by special contract; and, therefore, when a carrier receives valuable goods to carry, after notice to the bailor that he will not be responsible for loss or damage to them unless a higher than the ordinary rate of interest be paid for their carriage, he receives them on the terms of such *notice, [*712] which amounts to a special contract. But he is not exempted thereby from all responsibility, but is, notwithstanding the notice, bound to take ordinary care in the carriage of the goods; and is liable, not only for any act which amounts to a total abandonment of his character of carrier, or for wilful neglect, but also for conversion from mis-delivery, arising from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care (*Wyld v. Pickford*, 8 M. & W. 444). The degree of negligence which will render him liable is a question of fact for the jury (*Smith v. Horne*, Holt, C. 643); or, if he be guilty of any misfeasance, or wrongful act, contrary to his undertaking; as, where

the goods were lost or stolen in consequence of the carrier's leaving his cart in an unprotected state whilst delivering goods (2 Moo. 18; or if he neglect to forward the goods (*Garnett v. Willan*, 5 B. & A. 61); or send them by another coach or conveyance than that agreed on (*Ib.* 53; *Sleat v. Fagg*, *ib.* 342); but not if they are booked by another coach than that which plt. expected (*Nicholson v. Willan*, 5 Ea. 507); or beyond the place of destination (*Bodenham v. Bennett*, 4 Pri. 31; and see *Owen v. Burnett*, 2 C. & M. 533); or by an unusual and different route (see *Davis v. Garnett*, 4 M. & P. 540; 6 Bing. 716): or where he fails to deliver goods within a reasonable time (*Hyde v. Trent Navigation Company*, 5 T. R. 389). As to what amounts to gross negligence, see *Boys v. Pink*, 8 C. & P. 361. And the notice will not protect deft., where the parcel was lost in consequence of coachman's being intoxicated (*Bodenham v. Bennett*, 4 Pri. 31). The statute does not, it seems, in such cases, protect the carrier, and he is still liable for gross negligence (*Owen v. Burnett*, 4 Tyrw. 133; 2 C. & M. 533; *Boys v. Pink*, 8 C. & P. 361; and *ante*.)

Loss by inevitable Accident, &c.] A carrier at common law is not discharged or excused, in case of loss or injury to the goods, unless it was occasioned by the act of God or the king's enemies (*Jones on Bailm.* 104; B. N. P. 70; *Coggs v. Bernard*, 2 Ld. Raym. 918; *Palmer v. Grand Junction Railway Company*, 7 Dowl. 245). He is therefore liable, though robbed (*Jones on Bailm.* 103; 1 Inst. 89 a; 1 Rol. Ab. 2: as to what is a loss by robbery within the exception in a special contract, *Latham v. Stanbury*, 3 Stark. 143; *ante*, p. 703); or the goods be destroyed by accidental fire (*Forward v. Pittart*, 1 T. R. 27; *Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 389; *Gatcliffe v. Bourne*, 5 Sco. 667; 4 Bing. N. C. 314); or wrongfully seized by a third party (*Gosling v. Higgins*, 1 Camp. 451). But it is a good defence to show that the goods were sunk in the vessel in which they were sent, in consequence of a sudden squall of wind, or that they were thrown overboard to lighten the vessel, in order to save the passengers in a storm (1 Rol. Ab. 79). In order to prove a destruction or loss by the king's enemies, the goods having been taken by an armed force, it must be proved that they were taken by robbers or pirates (*Forward v. Pittard*, 1 T. R. 33). For the meaning of exception to "perils of sea and act of God," see *Buller v. Fisher*, Peak. Ad. Ca. 183; *Mordet v. Hall*, 1 M. & P. 561; 4 Bing. 607). If a carrier receive goods, he cannot set up as a defence, if the goods be subsequently lost, that they were not properly secured when delivered to him, the loss, it should seem, not arising from that cause (*Stuart v. Crawley*, 2 Stark. 323). With regard to carriers by water, they generally stipulate in their charter-party or bill of lading that they shall not be liable for losses occasioned by "the act of God, the king's enemies, fire, and all [*713] and every other dangers and *accidents of the seas, rivers, and navigations of what nature and kind soever," 26 Geo. III. c. 86, s. 2.

Loss resulting from Plaintiff's Negligence.] The deft. may also show in defence that the loss has resulted from the improper and negligent manner in which the goods had been packed or delivered by the plt. (*Wray v. Whalley*, 3 Esp. 74; see *East India Company v. Pullen*, 2 Stra. 690; *Sparrow v. Carruthers*, *ib.* 123; *Robison v. Dunmore*, 2 B. & P. 419); nor is the carrier responsible for the loss of a parcel which by agreement between the owner and owner's servant, the latter was to carry for his own private gain (*Butler v. Basing*, 2 C. & P. 613). Where a carrier gave a receipt for a dog, which was afterwards lost, it was held to be no defence that the dog had not been delivered in a state of security, there being no collar about his

neck, but only a cord. Lord Ellenborough, ruled that, after a complete delivery to the deft., the property remained at his risk, and he was bound to use proper means for securing it (*Stuart v. Crawley*, 2 Star. 323).

Declaration stated that defts. were proprietors of the Y. and N. M. Railway, and of certain carriages for the conveyance of passengers, &c., for hire; that they received nine horses of plt. to be safely and securely carried, &c.; and that it was the duty of defts. safely and securely to carry and convey and deliver the horses of plt.; and then averred the loss of one by reason of the insufficiency of one of the carriages. It appeared, that, when the horses were received, a ticket was given to plt., having at the bottom the following memorandum:—"N. B. This ticket is issued subject to the owners undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage, however caused, occurring to horses or carriages, while travelling, or in loading or unloading:" held, that these terms formed part of the contract; and that the alleged duty of defts. did not arise upon that contract (*Shaw v. York and North Midland Railway Company*, 13 Jur. 385; 18 Law J. 181, Q. B.). *Semble*, that, notwithstanding the contract, the plt. might have charged the defts. with a breach of duty, in not providing a sufficient carriage (*Ib.*).

The declaration stated, that the defts. were common carriers of passengers for hire from Southampton to a place beyond the seas, to wit, Gibraltar, in Spain. Plea, that the defts. were not common carriers of passengers for hire, *modo et formâ*; held, that this plea only put in issue the fact of their being common carriers of passengers for hire between Southampton and Gibraltar, and not their liability to carry by the custom of England (*Benett v. Peninsular and Oriental Steam-Boat Company*, 13 Jur. 347; 18 Law J. 85, C. P.).

The Railway Clauses Consolidation Act does not impose on a railway company acting as carriers any further liabilities than those which attached to common carriers (*Johnson v. Midland Railway Company*, 18 Law J. 366, Exch.).

Therefore, although the company carry coals and other goods for hire from one end of their line to the other, and carry goods other than coals from an intermediate station, they are not bound to carry coals from that station unless they have publicly professed to do so; and even if they have held themselves out as carriers of coals from that station, no action for refusing to carry coals from it will lie, unless it be shown that the company have conveniences at the station for receiving and carrying the coals (*Ib.*).

A passenger in a public conveyance, injured by the negligent management of another conveyance, cannot maintain an action against the owner of the latter, if the driver of the former, by the exercise of proper care and skill, might have avoided the accident which caused the injury (*Thoroughgood v. Bryan*, 18 Law J. 336, C. P.).

In an action against a railway company for injury received by the plt. by the breaking down of a bridge over which he was passing in a passenger train: held, that it was a proper question for the jury, whether the defts. had engaged the services of competent engineers, who had adopted the best method, and had used the best materials, and that if the defts. had done so, they would not be liable; but that the mere fact of their having engaged the services of such a person would not relieve them from the consequences of an accident arising from a deficiency in the work (*Grote v. Chester and Holyhead Railway Company*, 2 Exch. 251).

Loss by Carriers by Water.] The 2 Geo. II. c. 15, exempts carriers by water from making good, losses incurred by the misconduct of the masters

the goods were lost or stolen in consequence of the carrier's leaving his cart in an unprotected state whilst delivering goods (2 Moo. 18; or if he neglect to forward the goods (*Garnett v. Willan*, 5 B. & A. 61); or send them by another coach or conveyance than that agreed on (Ib. 53; *Sleat v. Fagg*, ib. 342); but not if they are booked by another coach than that which plt. expected (*Nicholson v. Willan*, 5 Ea. 507); or beyond the place of destination (*Bodenham v. Bennett*, 4 Pri. 31; and see *Owen v. Burnett*, 2 C. & M. 353); or by an unusual and different route (see *Davis v. Garnett*, 4 M. & P. 540; 6 Bing. 716): or where he fails to deliver goods within a reasonable time (*Hyde v. Trent Navigation Company*, 5 T. R. 389). As to what amounts to gross negligence, see *Boys v. Pink*, 8 C. & P. 361. And the notice will not protect deft., where the parcel was lost in consequence of coachman's being intoxicated (*Bodenham v. Bennett*, 4 Pri. 31). The statute does not, it seems, in such cases, protect the carrier, and he is still liable for gross negligence (*Owen v. Burnett*, 4 Tyrw. 133; 2 C. & M. 533; *Boys v. Pink*, 8 C. & P. 361; and *ante*.)

Loss by inevitable Accident, &c.] A carrier at common law is not discharged or excused, in case of loss or injury to the goods, unless it was occasioned by the act of God or the king's enemies (*Jones on Bailm.* 104; B. N. P. 70; *Coggs v. Bernard*, 2 Ld. Raym. 918; *Palmer v. Grand Junction Railway Company*, 7 Dowl. 245). He is therefore liable, though robbed (*Jones on Bailm.* 103; 1 Inst. 89 a; 1 Rol. Ab. 2: as to what is a loss by robbery within the exception in a special contract, *Latham v. Stanbury*, 3 Stark. 143; *ante*, p. 703); or the goods be destroyed by accidental fire (*Forward v. Pittard*, 1 T. R. 27; *Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 389; *Gatcliffe v. Bourne*, 5 Sco. 667; 4 Bing. N. C. 314); or wrongfully seized by a third party (*Gosling v. Higgins*, 1 Camp. 451). But it is a good defence to show that the goods were sunk in the vessel in which they were sent, in consequence of a sudden squall of wind, or that they were thrown overboard to lighten the vessel, in order to save the passengers in a storm (1 Rol. Ab. 79). In order to prove a destruction or loss by the king's enemies, the goods having been taken by an armed force, it must be proved that they were taken by robbers or pirates (*Forward v. Pittard*, 1 T. R. 33). For the meaning of exception to "perils of sea and act of God," see *Buller v. Fisher*, Peak. Ad. Ca. 183; *Mordet v. Hall*, 1 M. & P. 561; 4 Bing. 607). If a carrier receive goods, he cannot set up as a defence, if the goods be subsequently lost, that they were not properly secured when delivered to him, the loss, it should seem, not arising from that cause (*Stuart v. Crawley*, 2 Stark. 323). With regard to carriers by water, they generally stipulate in their charter-party or bill of lading that they shall not be liable for losses occasioned by "the act of God, the king's enemies, fire, and all [*713] and every other dangers and *accidents of the seas, rivers, and navigations of what nature and kind soever," 26 Geo. III. c. 86, s. 2.

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latter, if the driver of the former, by the exercise of proper care and skill, might have avoided the accident which caused the injury (*Thoroughgood v. Bryan*, 18 Law J. 336, C. P.).

Immediate Result of Defendant's Force.] And, in cases where the injurious act is the immediate result of the force originally applied by the deft., it is the subject of an action of trespass (*Scot v. Shepherd*, 3 Wils. 403; Bla. 892; *Turner v. Hawkins*, 1 B. & P. 472); as, if the deft. incited his dog to bite another, or let loose a dangerous animal (*Leame v. Bray*, 3 East, 595; 12 Mod. 333); or if, in the act of throwing a log into a public street it hurt the plt. (*Reynolds v. Clark*, 1 Stra. 636); or if a lighted squib be thrown into a market-place, and afterwards thrown about by others in self-defence, and ultimately hurt the plt., the injury is considered immediate, and the action should be trespass. See cases on the subject, cited at length, 1 Selw. N. P. 452. If a man set dog-spears in his wood, and the dog of another run against them, and be killed, case is the proper form of action, but no action will lie if the plt. had notice of the spears being set (*Jordin v. Crump*, 8 M. & W. 784).

The case of *Scott v. Shepherd*, *supra*, seems to be drawn to the utmost limit, and may always be consulted in order to ascertain to what extent the distinction may be drawn between actions on the case and actions of trespass. The form of action was trespass, for assault, and throwing a squib at the plt. whereby his eye was burned, so that he lost the sight of it. On the trial it appeared that the deft. threw a lighted squib into the market-house where a large concourse of people were assembled, and the squib falling upon the stand of B., who, to prevent injury to himself and his wares, threw it across the market-house, when it fell upon C.'s stand, who for the same reason threw it amongst the crowd, when it burst and injured the plt.: held, that trespass lay, for the deft. was the person who threw the squib, and if it had immediately hit the plt. there could have been no doubt that trespass would have been the proper form of action, and the new direction and new force given it by B. and C., were merely a continuation of the original force impressed upon it by the deft. But Blackstone, J., was of a contrary opinion, see his reasoning in this case. So, where the plt. brought an action on the case, for that he was master of a ship, which was laden with corn, and ready to sail, and that the deft. seized the ship and detained her *per quod impeditus fuit in viagio*, it was objected that trespass was the proper form

of action, but Ld. Holt held that although trespass might have been [*717] brought, declaring upon the plt.'s possession, which *would have been sufficient, yet he was not thereby prevented from declaring in case, as a particular officer, to recover his particular loss for the injury which he had himself sustained (*Pitts v. Gaince*, 1 Salk. 10); as to the right of a party who has sustained an injury which is the subject of an action of trespass, and there is also consequential damage to sue in trespass or case at his election (see *Wells v. Ody*, 5 Dowl. 95; and 1 Ch. Pl. 144, n. t). In *Weeton v. Woodcock*, Parke, B., says there is doubt that where there is a direct injury, and also consequential damage, that may form the subject-matter of either case or trespass; but where there is a direct injury to the soil and freehold, there is no other remedy but trespass (5 M. & W. 594).

This action lies in all cases of consequential injury or damage, *ex delicto*; to persons individually or to personal property; as for special damage arising from a public nuisance (see "NUISANCE"), or keeping mischievous animals (see *post*, p. 754). So, for injuries to a person arising from regular process of a court of competent jurisdiction (*post*, p. 718); as, for a malicious arrest (*Belk v. Broadbent*, 3 T. R. 185; *Johnstone v. Sutton*, 1 T. R. 535; *Cooper*

v. Booth, 3 Esp. 135; 1 T. R. 535; Gyfford v. Woodgate, 11 East, 297; Wetherden v. Embden, 1 Camp. 295; see "MALICIOUS ARREST"); for a malicious prosecution (Elsee v. Smith, 2 Ch. Rep. 304; Grainger v. Hill, 4 Bing. N. C. 212; 5 Sco. 561; Watkins v. Lee, 5 M. & W. 270; Heywood v. Collinge, 1 P. & D. 202; James v. Phelps, 3 P. & D. 231; see "MALICIOUS PROSECUTION"). A party who makes a malicious charge before a magistrate, but who prefers an indictment unwillingly, and solely because he was bound over on making the charge to prosecute, is nevertheless liable to an action for maliciously indicting (Dubois v. Keats, 3 P. & D. 306); case will not lie for causing the plt. to be rendered in discharge of his bail, where the deft. had no authority from the bail to do so unless express malice be alleged and proved (Porter v. Weston, 5 Bing. N. C. 715; 8 Sco. 25); so, in an action for causing to be registered an order of the Court of Equity against the deft. under 1 & 2 Vict. c. 110, s. 19, unless express malice be proved (Gibbs v. Pike, 9 M. & W. 351). A writ of *ca. sa.*, at the suit of B., having been lodged with the sheriff against A., who afterwards obtained an order for the protection of his person from the Insolvent Court, and the writ was allowed to remain in the hands of the sheriff. Subsequently A. was taken on another writ, which was set aside, but the sheriff detained him under the writ of B. A. then wrote to him for his consent, but he merely answered that he had not authorized his detainer; afterwards, on a summons, he indorsed his consent. Held, that an action on the case against A., for maliciously and negligently refusing to consent to his discharge, would not lie, even though he acted through malicious motives (Holloway v. Pocock, 8 Law T. 479, Ex. Pollock).

The plt. was in custody under an attachment from the Court of Chancery, for nonpayment of costs to the plt. in a suit in equity, who is the deft. in this action. After the costs were paid, the solicitor of the plt. in equity (the now deft.) refused to give an order to the sheriff to discharge the plt., saying, "Let him go to the court to purge his contempt." The judge in equity discharged him on motion. Held, that no action was maintainable for refusing to give the order to the sheriff, and thereby prolonging the plt.'s imprisonment, except on proof of express malice (Moore v. Gardner, 16 M. & W. 595; see "MALICIOUS ARREST AND PROSECUTION").

Case lies for an injury arising from maintenance (Pichell v. Watson, 8 M. & W. 691); so, for an injury arising from a false and unfounded claim of lien (Green v. Button, 2 Cr. & M. 707).

*Case lies concurrently with trespass for a malicious and un- [*718] founded proceeding in a court having no jurisdiction (Goslin v. Wilcock, 2 Wils. 302). But, where the *process is irregular*, trespass is the proper form, as, where a justice of the peace maliciously and irregularly grants a warrant against a person for felony, without an information on oath, the remedy is in trespass, and case does not lie (Morgan v. Hughes, 2 T. R. 225; Elsee v. Smith, 2 Ch. Rep. 304). But where the deft. procured a search warrant to search the plt.'s house for stolen goods, and went with the constable to search, and the plt.'s door was broken and his goods rummaged, it was held, that as it sufficiently appeared that the force used in the house was in pursuance of the warrant, the plt. had properly declared in case (Hensworth v. Fowkes, 4 B. & Ad. 449). So, in all cases where the deft. has acted under a warrant, case is the remedy (Barber v. Rollinson, 1 Cr. & M. 330); and, though case lies for maliciously issuing a commission (now a fiat) of bankruptcy (Chapman v. Pickersgill, 2 Wils. 145), yet trespass is a concurrent remedy, for, the plt. not being subject to the bankrupt laws, the commissioners could have no jurisdiction, in which case trespass is always sustainable, provided the injury be forcible and immediate (Perkin v. Proctor;

2 Wils. 382, 4; *Doswell v. Impey*, 1 B. & C. 163). In *Stokes v. White*, 1 C. M. & R. 243, it was held that case would not lie for arresting the plt. while attending as a witness at a trial, the declaration did not, however, aver malice (see *Whalley v. Pepper*, 7 C. & P. 506; and see also *Newton v. Constable*, 1 Gal. & Dav. 408). A party who was discharged from custody in Ireland, under the 3 & 4 Vict. c. 107, for the relief of insolvent debtors in that country, had inserted in his schedule of debts a judgment which had been obtained against him in one of the courts at Westminster. On his return to England he was arrested under a *capias ad satisfaciendum*, which had been sued out by the plt. in the original suit, and subsequently was, by a judge's order, discharged out of custody. Held, that no action of trespass could be maintained against that plt. for that imprisonment, but that he might be sued in *case*, if it could be shown that, in suing out the *ca. sa.* he had wilfully abused the process of the court (*Ewart v. Jones*, 9 Jur. 1015).

If a party be arrested, and the Court of Review order him to be discharged, on the ground that he was in attendance under order of that court, but the officer arresting does not discharge him, the remedy (if any) against the officer is in trespass, not *case*, though malice be alleged; so held by the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench (*Magnay v. Burt*, 5 Q. B. 381).

Case is also the proper form for injuries to rights not tangible, and consequently not liable to be affected by force, as health, reputation. &c., as in cases of libel and slander (see those titles).

Case lies against an auctioneer for not selling for ready money (*Ferrers (Earl) v. Robins*, 2 C. M. & R. 152); against an agent for improperly accepting a bill in the name of the plt. (*Pickwood v. Neate*, 10 M. & W. 206); against a railway company for negligently conducting a train (*Bridge v. Grand Junction Railway Company*, 3 M. & W. 244; *Aldridge v. Great Western Railway Company*, 1 Dowl. N. S. 247; 4 Sco. N. R. 150). And for any misfeasance by a party in a trade which he professes, the plt. may maintain an action on the case, as if a smith in shoeing my horse pierce him, and other such cases (1 Saund. 312 a, & n. (2)). So, where A., a wine merchant, ordered a crane rope of B., a dealer in and who represented himself as a manufacturer of ropes, and B.'s foreman thereupon ascertained the nature and dimensions of the rope required, and being told that [*719] it was wanted to raise pipes of wine *from the cellar, said that a rope must be made on purpose, but B. did not make the rope himself, but sent the order to his manufacturer, who employed a third party to make the rope; it was held in an action on the case by A. against B., to recover damages resulting from the insufficiency of the rope, that B., as between him and A., was to be considered the manufacturer of the rope, and that an implied warranty arose out of the contract that it was a fit and proper one for the purpose for which it is ordered, and that the action could be supported (*Brown v. Edgington*, 2 Man. & G. 279).

Case lies against sheriffs, and justices of the peace, especially after convictions quashed (43 Geo. III. c. 141); for refusing bail (2 Saund. 61, *c. d.*; *Osborne v. Gough*, 3 B. & P. 551); and against all other officers acting ministerially (Com. Dig. Action on the case, Misfeasance (A 1.)). Where justices have jurisdiction, and the conviction is still subsisting, and is not void *ex facie*, neither the justices, nor the officers who execute the warrant of commitment, can be sued as trespassers (*Baylis v. Strickland*, 1 Man. & G. 591). So, in many cases of distress for rent, for false returns, for not levying goods, for escapes, &c. (see those titles). Case also lies for rescue, or pound breach of cattle, or goods distrained for rent, or damage feasant (1 Ch. Pl. 155); but not for detaining cattle distrained damage feasant, when

tender of sufficient amends were made after the cattle had been impounded (Sheriff v. James, 1 Bing. 341; Anscombe v. Shore, 1 Taunt. 261): nor for refusing to restore goods distrained for rent on tender of the rent, unless the tender was made before the goods were impounded (Thomas v. Harries, 1 Man. & G. 697; Ladd v. Thomas, 4 P. & D. 9; Ellis v. Taylor, 8 M. & W. 415); case lies for the rescue of a person arrested on mesne process, and for an excessive levy on a *fi. fa.* (see Waiteworth v. Bullen, 9 B. & C. 840; 1 Ch. Pl. 155). So, for not delivering letters, &c. (Rowning v. Goodchild, 3 Willes, 443); making a false return to a *mandamus* (Bowles v. Neale, 7 C. & P. 262). Case lies against the owner of a close for negligently lighting a fire there, which spread to his neighbour's close, notwithstanding statute 14 Geo. III. c. 78, s. 86, by which no action shall be maintained against any person on whose estate any fire shall accidentally begin (Filliter v. Phippard, 12 Jur. 202; 17 Law J. 89, Q. B.).

Case lies for selling goods as the manufacture of another (Blofield v. Payne, 4 B. & Ad. 410; Morrison v. Salmon, 2 Sco. N. R. 449); for counterfeiting another manufacturer's mark for goods (Crawshay v. Thompson, 11 Law J., N. S., C. P. 301). If A., a manufacturer, use the mark of B., for the purpose of giving to articles manufactured by A. the appearance of being of the manufacture of B., B. may maintain an action against A., although A.'s articles are not inferior in quality to B.'s, and although it is not shown that B. has sustained actual damage (Blofield v. Payne, 4 B. & Ad. 410). Where plt. marked his goods "Syke's Patent," to show that they were his own manufacture, and the deft. copied the mark on his goods to show that they were the plt.'s manufacture, and sold them so marked as and for his manufacture: held, that case would lie for the injury, though neither party had a valid patent and both were named "Sykes" (Sykes v. Sykes, 5 D. & R. 292; 3 B. & C. 541). Plt.'s father prepared and sold a medicine for which no patent had been obtained. The plt., after his father's death continued to sell the same, the deft. sold a medicine under the same name and mark. Held, not liable to an action (Singleton v. Bolton, 3 Doug. 293).

It lies for withholding goods under a claim of lien which the party knew to be false (Green v. Button, 2 C. M. & R. 707). It lies against a witness for not obeying a subpoena (Pearson v. Iles, Doug. 556, 561; Amey v. Long, 9 East, 473; Hallet v. Mears, 13 East, 17, n.; Lamont v. Crooke, 6 M. & W. 615); for false and deceitful *representations; [*720] for unlawfully exercising trades: which see under their respective titles.

By the 8th section of the statute 6 & 7 Vict. c. 86, the registrar appointed under that act is empowered to grant a license to parties to act as drivers of hackney carriages, &c. By the 21st section, the proprietor of every such hackney carriage "who shall permit or employ any licensed person to act as the driver thereof, shall require to be delivered to him, and shall retain in his possession, the license of such driver, whilst such driver shall remain in his service." In an action brought by a driver of such hackney carriage against the proprietor for defacing his license whilst so retained in the possession of such proprietor, the declaration was in case, and alleged that the deft. "wrongfully and unjustly wrote in ink, in and upon the said license, certain words purporting to give, and being intended to give, a character of the plt., as an improper person to act as a driver of hackney carriages; that is to say, 'Discharged, having been guilty of the most careless, reckless act.'" Held, on motion in arrest of judgment, that *case* was the proper form of action; that it was unnecessary to allege that the deft. "maliciously"

wrote the above words, and that the declaration was, therefore, good (*Hurrell v. Ellis*, 9 Jur. 1013).

One of two parties to an agreement to suppress a prosecution for felony cannot maintain an action against the other for an injury arising out of the transaction in which they have both been illegally engaged. A declaration in case stated that B. (the deft.) had charged C. with embezzlement; that it was agreed between B. and A. (the plts.) that B. should abstain from prosecuting C. and that, in consideration thereof, C., should draw and A. should accept a bill of exchange, and that C. should indorse the same to the deft. The declaration then went on to aver, that a bill was drawn, accepted, and indorsed to B., pursuant to this corrupt and illegal agreement; that B., well knowing the illegal nature of the transaction, and that A. was not liable at law to pay the amount of the bill, and that there was no reasonable or probable cause for suing him thereon, conspired with D., a pauper, that the bill should be indorsed to D., and that D. should sue A. upon the bill, for the sole benefit of B.; and that an action was accordingly brought by D. against A., in which A. obtained a verdict, on the ground of the illegality of the consideration for the acceptance, but was unable to obtain his costs, in consequence of the insolvency of D. Held, that, inasmuch as A. could not make out his case, except through the illegal transaction to which he himself was a party, the action could not lie. *Semble*, that no action will lie against a party for inciting a third person to bring a civil action against the plt. without a reasonable or probable cause (*Tivaz v. Nicholls*, 2 C. B. 501).

Case lies for the infringement of patents, inventions, copyrights, &c. (*Clementi v. Goulding*, 11 East, 244; *Roworth v. Wilks*, 1 Camp. 94). There is no exclusive right in a subject not protected by patent, so as to prevent the sale of it by another person, if that person do not assume the name and character of the plt. (*Canham v. Jones*, 2 Ves. & B. 218). *Semble*, if an invention for which a patent is granted would, if put into practice, be useful, an action for the infringement of a patent may be maintained, although the plt.'s invention has never been put into actual use except by the deft. when he infringed the patent (*Macnamara v. Halse*, 1 Car. & M. 471).

A patent granted to the patentee the exclusive privilege of making, using, exercising and vending the invention, and prohibited other persons from making, using, or putting in practice the invention: held, that the mere "exhibiting to sale" imitations of the invention was not any infringement of the patent, and a count in a declaration, *which only alleged an [*721]. exposure to sale, was held bad on general demurrer (*Minter v. Williams*, 3 Nev. & M. 347; 4 Ad. & E. 251). Where a patent is originally void, but amended under 5 & 6 Will. IV. c. 83, by filing a disclaimer to part of the invention, that act has not a retrospective operation, so as to make a party liable for an infringement of the patent prior to the time of entering such disclaimer (*Perry v. Skinner*, 2 M. & W. 471). The deft. pleaded to an action for an infringement of a patent for improvements in a cabriolet, 1st, not guilty; 2nd, that the alleged improvements were not new; 3rd, that the plts. were not the true and first inventors: held, that on these pleadings it could not be contended that the patent was illegal, being a monopoly; and that, though all the improvements claimed must be shown to be new, yet it need not be shown that the deft.'s cabriolet was an imitation of the whole of them, but an imitation of one was sufficient to maintain the action (*Gillett v. Wilby*, 9 C. & P. 334).

The substitution of mechanical equivalents is but a colourable difference

(*Morgan v. Seaward*, Web. Pat. Ca. 171). The substance of the invention, and principle of the machine, and not the mere form, are to be looked to (Ib.).

The "public use and exercise" of an invention which prevents it from being considered as a novelty is a use *in public*, so as to come to the knowledge of others than the inventor, as contra-distinguished from the use of it by himself in private, and does not mean a use *for the public generally*; therefore, where an improved lock, for which the plt. had a patent, had previously been used by an individual on a gate adjoining a public road for several years, and several dozens of a similar lock had been made at Birmingham from a pattern received from America, and sent abroad, it was held that this constituted such an use and exercise of the invention as to avoid the patent (*Carpenter v. Smith*, 9 M. & W. 300; see *post*, "PATENTS").

For the infringement of the copyright of designs for ornamental articles of furniture, see 5 & 6 Vict. c. 100, s. 8; and *post*, "COPYRIGHT").

Piracy.] Case lies if parts of a book of chronology be servilely imitated, though other parts of the book be different (*Trusler v. Murray*, 1 East, 363 n.). A count for pirating generally is not supported by evidence that there are in the original work particular errors and mistakes with which the pirated edition corresponds verbatim (*Cary v. Kearsby*, 4 Esp. 168). But it would support a count for transcribing particular matter without the plt.'s consent (Ib.). It is lawful to incorporate part of the works of a contemporary writer in a new work, if it be not a pretext for stealing the original copyright (Ib.); or if so much be not copied as to form a substitute for the original work (*Rochworth v. Wilks*, 1 Camp. 94). A fair abridgment is no infringement (*Anon. Lofft*, 75; *Bell v. Walker*, 1 Bro. C. C. 451). An abstract published in an annual register or magazine is not piracy, especially if the author himself have published extracts in a periodical paper (*Dodsley v. Kinnersley*, Amb. 403). Publishing sea charts on an improved and more useful principle, with material corrections, though many of the terms are copied from the old charts, is not piracy (*Sayre v. Moore*, 1 East, 361 n.). In 1830, A., a foreigner resident in Paris, made a legal assignment of his copyright in an opera to L., a resident in England, who, in the same year, sold his interest to C., without exacting any written memorandum; C. died in 1834; in 1836 C.'s executor obtained a legal assignment: in the mean time copies had been imported into England, and *sold in London by several [*722] tradesmen. In 1841, P. published and sold the overture in London. Held, that C.'s executor could not maintain an action against P. for piracy. *Quære*, whether, after a foreigner has published his work in a foreign country, he can at common law assign his copyright limited to Great Britain to a British subject, so as to give the assignee the benefit of the statutes relating to copyright? (*Chappell v. Purday*, 4 Y. & C. 485; see *post*, "COPYRIGHT").

Where a printer was furnished with paper to print a certain work, but instead of doing so he pawned the paper, it was holden that this was the subject of an action on the case (*Smith v. White*, 9 Law J., 129, C. P.).

Relative Rights of Persons.] Actions for injuries to persons relatively are properly in case; as, for securing or harbouring, or for enticing away or harbouring, apprentices or servants (2 T. R. 167; 6 East, 587); and though it is now usual and perhaps more correct to declare in trespass for crim. con. and debauching daughters and servants, yet as the consequent loss of society or service is the ground of action, the plt. may still bring case (see *Law v. Clarke*, 2 Ch. Rep. 260; *Chamberlain v. Hazlewood*, 5 M. & W. 515; 7 Dowl. 816; 2 Ch. Pl. Index, Debauching Wife and Daughters; see

post, "CRIMINAL CONVERSATION," "SEDUCTION"). Case lies by a master for an injury inflicted on an apprentice (*Hodsall v. Stallebrass*, 3 P. & D. 200; 8 Dowl. 482; see "APPRENTICE").

Case lies for an injury to *real property corporeal*, where it is not immediate, but consequential (see instances, *Lutw.* 69; *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Bliss v. Hale*, 4 Bing. N. C. 183; *Flight v. Thomas*, 2 P. & D. 531; see *Weeton v. Woodcock*, per Parke, B., 5 M. & W. 594). So, for continuing a nuisance created before possession by the plt. of the property in respect of which he sues (*Thompson v. Gibson*, 7 M. & W. 456); or, for nuisances of a private nature to houses, lands, &c.; as, for fixing a spout, whereby the rain is discharged in a body upon the plt.'s land (*Reynolds v. Clarke*, 2 Ld. Raym. 1399; *Haward v. Bankes*, 2 Burr. 1114); even without proof that rain had fallen between the erection and the commencement of the action (*Kay v. Prentice*, 1 C. B. 828); or causing plt.'s land to be overflowed (*Reynolds v. Clarke*, *supra*; *Haward v. Bankes*, *supra*); or where plt.'s property is only in reversion (Com. Dig. Action, Case, Nuisance, A.). So, for nailing up a board so as to overhang the plt.'s close, the remedy is case, not trespass (*Pickering v. Rudd*, 4 Camp. 219; 1 Stark. 56). But not if the injury arose from the default of the complainant; therefore, where by statute a canal company were bound to repair the banks of the canal, and they brought an action against the owner of the adjoining land for digging pits therein, thus causing the banks of the canal to give way; there was some evidence of the bank not being in repair, and it was held that the plts. were not entitled to recover unless the bank were at the time it gave way in good repair (*Staffordshire Canal Company v. Hallen*, 6 B. & C. 317). It has likewise been held that where a party built a house upon his own land, which had previously been excavated to its extremity for mining purposes, and the owner of the adjoining land worked mines under his own land too near its boundary, so as to cause the excavated land whereupon the house stood to sink, the owner of the house could not maintain an action for this injury, having no right to a support for his house from the adjoining land, except by grant, and twenty years occupation had not elapsed from which a

[*723] grant could be presumed *(*Partridge v. Scott*, 3 M. & W. 320).

It has been considered that case is the proper remedy for continuing holdfasts in the plt.'s wall after he had recovered in trespass for the original driving (*Lawrence v. Obee*, Stark. 22); but see *Holmes v. Wilson*, where trespass was held the proper remedy for continuing buttresses on land, the plt. having originally recovered in trespass for the erection (10 Ad. & E. 503). But where the injury is immediate and committed on land &c., in the plt.'s possession, the remedy is trespass (*Shapcott v. Mugford*, 1 Ld. Raym. 188; and see *Weeton v. Woodcock*, 5 M. & W. 594, per Parke, B.); and an injury will be considered to be immediate if it be the natural and inevitable consequence of the act done; as, if the deft.'s servant, by his order, place rubbish so near the plt.'s wall that it must naturally, or in all probability, roll against the wall and it does so (*Gregory v. Piper*, 9 B. & C. 591; 4 Moo. & R. 500; see *post*, p. 756).

Case lies for obstructing lights or air (*Shadwell v. Hutchinson*, *supra*; *Willis v. Oddy*, 5 Dowl. 95; see "ANCIENT WINDOWS"); for injuries to water-courses, where plt. is not owner of the soil but is entitled to the use of the water (*Carrington v. Taylor*, 11 Ea. 571; *Williams v. Morland*, 2 B. & C. 910; *Griffiths v. Murson*, 1 Pri. 10; see *Shears v. Wood*, 7 Moo. 345; see "WAX"); and by a reversioner against his tenant or a stranger (*Goodright v. Vivian*, 8 East, 190; *Attersoll v. Stevens*, 1 Taunt. 194; *Kinlyside v. Thornton*, Bl. R. 1111); for not repairing fences (*Star v.*

Rookesby, 1 Salk. 335). If A., who is bound to do so, fail to repair against B.'s land, and the cattle of A.'s tenants enter upon B.'s land and do damage, then case lies against A. (1 Rol. Abr. 105, pl. 11; B. N. P. 74). So where a fence is so badly kept that a horse belonging to the owner of the adjoining ground fall from one field into the other and is killed (Booth v. Wilson, 1 B. & A. 59); nor is the damage too remote where the plt.'s horses escaped into the deft.'s close and were killed by the falling of a haystack (Powell v. Salisbury, 2 Y. & J. 391). It lies for suffering a hayrick likely to ignite to remain near the plt.'s house, by which negligence the rick took fire and burnt the plt.'s house (Vaughan v. Menlove, 4 Sco. 244; 3 Bing. N. C. 468). If a fire broke out in the house of A. by negligence, and burned or damaged his neighbour's house, case would lie against A. (Pantum v. Isham, 1 Salk. 19; but see 8 Anne, c. 31; see *post*, p. 742). Case lies against a former rector for dilapidation (see Grady on Fixtures and Dilapidations, 256—262, where the cases are collected).

For injuries to *real property incorporeal*, case is the proper remedy; and, as trespass cannot in general be supported where the matter affected is not tangible, case lies for disturbance of common (Com. Dig. Case, Disturb. A. 1); for disturbing a decoy (Keeble v. Hickeringill, 11 East, 574; Carrington v. Taylor, *ib.* 571; 2 Camp. 258); but not for frightening away game from a preserve (*ib.*); nor for disturbing a rookery (Hannam v. Mockett, 2 B. & C. 934; 4 D. & R. 518). But it lies for obstructing a private way (Com. Dig. Case, Disturbance, A. 2); or public way, with special damage to plt. (Greasley v. Codling, 9 Moo. 489; 2 Bing. 263); or for obstructing the navigation of a river (Rose v. Miles, 4 M. & S. 101; see "WAX"). So, for the neglect of a company maintaining a canal open to the public, to prevent damage to the navigation (Lancaster Canal Company v. Parnaby, 3 P. & D. 162). So, for wrongfully keeping shut a thoroughfare in consequence of which the plt. suffered loss in his business (Wilkes v. Hungerford Market Company, 2 Bing. 281); or obstructing plt.'s right to use a pew, the possession of which is supposed to be in the ordinary *(Stocks v. Booth, 1 T. R. 430); but the pew must be annexed to a house in [*724] the parish (Mainwaring v. Giles, 5 B. & A. 356; Bryan v. Whistler, 8 B. & C. 294). The right must be by prescription, or a faculty, the mere use of a pew, however long, if unconnected with a particular house, is not sufficient evidence of a right (Mainwaring v. Giles, *supra*; see Bryan v. Whistler, 8 B. & C. 294). And the jury are not bound to presume a faculty from the circumstance of the occupiers of a certain house having used a pew for many years (Morgan v. Curtis, 3 M. & R. 389). But uninterrupted possession for thirty years is a presumptive right to a pew against a wrong doer (Griffith v. Mathews, 5 T. R. 296; Rogers v. Brooks, 1 T. R. 431, n.). Repairs done to the pew by the owner of the house are evidence of a prescriptive annexation to the house (Kenrick v. Taylor, 1 Wils. 326). In an action against a stranger for disturbing plt. in his pew, he need not allege or prove that he repaired it; otherwise, in a dispute with the ordinary (*ib.*; see Feske v. Bovitt, Loff. 423). A pew in the aisle of a church may be prescribed for as appurtenant to a house out of the parish (Davis v. Wit, Forrest, 14). So, of one in the body of the church (Lousley v. Hayward, 1 Y. & J. 583). But it must be by prescription (Byerly v. Windus, 5 B. & C. 1; 7 D. & R. 564). Upon a libel in the Consistorial Court for disturbance of the plt.'s right to a pew, the court adjudged the right to be in the plt., and admonished the deft. not to sit in the pew; the Court of Arches reversed the sentence, but admonished the deft. not to use the pew again: these sentences were held not conclusive evidence of the plt.'s right in an

action for a disturbance between the same parties (*Cross v. Salter*, 3 T. R. 639; see "*PEW*"). But trespass is the proper remedy for taking away a tombstone from a churchyard, as they are the property of those who erect them (*Spooner v. Brewster*, 2 C. & P. 34; see "*TRESPASS*"). Case lies for obstructing the proprietor of tithes for entering on land to take them away (*Cobb v. Alby*, 2 N. R. 466).

Case lies for carrying away tithes (*Shapcott v. Mugford*, 1 Ld. Raym. 187).

Case lies for disturbance in the enjoyment of an easement (*Mainwaring v. Giles*, 5 B. & Ad. 361; *Hewlins v. Shippam*, 5 B. & C. 221; *Bryan v. Whistler*, 8 B. & C. 288); although the right to the easement were conferred by a written agreement, which is stated in the declaration, and which stipulates for the enjoyment of the easement (*Marst v. Goodson*, 3 Wils. 348; *Corbett v. Packington*, 6 B. & C. 273). For disturbance of tolls, ferries, offices, franchises, markets, &c., for not grinding at plt.'s mill, case is the proper form of remedy (Com. Dig. Action on the Case, Disturbance and Nuisance; *Gard v. Collard*, 6 M. & S. 69; see *Keeble v. Hickeringill*, *supra*).

Where a statute prohibits an injury to an individual, or enacts that he shall recover a penalty, case will lie, though not expressly named (Com. Dig. Action on Stat. of F. and Pleader, 2; S. 1, 2, s. 30; 10 Co. 75, 76; *President & College of Physicians v. Salmon*, 2 Salk. 451; 6 Mod. 26); as, on 8 Anne, c. 14, at the suit of a landlord against a sheriff, for taking goods without paying a year's rent (*Bristow v. Wright*, Doug. 665; *Andrews v. Dixon*, 3 B. & A. 645; *Arnett v. Garnett*, 3 B. & A. 440; *Lane v. Crocket*, 7 Pri. 566; *Harrison v. Barry*, ib. 690; *Reed v. Thoys*, 6 M. & W. 410; *Forster v. Cookson*, 1 Gal. & Dav. 58); and, on 13 Edw. I., at the suit of the party robbed, against the hundred; and, where a navigation act says, calls may be sued for in an action of debt or on the case, it was held to mean case in tort (*Huddersfield Canal Company v. Buckley*, 7 T. R. 36);

though deft. be deprived of his set-off (Ib.); and a party can only [*725] sue on 43 Geo. III. c. 141, in case (*Massey v. Johnstone*, *12 East, 67). Where a statute gives a remedy in the affirmative, without a negative expressed or implied, the party may still use his old remedy at common law, or that expressed in the act (Com. Dig. Action on Stat. E.). Where a statute confers a right and annexes certain penalties for its infringement, an action for damages will not lie against a party infringing the right by the party aggrieved (*Stevens v. Jeacoke*, 17 Law J. 163, Q. B.; 12 Jur. 477). Where a statute simply prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act without he alleges some special damage; but where the act prohibited is obviously for the special protection of a particular party it is not necessary to allege special damage (*Chamberlain v. The Chester and Birkenhead Railway Company*, 11 Law T. 270, Ex.). Declaration in case stated that deft., after 9th of November, 1835, and after the first election of councillors under stat. 5 & 6 Will. IV. c. 76, was appointed and acted as town clerk of the borough of L., and continued to be and act as such town clerk, until the expiration of his office by his lawful removal. That, after such removal, and within three months after the expiration of deft.'s office, the council of the borough, in pursuance of the statute, duly authorized and appointed A. to receive from deft., and required deft. to deliver to A. a true account in writing of all matters committed to deft.'s charge as such town clerk by virtue of the act, and also of all moneys, &c., together with proper vouchers, &c., and also a list of the names of debtors, &c., of which premises deft., within three months, had notice, and was, within the three months, required by A., pursuant to the authority, to deliver to A. the said matters and things which A. was so authorized to receive;

that, since deft. had such notice, &c., and within the three months, a reasonable time for the delivery had elapsed; that, before the expiration of deft.'s office, to wit, on, &c., divers matters and things were committed to his charge under the act, and for the corporation; viz., certain deeds, &c.; that during the time aforesaid, deft. received moneys amounting, &c., by virtue and for the purposes of the act, and had not tendered any account thereof to plts.; and that before and at the expiration of deft.'s office, there were divers persons from whom moneys were due for the purposes of the act, which ought to have been received and accounted for to plts. by deft., but who had not paid the same. Breach, that, though it was deft.'s duty to deliver the said matters and things to A., and A. all the time continued to be authorized to receive them, deft. had not delivered them to A., by means whereof plts. were kept in ignorance of matters which ought to have been contained in the account list and vouchers, and had been prevented from obtaining moneys which they might have obtained if deft. had performed his said duty, and from carrying on the business of the corporation, &c. Held, on special demurrer, that an action on the case for the breach of duty lay against the deft., and that plts. were not restricted to the summary remedy under stat. 5 & 6 Will. IV. c. 76, s. 60, before justices of the peace, and that the appointment of A. to receive the several matters and things, and the duty of deft. to deliver them, were sufficiently alleged (*Lichfield (Mayor, &c., of) v. Simpson*, 8 Q. B. 65). Case is the proper form of action against the commissioners of a local act, who have granted an annuity on the credit of the rates in pursuance of the powers given by the act, if they neglect to pay the annuity, when they have sufficient rates in their hands (*Cane v. Chapman*, 1 Nev. & P. 104).

Action for Infringement.] In case for infringement of a patent, the deft. pleaded not guilty; that the plt. was not the true and first inventor; and that the invention had been previously, wholly, or in part, publicly and generally known, used, practised, and published in England: held, that the issue on the first plea must be determined by the acts done by the deft., without reference to the existence or non-existence of a fraudulent intention; that the second plea would be proved by showing a publication before the date of the letters-patent; and that the third plea only raised a question of user before the grant of the letters-patent (*Stead v. Anderson*, 4 C. B. 806).

The doctrine laid down by the Court of Exchequer, that, if a patent has been infringed unintentionally, the patentee is not entitled to redress, disapproved of (*Heath v. Unwin*, 15 Sim. 552; 11 Jur. 420; 16 Law J. 293, Ch).

When a Concurrent Remedy with other Actions.] Case affords [*726] a *most extensive remedy for all breaches of duty *ex quasi contractu*; and, "where from a given state of facts the law raises an obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, an action on the case, founded in tort, is the proper form;" (per Littledale, J., *Burnett v. Lynch*, 5 B. & C. 609). Where the lessee, by deed-poll, assigned his interest in the demised premises to A., subject to the payment of the rent, and the performance of the covenants contained in the lease, and A. took possession and occupied the premises under this assignment, and the lessor, having sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, and recovered damages against the lessee, it was held, that the lessee might maintain an action upon the case, founded in tort, against A., for having neglected to perform the covenants, whereby the lessee sustained damage (*ib.* 589). If there be a covenant or contract under seal between the same parties, and directly relating to the matter in dispute, the action must be in covenant and founded thereon (1 Ch. Pl. 132). Case often lies as a concur-

rent remedy with assumpsit: "It by no means follows that, because a promise may be implied by law, this action on the case, which is in terms founded on the breach of *that duty from which* the law *implies* a promise, may not also be maintainable" (per Abbott, C. J., *Burnett v. Lynch*, 5 B. & C. 602). And, in *Govett v. Radnidge*, 3 East, 70, Lord Ellenborough observes, "There is no inconvenience in suffering the plt. to allege his gravamen as consisting in a breach of duty, arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise, implied from the same consideration of hire." But not only in the case of implied, but in express contracts, if they *create a duty*, case will lie; for, "although there be an express contract, a party is not bound to resort to that contract, but he may declare on the tort, and say that the party has neglected to perform his duty" (per Bailey, J., *ib.* 605; *Dickson v. Clifton*, 2 Wils. 319; *Brotherton v. Wood*, 3 B. & B. 54; *Mast v. Goodson*, 3 Wils. 348; *Ansell v. Waterhouse*, 2 Ch. Rep. 1).

Case lies for the improper or unskilful treatment of surgeons, or for want of skill and care, though assumpsit be also sustainable, &c. (*Seare v. Prentice*, 8 East, 348; *Shiells v. Blackburne*, 1 H. Bl. 161; *Slater v. Baker*, 2 Wils. 359; *Gladwell v. Steggel*, 6 Bing. N. C. 733; 8 Sco. 60). It also lies for not performing services, against carriers, innkeepers, bailees, attorneys, agents, &c., for neglect or other breach of duty, or misfeasance, in the conduct of a cause or other business, though it is usual to declare in assumpsit (*Samuel v. Judin*, in error, 6 East, 333). And, where the deft. had, by deed, granted to the plt. a license to mine and search for tin ore upon his the deft.'s lands, and afterwards prevented the plt. from doing so, and expelled him and his man from the land, and the plt. then brought an action on the case against him, when it was objected that the proper form was either covenant on the deed, or trespass, but the court held, that although the plt. might have maintained case for such a wrong as this, or although he might perhaps have maintained trespass for expelling him and his man from the land, yet as the preventing them from the working the mine, and hindering them from coming on the land for the purpose was clearly the subject of an action on the case, the action was maintainable (*Muskett v. Hill*, 5 Bing. N. C. 694). If the contract be laid as *inducement* only, it seems that case, for an act in its nature a tort or injury afterwards committed in breach of the contract, may be adopted (1 Ch. Pl. 151). Therefore case for not accounting for and *converting to the deft.'s use bills delivered to him to be discounted, or the proceeds of such bills, is properly sustainable (*Judin v. Samuel*, 1 N. R. 43; *Samuel v. Judin*, 6 East, 333; *Smith v. White*, 6 Bing. N. C. 218; 8 Dowl. 255). A count stating that the plt. being possessed of some old materials retained the deft. to perform the carpenter's work on certain buildings of the plt.'s, and to use those old materials, but that the deft. instead of using them made use of new ones, thereby increasing the expense, is sustainable (*Elsee v. Gatward*, 5 T. R. 153; see *Wilkinson v. Coverdale*, 1 Esp. 75).

Advantages of the Action in Preference to others.] By declaring in case, the plt. may, in many instances, prevent the deft. from pleading the non-joinder of other defts. (*Brotherton v. Wood*, 6 Moo. 141; 1 Ch. Pl. 97, 98, 162); and he will not be nonsuited, though he only prove one of several defts. liable (*Ansell v. Waterhouse*, 2 Ch. Rep. 1; *Brotherton v. Wood*, 6 Moo. 141; 3 B. & B. 54; *Govett v. Radnige*, 3 East, 65, 70; see *ante*, "ABATEMENT"; 1 Ch. Pl. 51, 97, 98, 162). It will also deprive the deft. of his right of set-off (*Smith v. Hodson*, 4 T. R. 211; 2 H. Bl. 135; see "SET-

off"); or of pleading his certificate (Parker v. Norton, 6 T. R. 695; Stainforth v. Fellowes, 1 Marsh. 184; see "BANKRUPTCY"); and also avoid the statute of limitations, (Brown v. Howard, 4 Moo. 508; 1 Saund. 346 e. n. (2); see "STATUTE OF LIMITATIONS"). As this form of action carries full costs, it is preferable to trespass; for, in some cases of assault and battery, and trespass to the land, the plt. is not entitled to full costs, if the damages be under forty shillings (Savignac v. Roome, 6 T. R. 129; see *post*, p. 767). And case is sometimes advisable, where the owner's property is not clear (Edmeades v. Newman, 1 B. & C. 418). It is also advisable at times to adopt case for the purpose of joining a count in trover (Govett v. Radnidge, 3 East, 70).

Form of Pleadings.

Under this head will be considered only those general rules which apply to actions on the case in general; those particular rules of pleading which apply only to particular actions, will be found under the respective titles of such actions throughout the work.

The plt., in his declaration complained that the deft., while driving a carriage, drove with force and violence against another carriage on which the plt. was sitting, and forced it with a great shock over a raised part of the road, and caused it to sway and incline to overturn, and thereby, with great force and violence, caused the plt. to be greatly terrified, and to be put in great peril and danger of the carriage overturning; and from reasonable apprehension of the said carriage overturning, then and there to jump and fall towards, to, and upon the ground; and in so falling, one of the legs of the plt., without his will, then and there struck against one of the wheels of the last-mentioned carriage, by means whereof the said leg was fractured. Held, to be a count in trespass *vi et armis*, and not in case (Spear v. Chapman, in error, 8 Ir. Law R. 461).

Where a declaration, after stating certain facts, alleges that it thereupon became the duty of the deft. to do a certain act, such allegation is to be understood as a mere exposition of the legal liability supposed to result from the previously stated facts, as an assertion that the deft. became thereby bound by law to do the act, and not as a distinct substantive allegation (Brown v. Mallett, 5 C. B. 599).

In such a case the word "thereupon" is to be understood not merely as afterwards, but as equivalent to "thereby" (Ib.).

Unless the duty results in all cases from the facts, a declaration so framed is bad in substance (Ib.).

The allegation of duty is superfluous where the facts stated show a legal liability, and it is useless where they do not (Ib.).

The declaration stated that the deft. was employed by commissioners of sewers to make a sewer in a public highway; that he kept and continued in the highway two iron gratings lying thereon, in the custody and care of the deft., for forming the sewer, without placing any light, &c., to show that the gratings were there. Plea, not guilty; held, that the averment that the gratings were in the custody and care of the deft., being immaterial, was not admitted by the plea of not guilty, and that the material averment of the declaration, namely, that the deft. kept and continued the gratings on the highway without a light, having been negatived by the jury, the plt. ought to be nonsuited (Grew v. Hill, 17 Law J. 317, Exch.).

The declaration stated that the plts. did prepare, vend, and sell for profit divers large quantities of a certain medicine, called "Morrison's Universal Medicines," which they were accustomed to sell in boxes wrapped up in paper, having those words printed thereon, and that the deft., intending to

injure the plt. in the sale of the said medicines and to deprive them of profits, wilfully and fraudulently prepared and made medicines in imitation of the medicines so *prepared by the plt., and wrapped up the same in paper having "Morrison's Universal Medicine" printed thereon, in order to denote that such medicine was the genuine medicine prepared, vended, and sold by the plt.; and that the deft. did deceitfully and fraudulently vend and sell for his own lucre and gain the said last-mentioned boxes of the said articles, represented and termed by him to be medicine by the name and description of "Morrison's Universal Medicine," which had been prepared, vended and sold by the defts., whereas in truth the plt. never had been the preparers, vendors, or sellers thereof: held, on motion in arrest of judgment that the declaration described a good cause of action (Morrison v. Salmon, 2 Sc. N. R. 449; 2 Man. & G. 385).

In actions on the case, the declaration should set forth,—1st, by way of inducement, the circumstances under which the injury was committed; 2d, the injury itself; and, lastly, the consequential damages resulting therefrom to the plt.

Inducement as to Circumstances under which the Injury was committed.] The property, or thing injured, should be described with certainty, and in such terms as are commonly used in the law: thus, a way ought not to be described as a passage (Alban v. Bromsal, Yelv. 163; Mudie v. Bell, 3 C. & P. 331; and see 1 Ch. Pl. 390, 391). The term "close" is proper in describing land, though the land be not enclosed, as it imports, in law, the interest in the soil (1 Ch. Pl. 390; Stammers v. Dixon, 7 East, 207; Vin. Abr. Fences). In actions for a tort to personal property, the goods or cattle ought to be described with certainty, stating the number and value (11 East, 576, 578; see 11 Russ. 28; 1 Saund. 333, n. (7); 2 Saund. 71, n. (1); Bertie v. Pickering, 4 Burr. 2455; Steph. Pl. 5th ed. 332; Attorney-General v. Jeffereys, M'Cle. 277, 278; Pope v. Sillman, 7 Taunt. 642; Holmes v. Hodgson, 8 Moo. 379; see 2 Saund. 274, a, n.); but, as the plt. may recover, if he prove any part of his case, the doctrine as to certainty in the enumeration of the property appears to be of little utility (1 Ch. Pl. 392; Berne v. Mattaire, Rep. temp. Hardw. 121; 2 Saund. 74, b). In case, as in trespass and trover, damages only are recoverable, the specification of quantity and quality generally is allowed: as, two pecks of flax; two ricks of hay; a library of books (2 Saund. 74, n. (1); Steph. Pl. 5th ed. 335; 1 Ch. Pl. 392); and cattle may be described with a *videlicet* under the word chattels (17 Edw., 3 pl. 41); with regard to the quality or species of the goods, though plt. is perhaps bound to prove the fact as laid (1 Ch. Pl. 393), yet with regard to number or value he may prove less, though not more, even although the statement in the declaration be under a *videlicet*: thus, if the declaration be divers, to wit, ten horses, he may show an injury to one, but not eleven (see Crispin v. Williamson, 8 Taunt. 107; Attorney-General v. Jeffereys, M'Cle. 270; Berne v. Mattaire, *supra*, 1 Ch. Pl. 392). It is, in general, however, advisable to keep as near to the facts as possible in every averment; and in prescriptions the plt. should not state a right to more than is sufficient to sustain the action (1 Ch. Pl. 391; Tewkesbury (Bailiffs of) v. Bricknell, 1 Taunt. 142; Morewood v. Wood, 4 T. R. 160; 1 B. & P. 394; 5 Co. 78, b; B. N. P. 59; Rogers v. Allen, 1 Camp. 315 n. (a); R. Buckingham (Marquis of), 4 Camp. 189; Brooke v. Willett, 2 H. Bl. 234; Vin. Abr. Prescription W.; Heriott v. Stuart, 1 Esp. 487); and this should be particularly attended to in an action claiming a right of common or a way (Brook v. Willett, 2 H. Bl. 234; Vin. Abr. Prescriptions, W. *post*). Customs must be proved as laid (Parkin v. Radcliffe, 1 B. & P. 394).

*For injuries to real property the quality of the realty, as whether it consists of houses, lands, or other corporeal hereditaments, should be shown (1 Ch. Pl. 390). When a plt. in possession brings an action on the case against a wrong-doer, it is sufficient for him to declare upon his possession (*Greistead v. Marlowe*, 4 T. R. 718). Therefore, in an action on the case for stopping or diverting a water-course, it is sufficient to state that the plt. is possessed of the mill and had a water-course running in the deft.'s land to the mill, and that the deft. stopped or diverted it (*Cro. Car.* 575; *ib.* 500; *Winford v. Wollaston*, 3 Lev. 266; *St. John v. Moody*, 2 Lev. 149). So, in case by the owner of a fair or market, against a person for erecting another fair in the neighbourhood, or for disturbing him in taking toll, it is sufficient to state that the plt. was possessed of the close, &c., and of the market or fair thereon holden (*Dent v. Oliver*, *Cro. Jac.* 43, 123; 2 *Saund.* 172, n. 1); or that J. S. demised to him the tolls and profit of the fair or market. The plt. declared that he was possessed of a "messuage and premises," with the appurtenances; plea, traversing this allegation: it appeared that the plt. had the separate use and occupation of only one floor of a dwelling-house. Held, that the evidence did not negative the allegation, that the plt. was possessed of a messuage (*Fenn v. Grafton*, *Bing. N. C.* 617; 3 *Sco.* 56). *Quere*, whether the declaration was subject to a special demurrer (*Ib.*)

The Plaintiff's Right or Interest in the Thing or Property affected should be stated according to the facts, to show that the injury by deft. has affected such right or interest; and any material variance would be fatal. Where the law gives a *general* right, as for all persons to pass along a public highway, it is improper to state such public right, or to prescribe; and it will suffice to show that such a particular place was a public highway, and that the deft. prevented the plt. from using it (*Ward v. Creswell*, *Willes*, 268; *Vin. Abr. Prescription*, U.; *Tenant v. Golding*, *Ld. Raym.* 1091). So, whenever the right of the plt. is *implied by law*, as the absolute rights of persons, it is unnecessary to state the same (see instances, 1 Ch. Pl. 393). But, where the law does not imply the right to the matter or thing affected, it must be stated either *generally* or *specially* (*Com. Dig. Pleader*, C, 34; 1 Ch. Pl. 393). In actions for torts to personal property, it must be shown, that the goods, &c. were the plt.'s, either by the words "of the plt.," or that he was "possessed of the goods," &c., or the omission will be fatal, even after verdict, the objection being the want of title and not a title defectively stated (see the precedents, 2 Ch. Pl. index, Case; 2 *Saund.* 379, n. 13; *Com. Dig. Pleader*, 3 M, 9). Where a declaration alleged that the plt. was possessed of a house belonging to, and supporting which there were certain foundations which the plt. had enjoyed and ought to enjoy; held, sufficient description of the plt.'s right to the enjoyment of the foundations as an easement (*Brown v. Windsor*, 1 *Cr. & J.* 20). And, where the plt.'s interest in personal property is reversionary, his right must be described accordingly (1 Ch. Pl. 165—170; but if the deft., by his plea, admit the plt.'s property, the defect will be aided (1 *Sid.* 184). If, however, the plt. instead of declaring thus generally upon his possession, undertake to set out a title, and do it insufficiently, the declaration will be bad (*Downe v. Cushford*, 1 *Salk.* 363; see 2 & 3 *Will. IV. c.* 71, s. 5; *Crowther v. Oldfield*, 2 *Ld. Raym.* 1230; 1 *Saund.* 346, n. 2); the plt. must nevertheless prove a good and sufficient title at the trial, or he will be nonsuited (*Ib.*; *B. N. P.* 76)..

In describing the plt.'s right to or interest in *real* property, corporeal or incorporeal, in a personal action against a *wrong-doer* for the
*recovery of damages, and not the land itself, it is sufficient to [**730*]

state in the declaration, that the plt. at the time of the injury, was possessed of a house or land, &c.; and that, by reason of such possession, he was entitled to the way, or other right, in the exercise of which he had been disturbed (Com. Dig. Pleader, C. 39; 2 Saund. 113, *a*, n. 1, 172, n. 1; Rider v. Smith, 3 T. R. 766; Blisset v. Hart, Willes, 508; Drake v. Wigglesworth, *ib.* 654; 1 Saund. 346, n. 2; Tewkesbury (Bailiff of) v. Diston, 6 East, 438, n. *a*). See Fentiman v. Smith, 4 East, 107, as to when plt. should not state that "by reason of such possession," &c.; see also, *post*, "COMMON, DISTURBANCE OF." In declaring for not grinding at plt.'s mill, it is sufficient to declare generally on the custom for a certain toll, without specifying the particular toll, or the consideration for it, or that it is a reasonable toll (Gard v. Callard, 6 M. & S. 69). But, though it is not necessary to lay a title by grant or prescription, &c., yet the title or consideration must be proved on the trial (2 Saund. 114, *c*.; 4 Mod. 421, 424; 1 Saund. 346, n. 2).

Where a declaration stated that the plt. had agreed to become a passenger by the deft.'s omnibus, and that the deft. received the plt. as such passenger; and these two allegations were traversed by the plea; and from the evidence it appeared the plt. held up his finger to the driver of the omnibus, who stopped to take him up, and that just as the plt. was putting his foot on the steps of the omnibus the driver drove on, and the plt. fell on his face: held, evidence to go to the jury in support of the declaration (Brien v. Bennett, 8 C. & P. 724). When the plt.'s right consists in an obligation on the part of the deft. to observe some *particular duty*, the declaration must state the nature of such duty, and the plt. must prove such duty as laid, and a variance will, as in actions on contracts, be fatal (1 Ch. Pl. 397; Lopes v. De Tastet, 4 Moo. 266).

When the declaration is for the breach of an express or implied *contract* and proceeds for nonfeasance, the consideration of the contract must be stated, either in terms or in substance (Elsee v. Gatward, 5 T. R. 143; Max v. Roberts, 12 East, 89); but, where it is for a *misfeasance*, or *malfeasance*, no consideration need be stated (*Ib.*). But there are cases where persons exercising public trades are bound by law to do what is required of them in their trades without the aid of an express contract, and are entitled to a recompense, and may be sued in case for breach of duty in refusing to exercise their calling, as a smith having materials for the purpose refusing to shoe the horse of a traveller, or a ferryman to convey one over a common ferry, 1 Saund. 312, *c*, n. 2; Elsee v. Gatward, 5 T. R. 149); or an innkeeper to receive a guest having room for him (Bac. Abr. Inns, C. 3, Ansell v. Waterhouse, 6 M. & S. 393; see R. v. Jones, 7 C. & P. 213; Fell v. Knight, 8 M. & W. 269); or a common carrier having convenience to carry goods, being tendered satisfaction for the carriage (Pickford v. Grand Junction Railway Company, 8 M. & W. 372). An averment that the plt. was willing and offered to pay whatever was legally due is sufficient, and an actual tender of money for the carriage is unnecessary (Pickford v. Grand Junction Railway Company, 8 M. & W. 372; 8 Dowl. 766). In an action on the case a count charged that the plt. had delivered to the deft. certain pigs to be taken care of by him, and in consideration thereof the deft. agreed to take care of the pigs, and to re-deliver the same on request: held, that this count was in assumpsit (Corbett v. Packington, 6 C. & P. 268; 9 D. & R. 265; see Smith v. White, 6 Bing. N. C. 218; and 1 Ch. Pl. 153, n. (*g*)). Case may also be maintained against parties who by virtue of their office are obliged to perform certain duties, for neglect of them, although

[*731] not * entitled to recompense. Therefore case lies against the secretary of a company for not making out and delivering to the

plt. a certificate of shares in the company pursuant to the act of parliament forming the company (*Daly v. Thompson*, 13 M. & W. 309); so, against an officer of excise for refusing to sign a bill of entry, for a person who had tendered the duty payable on the goods (*Barry v. Arnaud*, 2 P. & D. 633); so, against a banker for refusing to honour the check of a customer (*Margetti v. Williams*, 1 B. & Ad. 415; see *Whittaker v. England* (Bank of), 1 C. M. & R. 744); so, against the Bank of England for neglecting to transfer stock (*Coles v. England* (Bank of), 2 P. & D. 521). *Quære*, whether case lies against a parson for refusing to solemnize a marriage (see *Davis v. Black*, clerk, 1 Gal. & D. 432).

When it is founded on the *obligation of law*, unconnected with any contract between the parties, it is sufficient to state very concisely the circumstances which gave rise to the deft.'s particular duty or liability, as in actions against sheriffs, carriers, innkeepers, &c. (1 Ch. Pl. 397; *Elsee v. Gattward*, *ante*, p. 731; 1 Saund. 312 c. n. 2; *Max v. Roberts*, 12 East, 89. See these titles respectively).

The declaration must show that by express or implied contract the deft. in the particular character or situation, &c. stated in the declaration, is bound to do or omit the act in reference to which he is charged (*Max v. Roberts*, *supra*; *Boorman v. Brown*, 4 P. & E. 401; see *R. v. Everett*, 8 B. & C. 114; *Edwards v. Bennett*, 6 Bing. 235). In an action by a landlord against his tenant for not cultivating according to good husbandry, or for not repairing, or for waste, &c., the relation of landlord and tenant is concisely stated. In declarations for breach of duty in a particular character or situation, the character or situation of the deft. from which his duty and liability arise must be concisely stated (*Max v. Roberts*, *supra*; *R. v. Everett*, *supra*; *Boorman v. Brown*, *supra*). Where the declaration stated that the plt. was a servant of the deft. in his trade of a butcher, and that the deft. had desired the plt. so being, &c., to go with and take certain goods of the deft. in a certain van of the deft. then used by him, and conducted by another of his servants in carrying goods for him, upon a certain journey; that the plt. in pursuance of such desire and direction accordingly commenced and was proceeding, and being carried and conveyed by the said van, with the said goods, and it became the deft.'s duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that they should be safely and securely carried, in consequence of the neglect of which duties the van gave way and broke down, and the plt. was thrown down and his thigh-bone broken: held, on motion in arrest of judgment after verdict for the plt., first, that it was sufficiently to be collected from the declaration that the deft. directed the plt. to go in the van; but secondly, that even in that case the action was not maintainable (*Priestly v. Fowier*, 3 M. & W. 1; 1 Jur. 987).

In all actions on the case against one who has undertaken an employment or duty, for an injury occasioned by his negligence or unskilfulness in executing it, it is not necessary to state what his duty was; yet stating that it was the duty of the deft. to do so and so, if it do not appear from the other facts stated that it was his duty, will not be sufficient (see *Tollet v. Sherstone*, 5 M. & W. 283).

Variance in Statement of Plaintiff's Right or Interest affected.] With respect to what is a fatal variance in the statement of the plt.'s right or interest affected, the general rule is, that, if the whole of an averment or allegation be struck out without destroying the *plt.'s right of action, it is not necessary to prove it; but that, if the whole cannot be [*732] struck out without getting rid of a part essential to the cause of

action, then, though the averment be more particular than it need have been, the whole must be proved, or the plt. cannot recover (*Williamson v. Alison*, 2 East, 452; 1 Ch. Pl. 252, 400). And the other rules, as to what is a variance in actions of assumpsit, will here apply (*ante*, "ASSUMPSIT").

A distinction has been established between allegations of matter of substance and allegations of matter of description. The former require to be *substantially* proved; the latter must be *literally* proved. That distinction was laid down by the court in *Purcell v. Macnamara*, 9 East, 157; *Stoddart v. Palmer*, 3 B. & C. 4; *Phillips v. Shaw*, per Abbott, C. J., 4 B. & Ad. 435; in the first case the Chief Justice said, "There the allegation in the declaration was, that the plt. *had*, on a certain day, *been acquitted*. Now that fact could be proved by the production of the record of acquittal. When that was produced, it appeared *that the acquittal had taken place* not on the day stated in the declaration. But the court held it sufficient; for the allegation in the declaration being of a *substantial matter*, and not being a description of the *record* of acquittal, was well supported by the proof. In *Phillips v. Shaw*, which was for not indemnifying plt. for becoming bail for Pinnock, at the suit of D. Page, it was stated that Page, in Mich. T., 58 Geo. III. recovered against the plt.; the judgment given in evidence was of Hil. T., and Abbott, C. J., said, "Here the substantial matter is, that, before the present action was brought, a judgment had been recovered by Page; and it was perfectly immaterial at what particular time that judgment was obtained; this is then not a fatal variance; but, if plt. allege a judgment in K. B., and prove it in C. P., he will be nonsuited (*Sheldon v. Whittaker*, R. & M. 267; 4 B. & C. 657; and the case of *Stiles v. Rawlins*, 5 Esp. 133, is overruled). And where, in case against the sheriff for escape, it was stated that an attachment of privilege was sued out, viz. by which said writ, &c., &c., to answer the said plts. of a plea, &c., *to the damage of the said plts. of 30l. &c.*;" but the writ produced omitted the words, "*to the damage of the said plts. of 30l.*;" it was held not to be a variance; and Best, C. J., said, "I am of opinion, that the declaration does not profess to describe the writ, but merely to state the substance and effect of what the sheriffs were commanded to do" (*Cousins v. Brown*, R. & M. 292; see also the case of *Draper v. Garrat*, 2 B. & C. 2; and *Judge v. Morgan*, 13 East, 547; 1 T. R. 235). Where plt., in case for escape, stated that a party arrested on mesne process was brought before a judge by virtue of a *habeas corpus* and by him committed, &c., *as by record thereof now remaining in K. B. more fully appears*; and it appeared that the original writ was merely in the custody of the clerk of the papers of the K. B. office, where they were always deposited, the court held, that the allegation was either impertinent, as not being a record, and requiring no such proof; or, if it were *quasi of record*, it had been sufficiently proved by the production of the writ, &c. (*Wigley v. Jones*, 5 East, 440). In the case of *Turner v. Fyles*, 3 B. & P. 456, the party had been taken upon a writ of execution, which Lord Ellenborough said might perhaps make a difference.

Allegations of *description* must be literally proved; therefore, where plt. undertakes to describe a third person in his declaration, he must set out his name, title, &c., correctly, or he will be nonsuited; thus, where, in case for charging plt. with a felony before a justice of the peace, the allegation was, that plt. appeared before Baron Waterpark, of *Waterfork*, and the proof was, that he appeared before Baron Waterpark, of Waterpark, it was said, [*733] that the words, "of Waterfork," appeared to be part of the description of the title, and not merely referable to the place of residence of Lord Waterpark: so that it became matter of description, and was, there-

fore a material variance (Walters v. Mace, 2 B. & A. 758, 759). And, in case against an attorney for negligence, where it was alleged that the said Margaret was arrested, by virtue of a writ of *quo minus*, by the name of Margaret Brown, otherwise Southall, and the writ produced was Suthall, Lord Kenyon, C. J., considered it a fatal variance (Brown v. Jacobs, 2 Esp. 726); and where, in setting out a bail-bond, the words "upon promises" were omitted, it was held fatal (Baker v. Newbegen, Ry. & M. 93). In case for escape, it was alleged that one S. S. was arrested, and gave bail, and afterwards bail above was put in before a judge at chambers; *prout patet*, that S. S. surrendered, and afterwards escaped. Per Bailey, J.: "Upon the trial, the plt. produced the entry of recognizance of bail, and the entry of special bail in the filazer's book, to verify this allegation; but the former imported not that the recognizance was taken before me at Serjeant's Inn, but in court at Westminster; and the latter imported that bail was put in before me, but did not state in what place: the question was, whether *this* was evidence to support the averment. There was other evidence, to show that, upon a recognizance taken before a judge at chambers, it was the course of practice to enter it as if it were taken in court. It was not disputed but that this was an essential part of the plt.'s case; for, though the debtor was committed by the C. J., the validity of that commitment depended on the previous allegation, that bail above was put in. Whether this be or be not a recognizance, depends on the question, whether it was made before a competent tribunal. A judge is competent, so is the court; and it is essential to state that it was taken before one or the other. There is a difference in effect between a recognizance taken in court, and one taken before a judge at chambers, for the *scire facias* in the former case must be in the county in which the court sits; in the latter, it may be either in that county, or that county in which it is taken. A recognizance, when entered, is a record; and no extrinsic evidence can be resorted to to prove it. If evidence were allowed to be given by the filazer's book, that bail was put in before the judge at chambers, it would be necessary to go further, and there must be the introduction of new matter, to prove an essential and indispensable fact." It was, therefore, held to be a fatal variance (Bevan v. Jones, 4 B. & C. 407). In case against sheriff for negligence in losing replevin-bonds, &c., the declaration stated, that certain goods of a tenant were replevied, who appeared, &c., and levied his plaint against plt., which was afterwards, on 25th March, 1823, duly removed out of the county court of the said sheriff of the county of C., into the court, &c., by *re. fa. lo.*: at the trial it appeared, that in December, 1822, when the replevin-bond was taken, the deft. was sheriff of the county of C.; but that, at the time *the plaint was removed, he had ceased to be so*. Per Holroyd, J.: "I am of opinion, there is no variance in this case. It seems to me, that the averment, that the plaint was removed out of the county court of the said sheriff, is not an allegation of description, but of substance. It was matter wholly immaterial who the individual was who presided in that court at the time when the plaint was removed" (Perreau v. Bevan, 5 B. & C. 296). Case for escape: declaration stated a judgment recovered in K. B., in Easter T. 5 Geo. IV.; that in Trin. T. next *there was an award of execution by the court, and thereupon, on, &c., in Trin. T., in the fifth year aforesaid, the deft was *committed to, &c.* Plt. proved the original judgment in K. B., and the *committitur* thereon, [*734] but no judgment in *sci. fa.* It was objected that, to support the allegation of award of the execution, plt. must prove a *sci. fa.* Per Bailey, J.: "All these allegations have been proved; but deft. has failed in proving, as his allegation imports, that there was any judgment in *sci. fa.* That was of itself an immaterial allegation, because a *sci. fa.* was unneces-

sary, a year not having elapsed, &c. It has been contended, that the word *thereupon* so connected the judgment in *sci. fa.* with the commitment, as to make it necessary for the plt. to prove the former. I think not: *they seem to me to be introduced to mark the progress of the cause.*" And "they amount to an allegation of fact, and not to a description of the record upon which the commitment took place." "If the damages in the award of execution had been different from those in the judgment, it would have been a fatal variance" (*Bromfield v. Jones*, 4 B. & C. 384).

If the averment is in its nature divisible, though included in one sentence, it will be sufficient if the plt. prove a principal fact, or part only, and that he has been injured in respect of *that part* (but this merely extends to allegations of substance, and not of description, see *ante*, p. 734); that part or member of the sentence including such principal fact which is essential may be adopted, and that part which is useless rejected. Thus, where the declaration stated that the plt. was possessed of *a messuage and 150 acres of land*, &c., and, by reason thereof, was entitled to common of pasture, &c., and the proof was that plt. possessed *land only*, and was entitled to right of common in respect of it, the court held it not to be a fatal variance; and, per Abbot, C. J., "This allegation is divisible, and it may be considered as stating that the plt. was possessed of a house, and also that he was possessed of land, and that, in respect of both or either, he was entitled to the right of common in question" (*Ricketts v. Salway*, 2 B. & A. 364). And where, in case against a sheriff for a false return of *nulla bona* to a *fi. fa.* against the goods of R. S. and J. S., although the plt. alleged R. S. and J. S. had goods, and only proved that R. S. had goods, it was held not to be a fatal variance: and, *per curiam*: "The first allegation is severable, and not entire; the legal effect of it being that R. S. and J. S., both or either of them, had goods, &c. The allegation in substance is, that there were goods on which the sheriff might have levied, &c." (*Jones v. Clayton*, 4 M. & S. 349). And, if premises are described as being in the parish of A. and B., the court will construe it to mean part in the parish of A. and part in B. (4 Taunt. 671). In slander, proof of part of an inducement that plt. carried on two trades will suffice, provided the words proved apply to him in the one trade proved (*Figgin v. Cogswell*, 3 M. & S. 369; 1 M. & S. 386). But, where the averment consists of circumstances not divisible, each fact included in the different members of the sentence being equally essential to the cause of action, as where the averment is of an entire thing, the whole of it must be proved as laid, and no part can be rejected as immaterial, as no allegation sufficient to maintain the action would be left. Therefore, in *Savage v. Smith*, the plt., having described the *fi. fa.* as founded on a *particular judgment*, and having failed in proving the *judgment*, was nonsuited; for the *fi. fa.* so described was an entire thing (per Chambre, J., 3 B. & P. 465). And, in the case of *Edwards v. Lucas*, 5 B. & C. 340, it was said, "The former judgment was an essential part of the plt.'s cause of action: he was bound to set out a judgment warranting the *fi. fa.*" See case in 2 Stra. 892. Where a party has so connected an immaterial allegation with a material one, *it must be proved; because the material part is thus made

[*735] to depend on the immaterial part. In *Bromfield v. Jones*, 4 B. & C. 383, Bailey, J., cites the following words of Buller, J., in *Peppin v. Solomons*, 5 T. R. 496, in reference to *Savage v. Smith* (see abstract of this, *ante*, p. 734; "I admit it was not necessary for the plt. to state the judgment; but, as the plt. alleged that the party recovered a judgment, and that he sued out a writ of execution *upon the said judgment*, the execution was necessarily tied down by *that judgment* and therefore the judgment was made material by the subsequent words which were intro-

duced. So, in actions for words, where a long introduction is unnecessarily inserted in the declaration, if the charge be tied up to that introduction, the latter must be proved; because the material part is thus made to depend on the immaterial part of the declaration." See the abstract and *dicta* in *Bromfield v. Jones*, *ante*, p. 734, which is also a strong additional authority on this point. Though the plt. may fail in many particulars, yet, if he proves so much of it as leaves him a good cause of action, he shall recover (*Gilb. Ev.* 229; *Rep. t. Hardw.* 121; 2 *Saund.* 74 *b*, 207, n. 24; *Forty v. Imber*, 6 *East*, 434). It is in general no objection that a party prescribes for less than he can prescribe for (*Bailiffs of Tewkesbury v. Bricknell*, 1 *Taunt.* 143; *Cro. Eliz.* 722). When, by the unnecessary statement of a title, it appears that the plt. has no cause of action, it will be fatal. Thus, in an action against a disturber, in which mere possession is a sufficient title for the plt., yet, if he show a title, and it appear insufficient, the declaration is bad (1 *Saund.* 346 *a*, n. 2; *Com. Dig. Pleader*, C, 29; 1 *Salk.* 363).

Statement of the Injury itself.] Care must be taken so to frame the declaration that it will appear not to be in trespass or assumpsit. Thus, when the plt. sues for an immediate but negligent act of violence, the declaration should contain no words applicable only to trespass; such, for instance, as import wilful force (*Day v. Edwards*, 5 *T. R.* 648; *Williams v. Holland*, 10 *Bing.* 112; see *Hensworth v. Fawkes*, 4 *B. & Ad.* 449; *Smith v. Godwin*, *ib.* 443; see also *Hudson v. Nicholson*, 5 *M. & W.* 437, and *Spear v. Chapman*, *ante*, p. 727). And where a count in a declaration in case stated that the plt., at the instance of the deft., had caused to be delivered to him certain boars and pigs, to be by him kept and taken care of for the plt., for certain reward in that behalf, and, in consideration thereof, the deft. *undertook* and then *agreed* to take care of them, and to re-deliver them to the plt. when afterwards requested; and although the deft. was afterwards requested, yet, not regarding his duty in that behalf, he did not re-deliver them; but, on the contrary thereof, by his carelessness, the same became wholly lost to the plt.: held, a count in assumpsit, not in case; it had not indeed the word "promise" in it, but the words "undertook" and "agreed," which were equivalent; besides, the count charged more than common-law duty, which was merely to take care of the boars and pigs, and which alone could be the subject of a count in case; but the declaration here stated something more, viz., an agreement to re-deliver these boars and pigs to the plt., the breach of which could be the subject of an action of assumpsit alone, and as this count was joined with counts in case, the court arrested the judgment for misjoinder (*Corbett v. Packington*, 6 *B. & C.* 268).

Declaration in case stated that the deft. was possessed of a wharf for the loading and unloading of vessels on the banks of the Thames, near which there was certain woodwork, before then placed by the deft. and then being upon the bottom of the river, over which at *certain [*736] states of the tide the vessel of the plt. thereafter mentioned would float, but, at others, not: that while the deft. was so possessed of the wharf, the plt. was possessed of a vessel then being, by the sufferance and permission of the deft., at and alongside the said wharf, for reward to the deft. in that behalf, and the deft. then had the management and control of the said wharf, and the mooring and stationing of vessels at and near the same while they were at the said wharf, for the purpose of using the same. Breach, that the deft. unskilfully and negligently placed, moored, and stationed the plt.'s vessel in the part of the river near the said wharf, and over the said woodwork, and unskilfully and negligently detained the vessel there for a long time, until, on the natural fall of the tide, she fell and lodged against

the said woodwork, and was damaged thereby. Held, on motion in arrest of judgment, that this sufficiently stated a duty in the deft. safely to moor and station the plt.'s vessel, and a breach of that duty (*Wood v. Curling*, 15 M. & W. 626).

In an action for selling goods, which had been replevied, the declaration should aver that the deft. knew that the goods had been replevied (*Mounsey v. Dawson*, 1 Nev. & P. 763). In an action for arresting without probable cause, an averment of malice is absolutely necessary, and the words wrongfully and injuriously are insufficient (*Saxon v. Castles*, 6 Ad. & E. 652). In some actions the *scienter* must be alleged and proved: thus, for keeping a dog used to bite man, kine, or sheep (1 Ch. Pl. 403). So, enticing away a servant or apprentice, but the means of enticement adopted need not be stated (*Winsmore v. Greenbank*, Willes, 577). So, for falsely representing a third person fit to be trusted, though the word "fraudulently" might be sufficient (1 Ch. Pl. 403; 2 Ch. Pl. 522, n.(n); *Winsmore v. Greenbank*, Willes, 584); but the representation must be in writing (9 Geo. IV. c. 14). For a malicious prosecution in an inferior court having no jurisdiction, it seems a *scienter* in the deft., that the court had no jurisdiction, should be averred (*Goslin v. Wilcox*, 2 Willes, 302). But a *scienter* is not necessary in case for driving unruly horses (*Michael v. Allestree*, 2 Lev. 172). So, in an action for debauching plt.'s wife or servant, it is not necessary to allege that the deft. knew that she was the wife or servant of the plt. (*Pea*. 55; *Pea*. Ev. 334; *Winmore v. Greenbank*, *supra*). Nor need it be alleged, nor proved if alleged, in an action on an express warranty (*Williamson v. Allison*, 2 East, 446). Where the action is against a mere continuer of a nuisance, it is advisable to allege a request to remove it (*Winsmore v. Greenbank*, *supra*). It is necessary to aver in an action against a sheriff for removing goods under a *fi. fa.*, without paying the rent due, that the deft. had notice of the rent being in arrear, but the usual averment "that the deft., well knowing the premises," did, &c., will cure the want of such an averment after verdict (*Lane v. Crockett*, 7 Pri. 566; *Adamson v. Jervis*, 4 Bing. 66; 1 Ch. Pl. 403). In actions against officers, &c., for the non-observance of a public duty, unless notice be essential, as in an action against a returning officer of a borough, for refusing a vote at an election, &c., the breach of duty and intent to injure or deceive the plt. are stated, without alleging any other undue intent, as in an action against a sheriff for a false escape, &c. (1 Ch. Pl. 405); and the undue notice may be stated substantially; thus, the word *wrongfully* sufficiently indicates a *malicious* intent in an action against a returning officer for refusing a vote (*Harmer v. Suppenden*, 1 East, 563, 567; but see *Saxon v. Castle*, 6 Ad. & E. 652). So, in an action for harbouring the plt.'s wife; if the words unlawfully [*737] and unjustly harboured, &c., are used, *it will sufficiently designate the deft.'s conduct to have been illegal (*Winsmore v. Greenbank*, *ante*, p. 736; 1 Ch. Pl. 405).

When the act or nonfeasance complained of was not *prima facie* actionable, it is usual to state that the act complained of was wrongfully done (*Stancliffe v. Hardwick*, 3 Dowl. 769). In general it is necessary to state not only the injury complained of, but also the motive, that it was wrongfully or maliciously committed; as, that the deft., well knowing the mischievous propensity of his dog, or having been requested to remove a nuisance erected by another, maliciously or fraudulently contriving and intending, &c. (stating a bad intent, corresponding with the wrongful act complained of), committed or permitted the act complained of (1 Ch. Pl. 403). If any particular bad intention is necessary to constitute the injury, it must be stated; and, in stating it, the language, as in all other parts of pleading, should corres-

pond with the real or probable facts of the particular case. The usual averment of the deft. well knowing the premises had better be always inserted, in actions where a *scienter* must be proved (see 1 Ch. Pl. 404; 7 Pri. 566).

Declaration in case stated that judgment had been recovered against plt. for 1060*l.* 10*s.* damages for breach of covenant; that 1000*l.* had been paid to, and received by, deft. in part satisfaction of the damages; that deft., well knowing the premises, but intending to injure plt., issued a *ca. sa.* on the judgment, and “wrongfully and injuriously” caused it to be indorsed to levy the whole 1060*l.* 10*s.*, and “wrongfully and injuriously” caused plt. to be taken and imprisoned under it, until he executed a warrant of attorney to enter up judgment to secure 1081*l.* 14*s.* 2*d.*, whereas at the time of the taking of plt. under the writ, and giving the warrant of attorney, much less than 1060*l.* 10*s.* was due upon the judgment: held (in the Exchequer Chamber) bad, in arrest of judgment, for want of an averment that the act was done without reasonable and probable cause. By Maule, J.—That there was sufficient averment of malice. *Semble*, the suing out a writ, and indorsing it for the whole amount recovered by the judgment, though part of that sum has been paid, is not the ground of an action on the case (*De Medina v. Grove*, 11 Jur. 145, affirming judgment of Q. B.).

In the statement of the *injury itself*, it is frequently sufficient to describe it generally, without setting out the particulars of the deft.’s misconduct, especially as the mode of committing such injury must more peculiarly lie in the deft.’s own knowledge, rather than plt.’s (*Winsmore v. Greenbank*, Willes, 577; *The King v. Fuller*, 1 B. & P. 180; 1 Ch. Pl. 405; *Anon.* 3 Leon. 13; *Anon.* 1 Ld. Raym. 452; 1 Saund. 346 *a*; but see *Jones v. Stevens*, 11 Pri. 235). In all cases where the injury arises from an act which may legally be done, malice in fact must be laid and proved to entitle the injured party to maintain an action on the case (*Porter v. Weston*, 5 Bing. N. C. 715; 8 Sco. 25; 3 Jur. 507); and, therefore, where the deft. telling a bail, that the principal was likely to abscond, procured from him instructions to act for him, and obtained an order for the render of the principal: held, that an action did not lie against him for such proceeding at the suit of the principal, without alleging and proving express malice (*Ib.*).

The declaration alleged that the plt. was possessed of a house, and the deft. was also possessed of a house next adjoining to that of the plt., and that the deft. contriving to injure the plt., by his agents and his workman behaved and conducted himself so carelessly, negligently, and improperly, in pulling down the deft.’s house, that by, and through the carelessness, &c., of the deft., &c., and in neglecting to use due and proper precaution in that behalf, divers large *quantities of bricks, tiles, &c., fell from the deft.’s house into and upon divers parts of the plt.’s house, and [*738] upon and through divers windows and skylights of the plt., and thereby, &c.: held, that the declaration disclosed a sufficient cause of action, for that it complained not of a mere omission on the part of the deft., but of his doing certain acts by the negligent performance of which the plt. was injured (*Badbee v. Christ’s Hospital*, 2 Dowl. N. S. 164).

When a man is chargeable with a duty by reason of his estate or tenure, it is not necessary in an action against him for the non-performance of the duty to state the particulars of the estate, by reason of which he is chargeable; therefore, it suffices to state that the deft., “as occupier of the close,” is bound to repair a private road leading through the deft.’s close (*Ryder v.*

Smith, 3 T. R. 766; Com. Rep. 44), or to repair fences between him and the plt. (1 Vent. 264; Cro. Jac. 665; R. v. Bucknall, 2 Ld. Raym. 804). So, in an action for not repairing a wall between the deft.'s privy and the plt.'s cellar, "he ought to repair," is deemed sufficient (Tenant v. Goldwin, 1 Salk. 360). A declaration stated that deft. struck plt.'s cow divers blows, whereof she died, and, on proof that the deft. had beaten the cow unmercifully, and that plt., to shorten its misery, killed it, it was held no variance after verdict (Hancock v. Southal, 4 D. & R. 202; Bromage v. Prosser, 4 B. & C. 255).

In an action on the case against a master for the negligence of his servant, it has been decided that the negligence may be stated as that of the master, without noticing the servant; but, as the object of pleading is to apprise the opposite party of the facts, it is more correct to state them truly (Brucker v. Fromont, 6 T. R. 659; M'Manus v. Crickett, 1 East, 110).

If the plt. declare as reversioner, for an injury done to his reversionary interest, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion (Jackson v. Pesked, 1 M. & S. 234; 1 Ch. Pl. 71, 72, 157, 158). Building a roof with eaves, which discharge rain water by a spout into adjoining premises, is an injury, for which landlord may sue as reversioner, while they are under demise, if the jury think there is a damage to the reversion (Tucker v. Newman, 11 Ad. & E. 40). An intention to do an unlawful act confers no right of action on the reversioner (Durham and Sunderland Railway Company v. Walker, 2 Gal. & Dav. 326, 341), as to how the right of action is affected by the default of the tenant (Bell v. Twentyman, 1 Gal. & Dav. 323). In the statement of different injuries in one count, no inconvenience will result from a failure in proving the whole charge; for, in general, the plt. will, upon proving a part only of the injury charged, be entitled to recover *pro tanto* (Maitland v. Gouldney, 2 East, 438; Compagnon v. Martin, 2 Bl. R. 790; 5 Taunt. 27; 1 Ch. Pl. 407). On the other hand, the cause and manner of committing the injury must be substantially proved, as laid. Thus, evidence of the improper stowing of the deft.'s anchor, by reason of which it broke into another vessel, and thereby damaged the plt.'s goods, will not support a declaration charging the injury to have been occasioned by the unskilful steering of the deft.'s ship (Hulman v. Bennett, 5 Esp. 226). And, for an injury by fireworks, where it was alleged that the deft. a schoolmaster, *had delivered and caused them to be delivered* to his scholar, who let them off, whereas they had been delivered to the scholar by another person, without the master's authority, plt. was nonsuited (King v. Ford, 1 Stark. 421). So, if plt. allege that deft.'s dogs were accustomed to bite sheep, he will fail if he only prove that they bit men (Hartley v. Harnman, 1 B. & A. *620,

[*739] *supra*; S. C. 2 Stark. 212; and see further, *post*, "NUISANCE," "SLANDER"). If the plt., with minuteness, describe the injury, and the means adopted in effecting it, and the proof substantially vary from the statement, there will be a fatal variance, which will occasion a nonsuit; thus, under a count for causing the water to rush impetuously against the plt.'s land, he cannot prove that the water was at times prevented from coming thereto (Griffiths v. Marson, 6 Pri. 1; Williams v. Moreland, 2 B. & C. 910). Upon proof of part only of the injury charged, or of one of several injuries laid in the same count, the plt. will be entitled to recover *pro tanto*, provided the part which is proved afford *per se* a sufficient cause of action; for torts are, generally speaking, divisible (Maitland v. Gouldney, 2 East, 438; Compagnon v. Martin, 2 Bl. R. 790; Gwinnett v. Phillips, 3

T. R. 645; *Bernard v. Dathy*, 5 Taunt. 27; *Jones v. Clayton*, 4 M. & S. 349). In declarations for injuries to land, &c., a tort to any part thereof may be proved (3 Stark. Ev. 1538, 1539; 1 Ch. Pl. 407). An averment that lands are occupied by A. and B., may be supported by showing that each occupies a part (3 Stark. Ev. 1541). So, an allegation that lands are in the parishes of A. and B., may be sustained by proof that part is situate in each parish (*Goodtitle v. Walter*, 4 Taunt. 671; *Pool v. Court*, ib. 700). So, where the declaration alleged that A. and B. had goods within the bailiwick, it is sufficient to prove that either of them had (*Jones v. Clayton*, 4 M. & S. 349).

An averment of the *time* of committing the injury is material; yet the precise time is seldom so, and it may be proved to have been committed either on a day anterior or subsequent to that stated in the declaration (*Co. Litt.* 283 a; 1 Saund. 24, n. 1; 2 Saund. 295, n. 2; 1 Ch. Pl. 408; *Purcell v. Macnamara*, 9 East, 157; *Woodford v. Ashley*, 11 East, 508). Where the injury was capable of being committed on several days, it may be described as having been committed on such a day, and on divers other days and times between that day and the commencement of the suit. In such case, the first day should be laid anterior to the first injurious act, because the plt. would not be permitted to give in evidence repeated acts of trespass, unless committed during the time laid in the declaration, though he might recover as to a single trespass anterior to the first day (*Hume v. Oldacre*, 1 Stark. 351; B. N. P. 86; *Webb v. Turner*, 2 Stra. 195; *Brooke v. Bishopp*, Salk. 639; *Wilson v. Powell*, Skin. 641).

An averment as to the place where the injury was committed is material; yet the *precise* place is only material to be proved in local actions, and where the situation of the land, house, &c., is particularly described, as in trespass and replevin. Proof that the deflt.'s boat ran down the plt.'s in the half-way reach in the Thames, will support an allegation that the place where the boat was run down in the Thames is near the half-way reach (*Drury v. Twiss*, 4 T. R. 558). In transitory actions, it may be sufficient in general merely to state that the injury was committed in the county at large, though it is advisable to follow the usual course of stating a town or parish in the county; and, though the action is local, yet is not necessary to give a local description to the nuisance in an action for diverting the water of a navigation (1 Ch. Pl. 288, 289, 409). In cases where local description is required, such local description shall be given (R. G. H. T. 4 Will. IV.).

Statement of Damages.] In actions for torts, the damages resulting from the injury are frequently, and in some cases necessarily, stated, in addition to the usual conclusion of the declaration, *ad damnum*, &c. (1 Ch. Pl. 410). The general rules as to the *statement of damages in [*740] assumpsit will, for the most part, here apply (see *ante*, "ASSUMPSIT"). Though plt. prove more damage than stated, he cannot recover, if it be not alleged to such an amount (1 Bulst. 49); but he may enter a *remititur damna* for the excess (2 Arch. Pr. 1319; 4 M. & S. 94); but a mis-casting will not preclude the plt. (1 Lev. 58; Latch, 175). In actions of tort for special damage, he will not be allowed to go into evidence of any loss or damage beyond what he has expressly alleged in his declaration (*Browning v. Newman*, 1 Stra. 666; B. N. P. 7). The loss of substantial benefit arising from the hospitality of friends is a sufficient special damage, if proved (*More v. Meaguer*, 1 Taunt. 39). Where a loss of customers is alleged, *they* may be called to prove the fact of not dealing (Lib. P. 45; see "SLANDER"). The special damage must also be proved to be the *natural consequence* of the tort; for, if a third person is guilty of an illegal tortious

act to the plt. in consequence of such tort, such third person, and not the deft., is answerable (8 East, 1; 1 Saund. 243 a, n. 5).

In an action for enticing away a servant or apprentice, the damage *per quod servitum amisit* must be alleged and proved (Eades v. Vandeput, 5 East, 39, n.; Burr. 1352; 3 Bla. Com. 142). And the measure of damages is for the injury done by causing the servant or apprentice permanently to leave plt.'s employment (4 Moo. 12). The plt.'s horse being injured by the negligent driving of the deft. was sent to a farrier's for six weeks to be cured; at the end of that time it was ascertained that the horse was permanently injured to the extent of 20%. : held, that the proper measure of damages was the keep of the horse, the amount of the farrier's bill, and the difference in the value of the horse, and that the plt. ought not to be allowed also the hire of another horse during the six weeks (Hughes v. Quentin, 8 C. & P. 703). *Quære*, whether consequential damages are recoverable in cases where the direct injury is trespass (Raine v. Alderson, 2 Jur. 327). Where the damages were proved at 500%, but the jury gave 250% only, on the ground that there were faults on both sides, the court held the plt. entitled to the verdict (Raisen v. Mitchell, 9 C. & P. 613). Where the jury were of opinion that the deft.'s vessel alone was not the cause of the accident, they gave a verdict for 20%, although the damage proved amounted to 80%, and the court refused to interfere with the verdict (Smith v. Dobson, 3 Sco. N. R. 336).

Precedents.

Form of commencement of an action in case.

In the Q. B. (C. P., or Ex. of P.). On the day of A. D. 1850.
London to wit A. B. the plt, in this suit by E. F. his attorney (*or in his own proper person*) complains of C. D. the deft. in this suit who has been summoned to answer the plt. in an action of trespass on the case.

The forms of special counts in case will be found in the various titles relative to torts throughout the work; see the notes *ante*, p. 727; and 2 Ch. Pl. index, Case.

In actions of tort for misfeasance several counts for the same injury, varying the description of it, are not to be allowed. In the like actions for nonfeasance several counts founded on varied statements of the same duty are not to be allowed (Reg. Gen. H. T. 4 Will. IV. r. 5).

Plea of general issue, not guilty

In the Q. B. (C. P., or Ex. of P.). On the day of A. D. 1850.
C. D. } *The deft. by H. T. his attorney (*or in person*) says that he is not
[*741] . ats } guilty of the supposed grievances above laid to his charge in manner
A. B. } and form as the plt. hath above thereof complained against him. And
of this the deft. puts himself upon the country &c.

And for a further plea in this behalf the deft. says that the deft. was not possessed of the said dwelling-house in the said declaration mentioned (*or as the case may be*) in manner and form as the plt. has above in that behalf alleged and of this the deft. puts himself upon the country &c.

Plea of Payment of Money into Court.] The form of the plea will be found *post*, "PAYMENT OF MONEY INTO COURT."

By the 3 & 4 Will. IV. c. 42, s. 21, in all actions on the case, except actions for libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plt.'s daughter or servant, the deft. by leave of any of the superior courts where such action is pending, or of a judge of any of the said courts, may pay money into court by way of compensation and amends.

For notes on forms of pleas, see "DEFENCES," p. 760; see also the various titles of defences throughout the work, as "ACCORD AND SATISFACTION," &c., &c. See form of plea confessing causes of action as to part, and general issue as to residue, 3 Ch. Pl. 248, and replication thereto, ib. 466. To a declaration in an action on the case founded in tort, a plea of not guilty of the supposed grievances in the declaration mentioned, within six years before the exhibiting of the plt.'s bill, is bad on special demurrer (*Dyster v. Battye*, 3 B. & A. 448; "STATUTE OF LIMITATIONS").

Evidence for Plaintiff.

Proof of Inducement as to the Property or Thing affected.] If any special inducement as to the property or thing affected be stated in the declaration, the same, if material to the action, must be substantially proved. A material variance between it and the proof would be fatal (*ante*, p. 728, *et seq.*).

Proof of Inducement as to Plaintiff's Right or Interest affected.] If there be any special inducement stated as to this, the same, if material to the action, must be substantially proved. A material variance between it and the proof would be fatal; and, as to what is such variance, see *ante*, p. 731.

Proof that the Plaintiff's Right or Interest was such as to entitle him to maintain the Action.] It must be proved that the plt. had a *legal* right or interest in the matter or thing affected by the injury, at the time of such injury (*Dawes v. Peck*, 8 T. R. 330; *Benjamin v. England* (Bank of) 3 Camp. 417). And persons having a mere equitable interest cannot, in general, sue, except against wrong-doers, when the plt. is in actual possession of the property or thing affected (1 Saund. on Uses and Trusts, 222-3; *Jones v. Jones*, 7 T. R. 47; *Allen v. Imlett*, Holt, 641). Actions for all torts to the absolute rights of persons, as injuries to health, liberty, reputation, &c., must be in the name of the party immediately injured, as also actions for torts to *relative* rights (1 Ch. Pl. 69, and cases there collected; see *ante*, p. 744, and tit. "BANKRUPTCY"). A wife, child, or servant, cannot support any action for an injury to the person or property of the husband, parent, or master, as the law invests them with no relative legal rights in such person or property (3 Bla. Com. 143; *Russell v. Corne*, 1 Salk. 119). As to *real* property corporeal, proof of the plt.'s being in actual possession, *whether lawfully or not, will suffice to sustain a verdict, in an action for [*742] an injury committed by a stranger, or by any person who cannot establish a better title (*Graham v. Peat*, 1 East, 244; *Lambert v. Strother*, Willes, 221; *Harker v. Birkbeck*, 3 Burr. 1563; 2 Stra. 123; *Cro. Car.* 586; *Philpott v. Holmes*, Pea. 67; 1 Taunt. 83, 190; *Dyson v. Collick*, 5 B. & Ad. 600; *Welsh v. Nash*, 8 East, 394; *Seath v. Milward*, 2 Bing. N. C. 98; *Holmes v. Newlands*, 11 Ad. & E. 44). The party, however, must be in the personal or actual possession, or he must have the general property, in respect of which possession immediately follows, or he cannot maintain this action. A mere right to enter is not sufficient (*Dyson v. Collick*, 5 B. & Ad. 600). In case of real property, there is not that constructive possession that there is in case of personality; and the party entitled to possession cannot maintain trespass for an injury to such possession, unless he has had actual possession, though he have the freehold in law (Com. Dig. Trespass, B. 3). A person having the immediate reversion, or remainder in fee or in tail, or for a less estate, may support an action on the case for waste, &c., if it be injurious to his reversionary interest (2 Saund. 252 *b*; 1 Ch. Pl. 71). The absolute or general owner of *personal* property, having

the right of immediate possession, may in general support an action for an injury thereto, though he have never had the actual possession; it being a rule of law that the property in *personal* chattels draws to it the possession (2 Saund. 47 *a*, n. 1; Gordon v. Harper, 7 T. R. 12; 1 Bulst. 68-9). So, though at the time when the injury was committed the goods were in the actual possession of a servant, carrier, or other bailee, yet if the general owner had the right of immediate possession, the action may be in his name (2 Saund. 476; Gordon v. Harper, 7 T. R. 12); or it may be in the name of the person not having the actual possession, but only a special property (2 Saund. 47 *c, d*; Booth v. Wilson, 1 B. & Ad. 59; Fowler v. Down, 1 B. & P. 47; Nicholls v. Bustard, 2 C. M. & R. 659). But a mere servant, having only the custody of goods, and not responsible, cannot in general sue (1b.).

Where the general owner has not the right of immediate possession, as where he has demised or let, then if his reversionary interest be injured he may support an action on the case for such injury (1 Ch. Pl. 70; Gordon v. Harper, 7 T. R. 9); and a recovery by the party in possession would be no bar to his action (Bedington v. Onslow, 3 Lev. 209; Attersole v. Stevens, 1 Taunt. 190). As to remedy of reversioner or tenant against the hundred in case of a malicious fire, see 7 & 8 Geo. IV. c. 31, and Pellet v. Wonford (Inhabitants of), 9 B. & C. 134; see *ante*, p. 723). To sustain a count for an injury to an alleged reversionary interest, subject to a demise, the written lease or agreement must be proved (Cotterill v. Hobby, 4 B. & C. 465).

Where the declaration stated that the deft. had sold a gun to the plt.'s father for the use of himself and his sons, and warranted the same to have been made by Nock, and to be a good, safe, and secure gun, whereas it was not made by Nock, nor was it a good, safe, or secure gun; but, on the contrary, the plt., relying on the warranty, had used the gun, when it burst and wounded him: held, that case lay, for, the gun being delivered to the father for the purpose of being used by the plt., and the deft. having at the time made a representation which he knew to be false, but which induced the plt. to use the gun, he was liable to the plt. for the injury caused by it (Langridge v. Levy, 2 M. & W. 519). Case for obstructing light or air through ancient windows may be brought in the name of the tenant in possession, or

of the person entitled to the immediate reversion, *though the aver-
[*743] ments in the declaration necessarily differ in the latter case (Shadwell v. Hutchinson, 2 B. & Ad. 97; see Wills v. Ody, 1 M. & W. 452; 5 Dowl. 95). A common informer cannot sue for penalties under a statute unless an action be expressly given to him (1 Ch. Pl. 160).

An *assignee* of a chose in action or chattle cannot, in general, sue for an injury thereto, committed before he became such assignee. Thus, an heir cannot maintain an action of waste committed in the time of his ancestor: nor the grantee of a reversion, for waste committed before the grant (2 Saund. 252 *a*); though a reversioner may, as we have seen, sometimes sue, when the injury is such as to affect the reversion (*ante*, p. 741). An assignee may, however, always sue for an injury committed after he became such assignee. In some cases, where plt. has assigned his interest in the thing affected, he may still sue in case for a consequential injury. Thus, where the lessee, by deed-poll, assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the covenants contained in the lease, and A. took possession, and occupied the premises under this assignment, it was held, the lessee might maintain an action upon the case founded in *tort*, against A., for having neglected to perform the covenants whereby the lessee had been sued by the lessor, and sustained damages (Barnett v. Lynch, 5 B. & C. 608). A devisee may support an

action for the continuance of a nuisance erected in the lifetime of the testator (*Same v. Barwish*, Cro. Jac. 231). So, a remainderman may maintain an action for undermining a wall, during a tenancy for life, if the excavation be continued and the wall fall down during his own time (*Gillon v. Bodington*, 1 Ry. & M. 161; *Howell v. Young*, 5 B. & C. 263, 268).

Where one of several parties jointly interested in the property is dead the action should be in the name of the survivor, and the executor or administrator cannot be joined, nor can he sue alone (1 Ch. Pl. 76); but, if the parties had separate interests in respect of which they might have severed, then the personal representative might maintain a separate action if the tort were not of that nature that it died with the person (*Ib.*): the death of one shall not abate the action (8 & 9 Will. III. c. 21, s. 7).

Death of Party injured.] In the case of the death of the injured party in torts, the general rule is, *actio personalis moritur cum personâ*. And this rule seems to apply in all cases, whether the action be founded on personal injuries, or even on contracts (*Kingdon v. Nottle*, 1 M. & S. 355); except such as create an injury to the personal estate of the testator; because the executors and administrators are the representatives of the personal property, that is, the debts and goods of the deceased, but not of their wrongs. Therefore, where the damage done to the personal estate can be stated on the record, and increases the individual transmissible personal estate, the action remains to the executor or administrator (*Chamberlain v. Williamson*, 2 M. & S. 416). And it is on this principle that case or debt lies by the executor for an escape on final process (4 Mod. 403; 12 Mod. 71); or against the sheriff, for removing goods in execution, without paying a year's rent due to the testator (*Palgrave v. Windham*, 1 Stra. 212). But where the damage consists in previous personal suffering—as in all injuries affecting the life or health of the deceased, all such as arise out of the unskillfulness of medical practitioners, imprisonment of the party, brought on by the negligence of his attorney, through breaches of the implied promise by the persons *employed to exhibit a proper portion of skill, &c., [*744] or the like—the cause of action is extinguished by death, and the executor or administrator cannot sue (*Ib.*; *Jon. W.* 174; *Lat.* 168); and the statute of 4 Edw. III. c. 7, has made no alteration in the common law in this respect (1 Saund. 217, n. 1; *Mason v. Dixon*, *Jon. W.* 174).

Bankruptcy has the effect of passing to the assignees all rights of action, and every species of rights of which a profit can be made, as such rights are assignable at common law; and questions as to these rights seem to turn much upon the same principle as those which result to executors, &c. But for injuries of a personal nature, which are not the subject of property, as slander, &c. (*Chamberlain v. Williamson*, 2 M. & S. 413; *Benson v. Flower*, *Jon. W.* 215; *Ex parte Charles*, 14 East, 197; *Howard v. Crowther*, 8 M. & W. 603), the bankrupt himself must sue (*Webb v. Fox*, 7 T. R. 391; *Cull.* 414; see *post*, "BANKRUPTCY"). So, *insolvency* passes the estate, effects, rights, &c., by 1 & 2 Vict. c. 110; 5 & 6 Vict. c. 116, &c., and differs little in its effect, as far as regards the right of suing in case, from bankruptcy, except that, by the assignment at the time of the petition, the assignee takes only such property as the insolvent had at the time of the petition (*Hepper v. Marshall*, 2 Bing. 372; *post*, "INSOLVENT;" see *Lea v. Telfer*, 1 C. & P. 147; *Doe d. Palmer v. Andrews*, 4 Bing. 384).

Joint Interest.] Where there is a *joint legal* interest existing in two or

more persons, who have received a joint damage, they should join in the action (1 Saund. 291; 1 Ch. Pl. 73). So, part-owners of a ship or goods, ought to join in an action against any one who injures or takes them away (Childs v. Sands, 1 Salk. 32; 4 Mod. 176, 181; 3 Lev. 351). And, where defamatory words are spoken of partners respecting their trade, they may maintain a joint action for the slander; and it is not necessary for them to show the proportion of their respective shares (Forster v. Lawson, 3 Bing. 452; Cooke v. Batchelor, 3 B. & P. 150; 2 Saund. 117 *a*; see "SLANDER"). If two persons obtain a mandamus, they may join in an action for a false return to it (3 Lev. 362, 363). So, where bail together employ an attorney to surrender their principal, one cannot maintain a separate action for negligence against him; and, Mansfield, C. J., said, "The situation of Hill and Bailey (the bail) was the same: they were mutually responsible for each other; the act to be done would operate equally in favour of each; the one could not be relieved from his liability without the other" (Hill v. Tucker, 1 Taunt. 9; see Collins v. Barnett, cited in 3 Bing. 456; see cases where joint payment creates joint interest: Osborne v. Harper, 5 East, 225; Brand v. Boulcott, 3 B. & P. 235). Tenants in common should also join (Cro. Eliz. 554). To constitute a joint legal interest, it must be in the same degree, as tenant and reversioner cannot join for damage to the inheritance, nor copyholder and lord, &c. And, where the interest is several, yet plt. ought to join, if the cause of action be an entire joint damage. So, where several persons, called dippers, at Tunbridge Wells, who were chosen by the freeholders of the manor, &c., were disturbed by a person not duly appointed, against whom they joined in an action, it was held they should join; for, although the dippers were severally entitled to receive for their own several use such voluntary gratuities as the company were pleased to give them respectively, they were jointly concerned, as it was a hurt to them all (Weller v. Baker, 2 Wils. 423). So, if there be two ancient mills in a manor, at one or the other of which the tenants are bound to grind, the owners of both *mills may join against a tenant for not grinding [*745] (2 Saund. 115). And, in Collins v. Barnett, it was holden, that two persons might bring a joint action for maliciously holding them to bail, if the complaint in the declaration was confined to the expenses which they were jointly put to in procuring their liberty (per Best, C. J., cited in Forster v. Lawson, 3 Bing. 456). In actions of tort, if a party who ought to join be omitted, it can only be taken advantage of by plea in abatement (Addison v. Overend, 6 T. R. 766; see "ABATEMENT"); and it is not, as in contracts, the cause of nonsuit for nonjoinder; and so it is with tenants in common (Cro. Eliz. 554; ib. 770). And, if one of two part-owners of a chattel sue alone for a tort, and the deft. do not plead in abatement, the other part-owner may afterwards sue alone (Sedgworth v. Overend, 7 T. R. 279). If a third person collude with one partner in a firm to injure the other partners, the latter may jointly maintain an action on the case against the third person so colluding (Longman v. Pole, 1 Moo. & M. 223; see Story v. Richardson, 6 Bing. N. C. 123). A husband and wife may sue for a malicious prosecution (Derbey v. Dolthal, in error, Cro. Car. 553; see "HUSBAND AND WIFE"). So, two persons may sue for a malicious arrest, if it be laid as special damage that they jointly incurred an expense in obtaining their discharge (Barratt v. Collins, 10 Moo. 446). If too many join, the deft. may demur, move in arrest of judgment, bring error if the objection appear on the record, or if not, it would be ground of nonsuit (Barratt v. Collins, *supra*; 2 Saund. 116; see Worsley v. Charnock, Cro. Eliz. 473; Hare v. Celey, ib. 143; 1 Ch. Pl. 75).

Action for Infringement.] In case for infringement of a patent, the deft. pleaded not guilty; that the plt. was not the true and first inventor; and that the invention had been previously, wholly, or in part, publicly and generally known, used, practised, and published in England: held, that the issue on the first plea must be determined by the acts done by the deft., without reference to the existence or non-existence of a fraudulent intention; that the second plea would be proved by showing a publication before the date of the letters-patent; and that the third plea only raised a question of user before the grant of the letters-patent (*Stead v. Anderson*, 4 C. B. 806).

The doctrine laid down by the Court of Exchequer, that, if a patent has been infringed unintentionally, the patentee is not entitled to redress, disapproved of (*Heath v. Unwin*, 15 Sim. 552; 11 Jur. 420; 16 Law J. 283, Ch.).

In an action for the infringement of a patent, the novelty and utility of the invention being established, the plt. has a *prima facie* case (*Minter v. Hart*, Web. Pat. Ca. 130); slight evidence will be sufficient (*Turner v. Winter*, 1 T. R. 606); and, if the subject of the patent have never been brought into use or been seen by the plt., the fact of its having been made before by another will not invalidate the claim to novelty (*Lewis v. Marling*, 10 B. & C. 22; *Jones v. Pearce*, God. Pat. p. 10); but these cases proceeded on the ground that the purposes for which the former manufacture took place were for mere experiments which failed (per Lord Abinger, in *Smith v. Carpenter*, 9 M. & W. 300); when it was held, that the invention having been brought over from America, and several dozens manufactured here, some of which were on a gate on a public road, was not novel. The deft. denied the invention as well as that the specification described it "an improved construction of chairs." The jury found that another person, B., had before invented and sold chairs on the same principle, but that the plt. had discovered the practical use to which it had now been applied: held, that plt. could not recover, his specification including that to which B. was entitled (*Minter v. Mower*, 6 Ad. & E. 735). The declaration alleged that the deft. had directly or indirectly used the plt.'s invention; but it appeared that he got other manufacturers to do so, and then received and sold the goods so manufactured: held, that the breach was proved (*Gibson v. Brand*, 4 Man. & G. 179); and, where the deft. has slightly deviated from the process described in the specification, for the purpose of evading the patent, it is fraud. The question is, whether the deft.'s mode is substantially different (*Hill v. Thompson*; 2 Moo. 424; 8 Taunt. 375; *Holt*, 636; 3 Mer. 629). Where the patent was for making ropes in a particular way, and the rope made by the deft., which the plt. produced, appeared to agree in its peculiarities with the plt.'s, and the deft. would not permit the plt. to see his mode of making them: held, presumptive evidence that he made them by *the plt.'s process (*Huddart v. Grimshaw*, Dav. Pat. Ca. 288; God. Pats. 180). [*746] Novelty is established by the testimony of an experienced person, who says he never heard of the invention before (*Manton v. Manton*, Dav. Pat. Ca. 350). A manufacture newly imported into this country is new within the patent (B. N. P. 75). Prior publication in a book is an answer to novelty (*Brewster's case*; cited by Alderson, B., in 2 M. & W. 553, 554). The claim of a new process is not supported by evidence of an improvement in an old one (*Gibson v. Brand*, 4 Man. & G. 179, 198). It is no answer to the novelty that another person has enrolled another patent for the same discovery, since the grant of the patent to the plt., and before the enrolment of the specification (*Cornish v. Keene*, 3 N. C. 570). As to proof of letters-patent, see *post*, p. 762. The enrolment is proved by an examined copy of the original on the rolls of the Court of Chancery (see *post*, "PATENT").

Particulars of Objection.] In an action for infringing a patent the Court has a general power to order a particular of the alleged infringements (*Electric Telegraph Company v. Nott*, 4 C. B. 562).

But where the specification claimed a combination of numerous improvements (in electric telegraphs), the court refused to compel plts. to give the defs. such particulars; conceiving that, from the nature of the patent, the plts. would be thereby put to great difficulty and embarrassment; and that, under the circumstances, (the matter having been debated in Chancery, upon a motion for an injunction), the defs. must be taken to possess adequate information on the subject (*Ib.*).

With regard to copyright, see 5 & 6 Vict. c. 45; 5 & 6 Vict. c. 47. *Seem*, it is not sufficient evidence that the copyright is the plt.'s to show that he has been seen correcting the MS. (*Stockdale v. Onwhyn*, 7 D. & R. 625; 5 B. & C. 173). *Seem*, the first publisher of a book may sue a stranger who pirates it, although he has improperly obtained the copy in the first instance (*Cary v. Kearsley*, 4 Esp. 168; see *post*, "COPYRIGHT"). With regard to international copyright, see 1 & 2 Vict. c. 59, s. 1. Before this statute the court could not protect a foreigner's copyright (*Delondre v. Shaw*, 2 Sim. 237). If a non-resident alien publishes a work first in this country, he is entitled to protection (*Bentley v. Souter*, 10 Sim. 329; see "COPYRIGHT"). The privileges conferred by the stat. 54 Geo. III. c. 150, for the protection of copyrights in this country, do not extend to books printed abroad (*Clementi v. Walker*, 2 B. & C. 861). As to copyright in lectures, see 5 & 6 Will. IV. c. 65; in dramatic productions, see 3 & 4 Will. IV. c. 15 (see "COPYRIGHT"). Before this stat. the proprietor of the copyright of a tragedy which had been printed and published for sale could not maintain an action against the manager of a theatre for publicly acting and representing such tragedy in an abridged form for profit (*Murray v. Elliston*, 5 B. & A. 657). The assignee of the copyright of a dramatic work, printed and published within ten years of the passing of the 3 & 4 Will. IV. c. 15, and not the author who has assigned such copyright, is entitled to the whole right of representing the piece (*Cumberland v. Planché*, 3 Nev. & M. 537; 1 Ad. & E. 580). So, where the work is printed and published since the act, and no reservation of the right of exclusive representation is made by the author (*Ib.*). It is a question of fact for the jury, whether there has been a representation of part of a dramatic performance under the above act (*Planché v. Braham*, 8 C. & P. 68; 5 Sco. 242). With regard to prints and engravings, see 8 Geo. III. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57; see "COPYRIGHT." An engraving on a reduced scale of a specification of a new invention, enrolled at the patent-office, may be the subject of a copyright (*Newton v. Cowie*, 12 Moo. 457; 4 Bing. 234. But see *Wyatt v. Barnard*, 3 Ves. & B. 77). In order to sustain an action for pirating prints, the proprietor's name, and the date of publication must appear on the original print, but it is not necessary that the designation proprietor should be added (*Ib.*; overruling *Roworth v. Wilks*, 1 Camp. 94; and see *Sayer q. t. v. Dicey*, 3 Wils. 63. But see *Brookes v. Cock*, 4 Nev. & M. 652; 3 Ad. & E. 138; *Symond v. Thompson*, *infra*). The assignee of a print may maintain the action (*Thompson v. Symonds*, 5 T. R. 41). It is not necessary to produce the plate itself in evidence;

[*747] one of the prints taken *from the original plate is evidence (*Ib.*).

It is no piracy of one engraving to make another from the original picture (*Berenger v. Wheble*, 2 Stark. 548). A. being employed by B. to engrave plates from drawings belonging to B., took off from the plate so engraved by him a number of proof impressions, which he retained for his own use; he afterwards became bankrupt, and these proofs were advertised by his assignees for sale: held, that neither he nor his assignees were liable to

an action for having disposed of pirated prints without the consent of the proprietor, as the statute did apply to prints taken from a lawful plate (*Murray v. Heath*, 1 B. & Ad. 804). As to the copyright in prints, see 38 Geo. III. c. 71; 54 Geo. III. c. 56. As to the copyright in patterns for printing linens, calicoes, &c., see 27 Geo. III. c. 30, s. 38; 34 Geo. III. c. 23; 2 & 3 Vict. c. 13; 2 & 3 Vict. c. 17; see "COPYRIGHT."

Executor, &c., Husband and Wife.] In the case of an executor, administrator, heir, or devisee, suing for a tort, see *post*, "EXECUTOR AND ADMINISTRATOR," "HEIR," "DEVISEE." As to actions by husband and wife, *post*, "HUSBAND AND WIFE."

Proof of the Injury.] The injury must be proved to have been committed, as stated in the declaration; and, as to what is a variance, see *ante*, p. 731. This must, in general, be proved by persons present when the injury was committed, or by deft.'s admissions.

Proof that the Deft. committed the Injury.] It must be proved that the deft., or, what is tantamount thereto, the deft.'s agent, committed the injury. All natural persons are liable for injuries resulting from their tortious acts, not grounded on, or arising from a contract (1 Rol. 778, 913, 914; 1 Lev. 169). Therefore, an infant, or feme covert, is liable for her own tortious acts, though, indeed, a feme covert cannot be a tort-feasor, either by prior or subsequent assent (*Co. Litt.* 180, 186, n. 4; *Jennings v. Randall*, 8 T. R. 336; 1 Ch. Pl. 86); and a lunatic is liable in case for any injurious acts committed by him, though he could not be punished *criminaliter*, from the absence of criminal intention (*Bac. Abr. Tres. G. Jar. E.*; *Hob.* 134; *Haycraft v. Creasy*, 2 East, 104; see these titles respectively).

Corporations, Companies, Public Officers, &c.] Corporations are also liable for damages for torts: thus, where a public company lay down pipes so negligently, that an individual, passing along the streets, receives an injury, they are liable, although the negligence was the act of the men employed by the company's contractor (*Matthews v. West London Waterworks*, 3 Camp. 403; *Gibson v. Inglis*, 4 Camp. 72; *Yarborough v. England* (Bank of) 16 East, 7; *Bush v. Steinman*, 1 B. & P. 405; *Duncan v. Surrey Canal*, 3 Stark. 50; see *post*, "CORPORATIONS"). An individual who has suffered loss in consequence of the decay of sea walls, which a corporation is directed to repair under the terms of a grant from the crown, conveying a bridge and pier or quay, with tolls to the corporation, may sue the corporation for the recovery of damages (*Henley v. Lyme* (Mayor of), 5 Bing. 91). Where an act of parliament constituted a company for the purpose of making and maintaining a canal to be passable for boats, and all means were to be allowed to navigate the canal upon payment of tolls, the act provided, that in case of obstruction by any sunken vessel, not weighed up by the owner within a given time, *it should be lawful* for the company to do so: held, that these words were compulsory upon the defts., and that they were liable in an action on the case for an *injury occasioned by [*748] their non-removal in due time of the sunken vessel (*Parnaby v. Lancaster Canal Company*, 11 Ad. & E. 223). But if the act of parliament constituting the company give a remedy by mandamus, that must be applied (*R. v. The Northern Union Railway Company*, 8 Dowl. 329; see *Grady v. Scotlands*, Cr. Pr. tit. Mandamus). An action lies against the Bank of England for refusing to transfer stock (*ante*, p. 730); or for unreasonable delay in passing a power of attorney to transfer it (*Sutton v. England* (Bank of),

M. & R. 52; 1 C. P. 193); but not for refusing to pay dividends, if they have not received them from government (England (Bank of) v. Davis, 5 B. & C. 185; 2 Bing. 393).

An incorporated waterworks company are liable for the negligence of the workmen employed by their contractor (Matthews v. West London Waterworks Company, 3 Camp. 403). So, the London Dock Company is liable for the carelessness of their servants in removing goods (Gidson v. Inglis, 4 Camp. 72). But judges and justices of the peace (Bonnell v. Beighton, 5 T. R. 186; Raym. 466; Warne v. Varley, 6 T. R. 449; 3 M. & S. 425; see 1 & 2 Vict. c. 74); commissioners of bankrupts (Dodswell v. Impey, 1 B. & C. 163); the attorney-general (Johnson v. Sutton, 1 T. R. 513); or superior naval or military officers (Ib.) acting within the scope of their authority, are not liable. Trustees and commissioners acting gratuitously under acts of parliament for the benefit of the public, and intrusted with the conduct of public works, are not liable for the negligence or unskilfulness of the workmen (Hale v. Smith, 2 Bing. 156; see Boulton v. Crowther, 2 B. & C. 703). And, in general, where parties act, *bona fide*, in the discharge of a public duty, they will not be liable (Sutton v. Clarke, 6 Taunt. 29; 2 D. & R. 353; 2 Bl. R. 1141; Bolton v. Crowther, 2 B. & C. 703; Pike v. Carter, 3 Bing. 85; 2 Bing. 163); but if, as such, they exceed their authority, or act arbitrarily, carelessly, or oppressively, they will be liable (Ib.; Leader v. Moxon, 3 Wils. 461; Thompson v. Royal Exchange Assurance Company, 16 East, 214; Jones v. Biril, 5 B. & A. 837; 3 Bing. 85). So, commissioners of prize money are liable for not adjudging a prize, &c. (Chinotti v. Bumstead, 6 T. R. 646). And a justice of the peace, for refusing an examination on the statute of hue and cry (Green and Bucklehurst's case, 1 Leon. 323). This statute is repealed by 7 & 8 Geo. IV. cc. 27, 31. If an officer acting gratuitously take a reward, whatever be its nature, for the discharge of a public duty, that instant he becomes a public officer, and is liable for injuries caused by negligence or abuse of his office (Henley v. Lyme (Mayor of), *supra*). If one tenant in common misuse, spoil, destroy, or convert to his own use that which he has in common with another, he is answerable to the other in an action, as for misfeasance (per Lord Kenyon, C. J., Martyn v. Knowlys, 8 T. R. 146; see "COMMON"). And so with joint-tenants, though they cannot be sued for taking away the chattel (2 Saund. 47 f. g). Owners of a party-wall are liable, the one to the other, for tort; they are not, however, tenants in common (Matts v. Hawkins, 5 Taunt. 20).

Masters and Servants, Agents, &c.] The act of the servant will not bind the master to the same extent as in actions on contracts (Harding v. Greening, Holt, 531; 1 Moo. 477). A principal or master is, however, in general liable for the tortious acts of his servants in all matters done by them in the exercise of the authority that he has given them, whether such servants be immediately retained by himself, or by those whom he has employed; and, however remote the sub-agent may be whose unskilfulness or negligence, &c., *was the cause of the injury, the liability may always be traced [*749] to the principal, from whom the authority moved (Bush v. Steinman, 1 B. & P. 404; 5 B. & C. 547; Morley v. Gaisford, 2 H. Bl. 442; 3 Wils. 317; but see cases, *infra*. Steinman v. Bush would seem to be overruled by Rich v. Basterfield, 4 C. B. *post*, p. 756). So, for the negligent driving of a carriage, or navigating a ship, even whilst the servant was driving out of the direct road, and for his own purpose (Joel v. Morrison, 6 C. & P. 501); but the owner of a ship is not liable for the neglect of a pilot he was obliged to employ (M'Intosh v. Slade, 6 B. & C. 657; Lucey

v. Ingram, 6 M. & W. 302). But the party would not be liable unless the person committing the injury acted *at the time* as his servant (M'Manus v. Cricket, 1 East, 106; Rapoon v. Cubitt, 9 M. & W. 710); and on this point the liability often chiefly depends. And, in Lougher v. Pointer, 5 B. & C. 547, where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to plt.'s horse, the judges of K. B. were divided as to the liability of the owner of the carriage (Quarman v. Burnett, 6 M. & W. 499; Randleson v. Macray, 8 Ad. & E. 109; Fenton v. City of Dublin Steam-Packet Company, ib. 835; Bundy v. Giles, 1 Moo. & R. 495; Smith v. Laurence, 2 M. & R. 1); nor does it make any difference that the driver was provided during the drive with livery belonging to the owner of the carriage, and that the accident happened by the driver leaving the carriage while returning the livery (Quarman v. Burnett, *supra*). The licensed driver of a cab licensed to the deft., is a servant to the deft., for whose trespass in driving the cab the deft. is liable, although the driver hire the cab at a sum certain each day, by a bargain having reference to that day only; such an agreement being merely the mode of paying the deft.'s wages (Morley v. Dunscombe, 11 Law T. 199, Q. B.). Where the deft., the owner of the carriage, sat on the box, and did not interpose to prevent the postilions from forcing their way among other carriages, by which the injury was done, and afterwards admitted his responsibility: held, to be a joint act of the deft. and postilions, for which trespass lay (M'Laughlin v. Pryor, 4 Man. & G. 48). It is a question for the jury, whether the servants are acting as the servants of the person hiring, or of the owner (Bunday v. Giles, 1 Moo. & R. 494). In Sammell v. Wright, 5 Esp. 263, where the horses were hired to go to Windsor, the owner of the horses was held liable, because they were under the care and direction of his servants. The carriage belonged to the traveller, the Marchioness of Bath. In the case of Sir Henry Houghton, where he hired horses to draw his carriage travelling post, he was held not to be answerable for accidents produced by the misconduct of the drivers (cited 4 B. & C. 550, and referred to by Abbott, C. J. 575). And, in Dean v. Branthwaite, 5 Esp. 35, where a dispute arose between the owner of the carriage and the owner of the horses, which he hired, Lord Ellenborough said, "that a person who hires horses under such circumstances has not the entire management and power of them, but that they continue under the power and control of the stable-keeper's servants, who were intrusted with the driving. And, in Croft v. Alison, 4 B. & A. 590, where the plts. hired a chariot for the day, *appointed* the coachman, and *furnished* the horses, it was held they were correctly described as owners and proprietors.

But, if a servant *wilfully commit an injury*, the master is not liable (M'Manus v. Crickett, *supra*; Boucher v. Lowson, Rep. t. Hardw. 87; Middleton v. Foulter, 1 Salk. 282; *ante*, p. 715). "Therefore, if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another, the master is not liable; but if, in order to perform his master's orders, he strikes, but injudiciously, and **in* order to extricate himself from a difficulty that will be *negligent* and [*750] *careless* conduct, for which the master will be liable, being an act done in pursuance of the servant's employment" (*per curiam*, Croft v. Alison, 4 B. & A. 592; Gregory v. Piper, 9 B. & C. 591); nor will the master be liable where the servant takes out his cart for his own purposes, for any injury which the servant then does (Joel v. Morrison, 6 C. & P. 501; Sleath v. Wilson, 9 C. & P. 607); but the master would be liable if the servant were out on his business, and whilst making a mere detour for his own pur-

poses, committed an injury (Ib.). In order to prove the ownership of a stage coach, it was held sufficient to show the inscription on it, of the name of the party licensed to use it, under 50 Geo. III. c. 48, s. 7 (*Barford v. Nelson*, 5 B. & Ad. 571).

In tort, as in other actions, it is sufficient to state matters according to their legal effect; thus, in an action for negligence in driving the deft.'s carriage, it is sufficient to show that the damage was occasioned by the negligence of the deft.'s servant (*Brucker v. Fromont*, 6 T. R. 659). In an action against an attorney for negligently letting judgment go by default, it lies on the deft. to show that there was good ground for doing so, and not on the plt. to show there was a good defence to the action (*Godefroy v. Jay*, 7 Bing. 413); but in an action for negligence against carriers, it lies on plt. to prove it, and not on deft. to show reasonable care (*Marsh v. Horne*, 5 B. & C. 327; but see *Carpue v. London and Brighton Railway Company*, where Lord Denman, C. J., held, that it lay on the company to disprove negligence, 5 Q. B. 747). In actions for negligent driving, actual negligence must be proved, and it is not sufficient merely to show an accident, unless it be of such a nature as to afford a presumption of negligence. Where a stage-coach breaks down, a presumption arises that the accident arose, either from the unskilfulness of the driver, or the insufficiency of the coach (*Christie v. Griggs*, 2 Camp. 79; *Curtis v. Drinkwater*, 2 B. & Ad. 169), for which latter he is liable, although the defect be out of sight and not perceptible on ordinary examination (*Sharp v. Grey*, 4 Bing. 457); and the excess in number of passengers on a coach has been held to be conclusive evidence of the accident having arisen from over-loading (*Israel v. Clark*, 4 Esp. 259). But where the accident arose from foggy weather, or the removal of accustomed landmarks, or where the coachman was driving in the middle of the road and not on his own side, but there were no other coaches on the road, and the horses took fright and overturned the coach: held, that no presumption of negligence arose (*Crofts v. Waterhouse*, 3 Bing. 319, 321; *Aston v. Heaven*, 2 Esp. 533; *Wakeman v. Robinson*, 1 Bing. 213). If a carriage coming in any direction leave sufficient room for any other carriage, horse, or passenger on its side of the way, it is sufficient (*Wordsworth v. Willan*, 5 Esp. 273; *Clay v. Wood*, 5 Esp. 44); and it is matter of evidence whether sufficient room is left (Ib.). Whatever may be the law of the road, it was not to be considered inflexible and imperative. In the crowded streets of the metropolis situations and circumstances might frequently arise where a deviation from what is considered the law of the road would not only be justifiable, but absolutely necessary (*Wayde v. Lady Carr*, 2 D. & R. 256). But if the deft. leave his own side of the road, he is bound to use greater care than if he were on his own side (*Pluckwell v. Wilson*, 5 C. & P. 375). Where the deft. was driving on the wrong side of a road of considerable breadth, and the plt.'s servant, who was on horseback, crossed over to the same side without any reason, and in passing, the horse was killed, Lord Kenyon held, that he voluntarily put himself into danger, and that the injury was of his *own seeking; but the jury having found for the plt., [*751] the court refused to disturb the verdict (*Cruden v. Fentham*, 2 Esp. 685). Though the law of the road is not to be adhered to, if by departing from it an injury can be avoided, yet in cases where parties meet on the sudden, and an injury result, the party on the wrong side should be held answerable, unless it clearly appear that the party on the right had ample means and opportunity to prevent it (*Chaplin v. Hanks*, 3 C. & P. 554). The rule of the road applies to saddle-horses (*Farley v. Thomas*, 8 C. & P. 103); but if a driver of a carriage on his proper side see a horse coming furiously on his wrong side of the road, it is the duty of the driver

of the carriage to give way, and avoid an accident, although in doing so he does go a little out of what would otherwise be the law of the road (*lb.*). But the master will not be liable for the acts of the servant, unless the latter was to blame, and he will be so for not exercising the best and soundest judgment (*Jackson v. Tollett*, 2 Stark. 39). If one of two courses be open to a driver, one being safe and the other hazardous, and he selects the latter, he is responsible for the mischief that follows (*Mayhew v. Boyce*, 1 Stark. 423). When a passenger, who is in consequence of the negligence of the deft. obliged to adopt the alternative of leaping from the coach, or remaining at peril, leaps and is hurt, the deft. is liable, if the leaping were a prudent precaution (*Jones v. Boyce*, *ib.* 493). So, the owner is liable for damage to a passenger when the driver neglected to inform him of the danger in passing through a low arch (*Dudley v. Smith*, 1 Camp. 167). A coachman is bound to use competent skill, and that with diligence; he must be acquainted with the road, have steady horses, a coach and harness of sufficient strength, and properly made, and have lights by night (*Crofts v. Waterhouse*, 3 Bing. 321, per Best, C. J.).

A foot passenger, though he be infirm from disease, has a right to walk in the carriage way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it (*Boss v. Little*, 5 C. & P. 407). In an action for an injury to a person crossing a public highway, by driving against him and knocking him down, the jury must be satisfied that the injury was attributable to the negligence of the driver, and to that alone, before they can find a verdict for the plt.; and if they think that it was occasioned in any degree by the improper conduct of the plt. in crossing the road in an incautious and imprudent manner, they must find their verdict for the deft. (*Hawkins v. Cooper*, 8 C. & P. 473; see *Raisin v. Mitchell*, 9 C. & P. 613). The principle as to negligence is, that a man must bring skill and precaution proportionate to the danger to the public in the employment he is engaged upon, and this is to be measured by all the circumstances; as, for instance, in the case of driving, with reference to the size and character of the horse, the nature of the vehicle, the place where, and the time when, he is driving (*Hall v. Dayrell*, 8 Law T. 338, Q. B.).

In an action for the result of a collision, it was held that the plt. might recover, although he could have avoided the collision, if he were in no degree in fault in not endeavouring to prevent it (*Vennall v. Garner*, 1 C. & M. 21; 3 Tyrw. 85). It is the duty of the ship on the larboard tack to give way, and that on the starboard tack to hold on; and where two steamers are approaching in a straight line, each is to put the helm apart (8 Jur. 999, 1094). If a vessel at sea be going close hauled to the wind, and another meeting her be going free, the rule of the sea is for the latter vessel to go to leeward or windward, as she best can; she ought as a general rule to suppose that the vessel going to windward will keep her position (*Handayside v. Wilson*, 3 C. & P. 528); and where the deft.'s *ves- [*752] sel was sailing in the channel before the wind, having her studding sails set, at night, and the plt.'s brig was sailing by the wind, and the jury found a verdict for the deft., the court granted a new trial, in order to ascertain the propriety of carrying studding sails at such a time, and in such a place, as also whether the deft.'s captain had kept a proper look out (*Jameson v. Dunkald*, 12 Moo. 148). The question in these cases is, whether the plt., by his improper conduct, substantially contributed to the accident. Therefore, where a brig was carrying her anchor in a position contrary to the by-laws of the river Thames, when she came in collision with a barge; held, that the carrying the anchor would not of itself be sufficient to make the owner of the brig responsible in damages, if the barge, by violation of

the rule of the river, placed herself where the brig struck her, although but for the position of the anchor the injury would not have been produced (*Sills v. Brown*, 9 C. & P. 601); and if the accident happen from circumstances against which persons of competent skill could not guard, the plt. cannot recover, nor, if his men had put his barge in such a place that persons using ordinary care would run against it, nor, if the accident could have been avoided, but for the negligence of the plt.'s own men in not being on board his barge while lying in a dangerous place (*Luck v. Seward*, 4 C. & P. 106). In an action against the captain for swamping a loaded wherry on the river, by a swell produced by a too rapid rate of passage of a steamer, the jury, in order to find for the plt., must be satisfied that the mischief was occasioned by the swell alone, and if they think it doubtful, or that the plt. contributed to the injury, by his own improper conduct in managing or overloading the boat, they must find for the deft. (*Luxford v. Large*, 5 C. & P. 421). The captain of a sloop of war is not liable when the mischief was done during the watch of the lieutenant, who was on deck and had the direction and management of the steering and navigating the sloop at the time, the captain not being on the deck, nor called there by his duty (*Nicholson v. Mouncey*, 15 East, 34; and see *Huggett v. Montgomery*, 2 N. R. 446; *Rose v. Miles*, 4 Moo. & S. 101). If a ship be chartered to the commissioners of the navy as an armed vessel, and an injury occur through the misconduct of the persons on board, while a commander of the navy and a king's pilot are on board, the owners are liable (*Fletcher v. Braddick*, 2 N. R. 182). A steamer was under charter for six months, the owners to keep it in order, for the conveyance of goods from N. to G., or other coasting station, at the option of the charterer; the crew were appointed by the owners, but paid by the charterer, who was also to pay all disbursements. The charterer did not interfere with the navigation of the vessel; but whilst he was on board, through the negligence of the crew, it run against and injured the plt.'s keel: held, that the owners were liable (*Fenton v. Dublin Steam-packet Company*, 1 P. & D. 103; 8 Ad. & E. 835). Where the defence was that the vessel was at the time under the management of a pilot, although evidence was adduced to show that in fact a pilot had shortly before the accident happened to come on board the deft.'s ship, yet it is a question of fact for the jury, whether at the time of the accident the deft.'s vessel was under the direction of a pilot or not (*Catts v. Herbert*, 3 Stark. 12). Where the owner of a barge on the Thames lends it to another, who navigates it with his own men, who are guilty of negligence: *semble*, that the owner is not liable (*Scott v. Scott*, 2 Stark. 438). The owners of goods in a ship may sue the owners for the loss occasioned by the ship's striking against an anchor lying under water in the river Trent without a buoy (*Trent v. Mersey Navigation Company*, Ab. Sh. by Shea, Serjt., 256). *Where [*753] it was proved that the barge belonged to the deft.; but the man who was steering could not be identified: held, *prima facie* evidence that the barge was steered by the deft.'s servant, and that if it were on hire, or in the use of any other person, it lay on the deft. to show it (*Joyce v. Capell*, 8 C. & P. 370). In an action by the owner of a brig for an injury done to a sloop belonging to the plt., who proved damages to the amount of 500*l.*, but the jury gave a verdict for 250*l.*, on the ground that there were faults at both sides: held, that notwithstanding this, the plt. was entitled to the verdict, as there might be faults in the plt. to a certain extent, and yet not so far as to prevent him from recovering (*Raisin v. Mitchell*, 9 C. & P. 613). The plt. cannot recover, if by his own culpable negligence he contribute substantially to the accident (*Vennell v. Garner*, *supra*; *Sills v. Brown*, 9 C. & P. 601; *Smith v. Dobson*, 3 Man. & G. 59; *Vanderplank*

v. Miller, Moo. & M. 169). But see *Bridge v. Grand Junction Railway Company*, 3 M. & W. 244, where Parke, B., states the rule to be, that although there may have been negligence on the part of the plt., yet, unless he might by the exercise of ordinary care have avoided the consequences of the deft.'s negligence, he is entitled to recover; if by ordinary care he might have avoided this, he is the author of his own wrong (see also *Holden v. Liverpool Gas Company*, 3 C. B. 1). The deft. cannot set up as a defence that the vessel became unmanageable in consequence of a previous accident happening by the neglect of the crew (*Seecomb v. Wood*, 2 M. & R. 290). But, as in actions for negligent driving, the master, although on board at the time, is not liable for the wilful acts of the crew (*Boucher v. Worstran*, 1 Taunt. 568).

In an action for damage done to the deft.'s cabriolet from the negligence with which the deft.'s cart was driven, the deft. will be liable, although it should appear that the deft.'s servant was not driving at the time of the accident, but had intrusted the reins to a stranger who was riding with him, and who was not in the service of the deft. (*Booth v. Mister*, 7 C. & P. 66).

Where the plt. and his two partners employed the deft. as accountant, for hire, to make out the accounts of the firm, and of the separate balance of each partner, and the deft. made out the plt.'s separate balance so erroneously and negligently, that relying on his statement, he was a considerable loser, it was held that the plt. might sue alone in case for misfeasance, and that it was no variance to allege that *he* had employed the deft. (*Story v. Richardson*, 6 Bing. N. C. 123; see also *Coates v. Chaplin*, 2 Gal. & D. 552). A master may sue alone for debauching his servant, when there is evidence to prove a consequent loss of service (*Faes v. Wilson*, Pea. 55; *Dean v. Peel*, 5 East, 45; *Woodward v. Walton*, 2 N. R. 476; *Martenez v. Gerben*, 3 Sco. N. R. 386); and a father may sue for the seduction of a daughter, although she be married, if some loss of service be proved (*Harper v. Luffkin*, 7 B. & C. 387), but not otherwise (*Ib.*; 3 Bla. Comm. 142; 1 Ch. Pl. 69). If the child be so young that the father could not sustain loss of its services, he cannot support the action unless he has incurred expense upon the occasion (*Hall v. Hollander*, 4 B. & C. 660; see "SEDUCTION").

In case against a railway company for so carelessly, negligently, and improperly (by their servants) managing and directing an engine on their railway, that a stack of beans standing on a field adjoining, belonging to the plt., was destroyed by fire emitted from the engine, the facts were stated for the opinion of the court, by order of a judge under 3 & 4 Will. IV. c. 42, s. 25, and the court was to direct a verdict for the plt. or a nonsuit, as they should think fit. The facts were as follow: the engine and boilers used upon the railway *(under the authority of an act of parliament), were such as were usually employed on railways for the purpose [*754] of propelling the trains and carriages thereon, and the engine from which the sparks flew, which set fire to the plt.'s stack, was at the time used in the ordinary way, and for the purposes authorized by the Act of Parliament: held, that though the facts stated were not sufficient to justify the court in inferring negligence, there was not such an entire absence of negligence as to enable them to direct a nonsuit (*Aldridge v. Great Western Railway Company*, 4 Sco. N. R. 156; 1 Dowl. N. S. 247).

A master is liable for an accident which happened in consequence of a horse running away by reason of a fright occasioned by the chain-stay of the cart breaking (*Welsh v. Lawrence*, 2 Ch. Rep. 262); and a party was held liable, although he had previous to the accident ceased to be the owner

of the horse and cart, and to have an interest in the business, he having held himself out to the world to be the owner by suffering his name to remain painted on the cart, and over the house of business to which it belonged (*Stables v. Ely*, 1 C. & P. 614). A porter removing goods is not liable for damage unless he has been guilty of negligence, and he is not bound to put a person at the head of his horse while he removes the goods (*Hayman v. Hewitt*, Peak. Ad. Ca. 170). A van was standing at A.'s door, from which his goods were unloading, and his gig was standing behind the van; B.'s coachman was driving B.'s carriage, and there not being room for the carriage to pass, the coachman got off his horse and laid hold of the van-horse's head, which caused the van to move, when a packing-case fell out of the van upon the shafts of the gig and broke them: held, that B. was not liable for this, as the coachman was not acting in the employment of B. at the time (*Lamb v. Palk*, 9 C. & P. 629).

An *agent* or *servant* cannot, in general, be sued for any neglect or non-feasance of which he is guilty, when it is committed on behalf of, and under the express or implied authority of, his master (12 Mod. 488; Say. 41; *Wilson v. Peto*, 6 Moo. 47). Thus, if a coachman lose a parcel, his master alone is liable; so, a servant is not liable for deceit on the sale of goods, or for a false warranty (Com. Dig., Case for Deceit, B; 3 P. W. 379); nor can an action be supported against an *attorney* for malicious arrest (1 Mod. 209; Roll. Ab. 95; *Barker v. Braham*, 3 Wils. 379; *Carrol v. Bird*, 2 Esp. 202), unless he exceed the line of his duty (*Crozer v. Pilling*, 4 B. & C. 26). And, where under-sheriffs or bailiffs, acting under the *express* or *implied authority* of the sheriff (*Taylor v. Riley*, 9 Pri. 387; *Bowden v. Waithman*, 5 Moo. 183) commit a tort, the action should not be against them, but the sheriff (*Cameron v. Reynolds*, Cowp. 403; 2 T. R. 151; *Sanderson v. Baker*, 2 Bl. R. 832; 911). And no action is sustainable against an intermediate agent for the negligence, &c., of a sub-agent, but the principal is liable (*Stone v. Cartwright*, 6 T. R. 411; *Bush v. Steinman*, 1 B. & P. 405; *Cameron v. Reynolds*, Cowp. 406; 2 B. & P. 438; *Harris v. Baker*, 4 M. & S. 27; *sed quare*; see *ante*, p. 755); nor is a person employed to do work for another liable, though the work be so badly done as to injure a third person; but, if he personally interfered and *caused the injury*, he would be liable (*Wilson v. Peto*, 6 Moo. 47; 2 D. & R. 33). The party in a cause is liable for any irregularity in the proceedings of his attorney, or his agent (*Parsons v. Lloyd*, 2 Bl. R. 845; *Barker v. Braham*, 3 Wils. 368; *Bates v. Pilling*, 6 B. & C. 38). The marshal of the Queen's Prison is not liable for a tortious act committed by the deputy marshal in ill-treating a prisoner in the exercise of his office, unless the appointment of the deputy be proved, or the facts show *that the marshal was cogni-
[*755] zant of the act done (*York v. Chapman*, 3 P. & D. 496). If the owner of a shop allow A. to be there, and in his own name to sell and dispose of the goods as he pleased, and B.'s coachman, through negligence, destroy them whilst carrying by A.'s servant, A. may sue B. (*Whittingham v. Bloxham*, 4 C. & P. 597). As to agents of government discharging a public duty, and not acting for their own benefit, they are not liable for the misconduct of such persons as they are obliged to employ; and the doctrine of *respondent superior* does not apply (*Hall v. Smith*, 2 Bing. 159; *Nicholson v. Mounsey*, 15 East, 384); but the action must be against those persons whose negligence occasioned the injury. Agents, however, are liable who order anything to be done not within the scope of their authority, or are themselves guilty of negligence in doing that which they are empowered to do (*Hall v. Smith*, 2 Bing. 159).

Owner's Liability for Animals.] The liability attaching to the owner of animals varies with their particular species. In the case of such as are not naturally inclined to commit mischief, as dogs, horses, and other domestic animals, a previous mischievous propensity must be shown, and the *scienter* clearly established, or that the injury was attributable to that or some other neglect on the part of the owner; and case, and not trespass, is the proper remedy (12 Mod. 333; *Mason v. Keeling*, Raym. 608; *Cro. Car.* 254; 2 Salk. 662; *R. v. Huggins*, 2 Ld. Raym. 1583; B. N. P. 76).

If the owner of a dog which is accustomed to bite sheep, &c., to the owner's knowledge, notwithstanding still keep him, and the dog bite a horse, the owner is liable (*Jenkins v. Turner*, 1 Ld. Raym. 110, per Powell, J.). Evidence that the deft. had warned a person to beware of the dog was held sufficient to go to the jury in support of the *scienter*, that the dog was accustomed to bite mankind (*Judge v. Cox*, 1 Stark. 285); but proof that the dog had jumped at a man, and chased sheep, was not sufficient to support the allegation of *scienter*, that the dog was accustomed to bite sheep (*Hartley v. Halliwell*, 2 Stark. 214, and note; 1 B. & Ad. 620); nor is it evidence, that the dog was of a fierce and ferocious nature, and was usually tied up, and that the deft. promised a pecuniary satisfaction to the plt. (*Beck v. Dyson*, 4 Camp. 198). But this has since been held to be very slight evidence of *scienter* (*Thomas v. Morgan*, 2 C. M. & R. 496). The gist of the action is not the negligent keeping, but the keeping with knowledge of the mischievous propensity, whether the animal be of a savage or malicious propensity, as a monkey, a ram, &c. (*Jackson v. Smithson*, 15 M. & W. 563; 15 Law J. 311, Ex.; *May v. Burdett*, 16 Law J., N. S., Q. B. 64). A person has a right to keep a fierce dog to protect his property, but not to place it in the approaches to the house, so as to injure persons exercising a lawful purpose in passing to the house (*Sarch v. Blackburn*, Moo. & M. 505; see also *Blackman v. Simmons*, 3 C. & P. 138; see *Bird v. Holbrook*, 4 Bing. 628; and *Jordin v. Crump*, 8 M. & W. 782); and where a dog has once bitten a man to the knowledge of his owner, who afterwards lets him go about and lie at his door, the owner will be liable if he again bite a man, although such man were to blame himself for treading on the dog's toes (*Smith v. Pelah*, 2 Stra. 1264); and where the deft.'s dog was reported to be mad, and he tied him up, but he broke loose again and bit the plt.'s child, who died of the wound, it was held that the deft. was liable to the extent of the surgeon's bill for attending the child, and evidence was admitted of reports in the neighbourhood that the dog was mad to prove the *scienter* (*Jones v. Parry*, 2 Esp. 482); *see a different report [*756] (*Pea. Ev.* 292). But the plt. may let loose in his yard at night, for the protection of his property, a dog accustomed to bite, and if he bite the plt., who incautiously went into the yard after it was dark, the owner is not liable (*Brock v. Copeland*, 1 Esp. 203).

Where an accident happened through the neglect of the workmen of a contractor employed by a company, it was held that the company was liable to an action (*Matthews v. West London Waterworks Company*, 3 Camp. 403). So, where the defts. were occupiers of a warehouse, and employed a master porter to lower and convey a barrel of flour from their warehouse, and he employed a master carter, and both of them attended with their men; during the process of lowering it from their warehouse, the barrel fell and injured the plt., owing to a defect of the rope furnished by the master porter: the defts. were held to be liable (*Randleston v. Murray*, 3 Nev. & P. 239; 8 Ad. & E. 109; see *Bush v. Steinman*, 1 B. & P. 404; but see *Rich v. Basterfield*, 4 C. B. 756; 16 Law J., N. S., C. P. 273, see *infra*). Where the deft. had employed a bricklayer to make a sewer, who left it open, and the plt. fell into it and broke his leg, the deft. was held liable (*Sly*

v. Edgly, 6 Esp. 6). Where the landlord superintended repairs of a house which the tenant was bound to do, and the cellar door was left in a dangerous state, which caused an accident: held, that the landlord was liable (Payne v. Rogers, 2 H. Bl. 349).

But where the deft., a builder, was employed by the committee of a club to execute certain alterations at a club-house, including the preparation and fixing of gas-fittings; he made a contract with B., a gas-fitter, to execute this part of the work; the gas, through B.'s negligence, exploded and injured the plt.: held, that the deft. was not liable in case for this injury Rapson v. Cubitt, 9 M. & W. 710; Milligan v. Wedge, 12 Ad. & E. 737; Allen v. Haywood, 7 Q. B. 960, 975). If a contractor employed by commissioners in executing the works flood plt.'s land, by improperly and without authority introducing water into a drain insufficiently made by himself, the contractor is the party liable (Allen v. Haywood, *supra*). If the commissioners were liable, they might have been sued by the clerk as for a thing "done in pursuance of a local act," under which they acted (*Ib.*). But the employer may still retain his control over the contractor by personally interfering, &c., so as to make himself liable (Burgess v. Gray, 1 C. B. 578). The owner of real property is not responsible for injuries to strangers arising out of the way in which it is used by others who are not his servants, or part of his family, unless perhaps where the act done amounts to a nuisance, which he has not taken care to prevent, and which it was his duty to have prevented when occasioned by his servants or others (Reedie v. North Western Railway Company; Hobbit v. Same, 13 Jurist, 659; Rich v. Basterfield, 4 C. B. 756; 16 Law N. S., C. P., 273; Bush v. Steinman, 1 B. & P. 404, *ante*, p. 748, probably overruled; see *post*, p. 757). A. supplied mail coaches by contract with the postmaster, and B. the horses and drivers, the plt. was hired by B. to drive one of the coaches, in doing which he met with an accident from a defect in one of the coaches: held, that A. was not liable to be sued (Winterbottom v. Wright, 10 M. & W. 109).

And an action lies, although the accident could not have occurred were it not for the act of the plt. Thus, where the plt. had improperly left an ass on the high-road, and the deft., by negligently driving too fast, had run over and killed it, the deft. was held liable (Davies v. Mann, 10 M. & W. 546).

So, where the deft. negligently left a cart and horse in the public [*757] street, and one of two *children who were improperly playing with the cart met with an accident by falling from it whilst the other was driving on, it was held that the deft. was liable in case (Lynch v. Nurdin, 1 Q. B. 29); and where the driver left the cart, the owner was held liable for an accident which occurred through another person striking the horse (Wedge v. Goodwins, 5 C. & P. 190). Where the deft. was held liable for damage occasioned to the plt.'s property by the deft.'s hayrick having ignited owing to its being carelessly made, Pattison, J., directed the jury to consider whether the deft. had acted as a man of ordinary skill and prudence would have acted, or whether through his negligence and carelessness, the plt.'s property was consumed. It was not enough that the deft. had acted *bona fide*, for if by his injudicious want of care the injury had been committed, he was liable (Vaughan v. Menlove, 7 C. & P. 525; 3 Bing. N. C. 468). In case against a railway company for so negligently managing an engine that the plt.'s premises were burned by sparks emitted from it, it appeared in evidence that the danger from emitting sparks might be diminished; but it was not shown that the company had taken any precautions for that purpose: held, that there was a *prima facie* case of negligence (Piggot v. Eastern Counties Railway Company, 3 C. B. 229); and if a question arise whether the sparks could have been thrown the distance, evidence will be admitted to show that sparks had been thrown as far by

other engines (Ib.). Where a drover's servant so negligently and carelessly drove a bullock through the streets of London, that he ran into the plt.'s show shop, and did considerable damage, it was held that the plt. might maintain case against the drover, but not against the owner of the bullock (Mulligan v. Wedge, *ante*, p. 755). So, where an engineer, who was employed to erect a steam-engine on the premises of B., made the boiler of such insufficient materials that it burst in his presence, and damaged C.'s premises: held, that C. might maintain case for the damage done against the engineer (Witte v. Hague, 2 D. & R. 33). Where a horse was killed by falling down an old shaft of a mine which had not been covered over, the owner of the mine was held liable in case (Sybray v. White, 1 M. & W. 453).

With respect to cattle, as their propensity to roam and trespass on other persons' land is notorious, the owner will be answerable (Ib.; Rex v. Huggins, 2 Ld. Raym. 1583); but no action lies for damage done by animals *feræ naturæ* escaping from the land of one person to that of another (Cro. Car. 387; 1 Burr. 259; 5 Co. Rep. 104, 106; see further, *post*, "NUISANCE;" 1 Ch. Pl. 94).

Owners' Liability for Animals—Not Guilty.] In an action on the case for injury done to the plt.'s sheep by a dog, the declaration alleged that the deft. wrongfully, wilfully, and injuriously kept the dog, well knowing it to be of a ferocious and mischievous disposition: held, that the plea of "Not guilty" put in issue the *scienter* (Card v. Case, 12 Jur. 247; 17 Law J. 124, C. P.).

Where the declaration alleged that the deft. had falsely represented himself as agent of the master of a vessel, and so entered into a charter-party with the plts.: held, that, under the plea of "Not guilty," the contract must be proved by the plts., and not the misrepresentation only; and, secondly, that the charterparty, being unstamped, could not be read in evidence, though the deft. was not an agent of any master or captain or owner of a vessel (Brink v. Wingard, 2 C. & K. 657—Wilde).

Negligence producing Death.] By 9 & 10 Vict. c. 93, ss. 1, 2, whenever the death of a person is caused by some wrongful act, neglect, or default, which would, if death had not ensued, have entitled the injured party to an action, then the person who would have been liable, if death had not ensued, shall be liable for damages, though the death was caused by an act amounting to felony; and the action shall lie for the benefit of the wife, husband, parent, and child of the deceased, and in the name of executors or administrators, and the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount, after deducting costs not recovered from the deft., shall be divided among the above parties in such shares as the jury by their verdict shall find and direct. By sect. 3, only one action will lie for the same subject of complaint, and it must be brought within twelve calendar months after the death. Sect. 4 requires the delivery of a full particular of the person for whom *and on whose behalf the action is brought, and the nature [*758] of the claim. By sect. 5, the word person is explained to include corporations; parents includes father, mother, grandfather, grandmother, stepfather and stepmother; and child includes son, daughter, grandson granddaughter, stepson, and stepdaughter:

In an action by an executor or administrator under the 9 & 10 Vict. c. 93, against a party who by his wrongful act, neglect, or default, had caused

the death of the testator or the intestate, the damages are not to be estimated according to the value of the deceased's life calculated by annuity tables; but the jury should give what they consider a fair compensation. The proper question for the jury in such cases is, whether the circumstances are such that if the deceased, instead of meeting his death, had been only wounded in consequence of the conduct of the deft., he would have been entitled to damages for the injury. An action will not lie for an injury caused by the neglect of a party where the person injured might by reasonable care have avoided the mischief (*Armsworth v. The South Eastern Railway Company*, 11 Jur. 758, Parke).

Possession or Ownership of Real Property renders a Party liable.] In cases where a man is *in possession of real property*, he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants, or by contractors, or their servants (but see *ante*, p. 756). The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be charged, when occasioned by any acts of persons whom he brings upon the premises (per Littledale, J., *Laugher v. Pointer*, 5 B. & C. 560). In *Littledale v. Lonsdale* (Lord), 2 H. Bl. 299; and *Stone v. Cartwright*, 6 T. R. 411), it was held, that the owner of a mine (and not his agent) is answerable to the person whose property may be injured by the improvident manner of working it, on the principle that "whatever is done for the working of my mine, or the repair of my house, by persons mediately or immediately employed by me, may be considered as done by me. I have the control of all that belongs to my land or my house; and it is my fault if I do not so exercise my authority as to prevent injury to another" (per Abbott, C. J.; 4 B. & C. 576). But to the mere ownership of moveable property this liability does not attach; as it may be sent out into the world, and conducted by other persons. Actions of this nature should therefore generally be against the tenant or person in possession (*Chietham v. Hampson*, 4 T. R. 318); unless the landlord superintended the repairs, &c. (*Leslie v. Pounds*, 4 Taunt. 649); and, if the landlord erects the nuisance and demises, he is liable, as the demise is a continuation of the nuisance (*Rosewell v. Prior*, 2 Salk. 460; *Bush v. Steinman*, 1 B. & P. 409; *Chietham v. Hampson*, 4 T. R. 320; *Com. Dig. Action, Case, Nuisance, B*); or where he covenants to repair (*Payne v. Rogers*, 2 H. Bl. 349. But see *ante*, p. 756).

The Number of Parties Defendants.] With respect to the *number* of the parties to be sued, and *who may be joined*, where different persons have been jointly concerned in a tortious act, the party injured may bring one action against all jointly, or may sue each in a separate action (*Sutton v. Clarke*, 6 Taunt. 34; *Scott v. Godwin*, 1 B. & P. 73). So, for composing and publishing a libel (2 Saund. 117; 2 Burr. 985); for not setting out tithe (*Carth. 361*); so, if two persons procure a person to be indicted falsely (*Lat. 262*); so, against bailiffs or other officers for a joint tort (*Cowp. 192*). All persons liable, as co-proprietors, for the acts of their servants or partners, may be *joined (*Moreton v. Hardern*, 4 B. & C. 228); as the act of one is [*759] the act of all the partners. And, in these cases, the joinder of more persons than were liable constitutes no objection, and one may be acquitted, and a verdict taken against the others (3 East, 62; 1 M. & S. 589); but not after judgment (*Tidd, Pr. 711, 903*). Where the defts. in an action by a pauper, in which he was non-suited, were put to great expense; held, that they might maintain an action jointly against a third party for maintenance (*Pechell v. Watson*, 8 M. & W. 691). If two defts. jointly

hired a chaise and were jointly in possession of it, both are liable for an accident (*Davey v. Chamberlain*, 4 Esp. 229). If the plt. elect to sue one only for a tort committed by several, he cannot plead the nonjoinder of the others, or take any advantage of such nonjoinder (*Sutton v. Clarke*, 6 Taunt. 29; 1 Saund. 291 *d*; *Mitchell v. Tarbutt*, 5 T. R. 649). But this only applies to the case of torts; for it appears that, if the case be grounded on a *particular contract*, the action will be subject to the same rules of law as if brought in assumpsit (*Weal v. King*, 12 East, 454; *Bretherton v. Wood*, 3 B. & B. 62; *Leslie v. Wilson*, *ib.* 171; *Powell v. Layton*, 2 N. R. 365; *Max v. Roberts*, 12 East, 89, 365; *Govett v. Radnige*, 3 East, 62; 1 Saund. 291, *e*, n. (c); see conflicting opinion referred to in *Pozzi v. Shipton*, 8 Ad. & E. 963). But it must appear from the declaration that the gist of the action is for a breach of contract (*ib.*; see *ante*, p. 726). A recovery against one of several parties to a joint tort often precludes from proceeding against another party not included in the former action; as, where plt. had recovered against his servant for leaving his service, it was held he could not recover against a person who enticed him away (*Bird v. Randall*, 3 Burr. 1345; S. C. 1 Bl. R. 387); and it is usual to apply to the court to stay the proceedings (*Williams v. Brown*, 2 B. & P. 71). But the evidence should be the same, and not on different occasions (*ib.*; *Gregson v. McTaggart*, 1 Camp. 415). Where the torts are distinct, a joint action against two or more cannot be maintained, as two persons cannot be separately liable unless they would be jointly liable (*Laugher v. Pointer*, 5 B. & C. 559). So, no action lies against several persons for speaking the same words, as the words of one cannot be the words of another (*Palm*. 313; *Cro. J.* 647; 1 Bulst. 15). And, if several persons be joined where the tort could not in point of law be joint, they may demur, and, after verdict, they may move in arrest of judgment, or bring a writ of error (*Barnard v. Gostling*, 1 N. R. 245; 2 Saund. 117, &c.); but the plt. may obviate the objection by taking a verdict against one only, or by assessing the damages separately, and entering a *nolle prosequi* before judgment (1 Saund. 207 *a*).

Joint Tenants, &c.] Where the action is against a tenant in common, joint tenant, or coparcener, for anything respecting their land, it should be joint, or it will be bad in abatement (1 Saund. 291 *e*).

Where an Assignee is liable.] Though an *assignee* is not liable for torts before he came to the estate, he will be, in many cases, during his possession, and even after he has assigned his interest; and there is no privity of estate. Therefore, where a lessee by deed-poll assigned his interest in the demised premises to A., subject to the payment of rent, and the performance of the covenants contained in the lease; A. took possession and occupied the premises under this assignment, and, before the expiration of the term, assigned to a third person, and the lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee of the *premises, and recovered damages against the lessee; it was [*760] held, that the lessee might maintain an action on the case, founded in tort, against A., for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage (*Burnett v. Lynch*, 5 B. & C. 589). And, where a tenant for years erects a nuisance and makes an under-lease to B., an action lies against either (*Rosewell v. Prior*, 2 Salk. 460; *Bush v. Steinman*, 1 B. & P. 409, *ante*, p. 748). Case, in nature of waste, lies against a tenant for years after the expiration of his term (*Kinlyside v. Thornton*, 2 Bl. R. 1111).

Executors, &c., Husband and Wife.] The proof for 'plt., in an action against executors, bankrupts, assignees of bankrupts, insolvents, husband and wife, &c., will be found under those titles.

Bankruptcy and Insolvency.] The Bankrupt Acts, 6 Geo. IV. c. 16, 1 & 2 Will. IV. c. 56, and 5 & 6 Vict. 122, did not contain any provisions enabling a person injured by any personal tort committed by a bankrupt before his bankruptcy, or by any trespass or wrong to any real or personal property of which he might be guilty, to obtain remuneration from the funds of the bankrupt, which become vested in the assignees for the benefit of the creditor (*Gulliver v. Drinkwater*, 2 T. R. 261; *Parker v. Norton*, 6 T. R. 695; *Parker v. Crole*, 5 Bing. 63). His remedy is still against the bankrupt, and whose certificate is no bar to such action (see *Parker v. Crole*, 5 Bing. 63; see the Bankrupt Act, 12 & 13 Vict. c. 106, *ante*, "BANKRUPTCY"). The Insolvent Acts, 7 Geo. IV. c. 57, and 1 & 2 Vict. c. 110, only discharge the insolvent as against his creditors described in the schedule. He still remains liable for torts, and where there has been, prior to the petition, a judgment in an action for damages for criminal conversation, seduction, breach of promise of marriage, malicious prosecution, libel, slander, malicious injury, or in any other action of trespass or tort to the person or property of the plt. therein, if it shall appear to the satisfaction of the said court that the injury complained of was malicious, the court may remand the insolvent for a period not exceeding two years at the suit of the plt. in such action (see "INSOLVENCY").

Proof of Damages.] The plt. must, in all cases, be prepared to prove the amount of the damages he has sustained, that they were sustained before action brought, or before the time when the declaration appears to have been filed (2 Saund. 171, n.). If any have accrued since, if deft. can be procured to consent at the trial to their being taken into consideration by the jury in their verdict, on condition of no action being brought for them, this is desirable. The nature of the proof must depend on the facts stated in the declaration. The statement of the damages being larger than the proof, will not prejudice. The defts. in an action for collision cannot deduct from the damages money paid to the plt. by insurers for the same damages (*Yates v. Whyte*, 4 Bing. N. C. 272). By 53 Geo. III. c. 159, the responsibility of a shipowner for damage done, without his fault or privity, to another ship, is limited to the value of his own ship and freight *at the time of the loss or damage*. The words in italics mean *immediately before*, therefore he is not exempt from liability, though his own ship foundered by the same accident (*Brown v. Wilkinson*, 15 M. & W. 391). In actions for tort, the court will not interfere with the damages found by the jury, unless they appear to be grossly disproportioned to the injury sustained. Where, *therefore, a landlord caused considerable injury to the crops of his tenant, by selling, felling, and removing timber, without applying for leave to enter, and the jury assessed the damages at 300*l.*, the court refused to interfere, although the net value of the entire crops did not exceed 200*l.* (*Williams v. Currie*, 1 C. B. 841).

Proof under Special Plea or Defence.] Where an issue is taken on special plea, and the general issue is also pleaded, the plt. must not only be prepared to prove all that is required of him by the general issue, but also what is required of him in the issue taken on the special plea. When a special plea is pleaded without the general issue, so as to admit all other facts but what are denied by such special plea, then no proof of such admitted

facts need be adduced: and the proof will, in general, then consist of an answer to the special plea, and the amount of the damages.

As to who is to begin to prove the issue, see *ante*, 243, and *post*, "EVIDENCE."

Evidence for Defendant.

We shall now see under what plea deft. may avail himself of his defence, and evidence should be adduced accordingly.

Defences.] The several defences consist in denying, and, as far as possible, disproving, 1st, the *plt.*'s right to sue, his *legal* right not having been affected (*ante*, 728, 740); or to show that too many persons are *plts.* (*ante*, 743); or that *plt.* is a mere assignee, and has no right to sue (*ante*, 742); or that the party who should have sued is dead (*ante*, 442); or that the *plt.* is disabled from suing, as being a bankrupt, insolvent (*ante*, 743), *feme covert*, &c. (see those titles). 2nd. That the deft. was not the party who committed the injury (*ante*, 747); or that he was a mere agent (*ante*, 753); or that the real wrong-doer is dead; or that the deft. is discharged by bankruptcy, insolvency, or is a *feme covert* (see those titles). 3rd. That the action is misconceived, and should not have been in case (*ante*, 714, et seq.); or that it is brought too soon. 4th. That there is a variance between the inducement or injury, &c., and the proof. 5th. That deft. is discharged by the Statute of Limitations, accord and satisfaction, &c. (see those and other titles). 6th. Dft. should be prepared to reduce the damages.

The declaration stated that after the passing of a local act for the paving, &c., of the town of H., the *plt.* paid to the commissioners a certain sum of money, and thereupon, by a grant made according to the form of the stat., five commissioners, by virtue of the act, in consideration of 1350*l.* paid to them by the *plt.*, did grant to the *plt.* 140*l.* a year out of the rates, to arise by virtue of the act, to be paid quarterly; that a quarterly payment was due; that the commissioners had money in their hands arising from the rates, and were requested to pay, and it thereupon became their duty to pay; concluding with a breach of non-payment. Plea, traversing the duty as alleged: held bad, on special demurrer, as it tendered a mere issue of law (*Cane v. Chapman*, 1 Moo. & P. 104; 5 Ad. & E. 647). When special damage is alleged, and is essential to the maintenance of the action,, such special damage may be traversed by the plea, and if not, it is admitted (*Perring v. Harris*, 2 Moo. & R. 5; see *Smith v. Thomas*, 2 Bing. N. C. 372).

In an action for negligence in not properly securing a cow of the deft. in a slaughter-house, the declaration stated that by means thereof the cow "ran at, butted at, gored, killed, and destroyed a *cow, of the *plt.*." Plea of payment of 30*l.* into court, and that the *plt.* had sustained no [*762] greater damages: held, that the deft. could not go into evidence to show that his cow had not killed the *plt.*'s cow, as the contrary was admitted by the plea (*Lloyd v. Walkey*, 9 C. & P. 771).

Infringement of Patent.] In an action for the infringement of a patent, the objection that the title is larger than the invention, is raised by a plea of the insufficiency of the invention (*Derosne v. Fairie*, Web. Pat. Ca. 161). Plea, that the invention was not at the time of making the letters-patent a new invention within this realm, within the true intent and meaning of an act of parliament, &c.: held, on special demurrer, that the plea was bad for ambiguity, because it was doubtful whether the defence set up was that the manufacture was not new, or that it was not within 21 Jac. I. c. 3, s. 5

(*Spilsbury v. Clough*, 2 Gal. & D. 17 ; 6 Jur. 579). *Semble*, that it might have been good, as containing an entire defence in one connected proposition if the words in the above section in favour of letters-patent, "of the sole working or making of any manner of new manufacture within this realm," had been embodied in the plea (*Ib.*). The court refused to allow the deft. to plead that the article for which the patent was granted (an improvement in cards), was generally known previously, and that the alleged improvements were not an invention in respect of which a patent could lawfully be granted, and a similar plea to part of the alleged invention, in addition to a plea that the invention was not a new manufacture within the meaning of the stat. 21 Jac. I. c. 3 (*Walton v. Bateman*, 4 Sco. N. R. 397). The question of identity of two mechanical contrivances is for a jury (*Morgan v. Seaward*, Web. Pat. Ca. 168). Whether the adoption of a principle is a piracy, is a question for a jury (*Jupe v. Prate*, *ib.* 171). The meaning of a specification is for the court, the words of art having been interpreted by the jury (*Neilson v. Harford*, *ib.* 350 ; 8 M. & W. 806).

On the trial, the judge having summed up the evidence and left to the jury the several questions of fact raised upon the record, was requested by the deft. to put the following questions: "Whether the mode adopted by the deft. of saturating the cloth with dissolved India-rubber (which was used as an improvement in cording cards) was not known to and practised by one Hancock before the date of the plt.'s patent." 2nd, "Whether or not, if the dents or teeth were fixed in the fillet (meaning the sheet of India-rubber), and then cemented to the cylinder without any linen at the back, it would answer the purpose of a sheet card." Held, that his refusal to comply with this request was no misdirection (*Walton v. Potter*, 4 Sco. N. R. 91 ; 3 Man. & G. 411). Where, in an action for infringing a patent for blocks for pavement, the plt. claimed as his invention that his block was bevilled both inwards and outwards on the same side of the block, and it was alleged that the deft.'s blocks were an imitation of the plt.'s, as two of the deft.'s were equivalent to one of the plt.'s: held, that it was for the defts. to say whether the deft.'s blocks were in effect the same as the plt.'s although no single block of the deft.'s was bevilled both inwards and outwards on the same side (*Macnamara v. Hulse*, 1 C. & M. 471). The specification stated the use of bituminous schistus, and that it was "convenient before the carbonization to separate the sulphurates of iron which are mixed with it." On the trial it was proved that all such schistus was combined with that sulphuret: held, that as the specification had not stated the mode of separation, he must show that the presence of iron would not be injurious, and that if it would it might

*be removed by means known to persons ordinarily acquainted
 [*763] with the subject; that the schistus might be purchased in a proper state as an article of commerce, or that it might otherwise without any secret or unknown means be obtained in a fit state (*Derosne v. Fairie*, 2 C. M. & R. 476 ; 3 Tyrw. 393). A patent is not avoided by the specification claiming as part, but not as an essential part, of the patent something which proves useless (*Lewis v. Marling*, 10 B. & C. 22). A patent being granted upon a specification that the machine was capable of performing all the operations necessary to the perfection of the invention, and it appearing that a second patent was taken out for improvements necessary to the efficient operation of the original machine, held, that the consideration of the first patent having failed, both were void (*Bloxam v. Elsee*, 6 B. & C. 169). The specification stated the use of "gunpowder or other combustible" in making a safety fuse ; held sufficient to show that some other such combustible might be used, though never in fact used for the fuse, but if nothing but gunpowder could be used, then the deft. was entitled to a verdict (*Bick-*

ford v. Skeeves, 1 Q. B. 938). Where the specification, after setting forth the mode in which the cloth was to be extended by the patented machinery for the purpose of drying, proceeded to state that it might be taken up again by the same machinery, the jury found that the invention was new and useful on the whole, but that the machine was not useful in some cases for taking up the goods; the court refused to set aside the verdict and enter a nonsuit (Haworth v. Hardcastle, 4 Moo. & S. 720; 1 Bing. N. C. 182). A patent claimed the invention of manufacturing tubes by drawing them through rollers, using a mandril in the course of the operation. A later patent was taken out for the manufacture of them by drawing them through dies or holes, but the specification was silent as to the maundril. Held, that the court in the later specification would take it that the maundril was not to be used, and that the patent was good (Russell v. Cowley, 1 C. M. & R. 864). A variance between the title of the patent and specification cannot be shown on pleas denying a true specification or enrolment of such specification (*semble*, Derosne v. Fairie, *supra*). The construction of the specification is for the court (Neilson v. Harford, 8 M. & W. 806), but whether the materials come within the description, or whether those described will answer the purpose, is a question for the jury (Bickford v. Skeeves, *supra*). The illegality and inutility of the invention must be pleaded specially. It is enough to show it as to part of the alleged invention (see Morgan v. Seaward, 2 M. & W. 544; Web. Pat. Ca. 185). An invention not getting into general use, or not being pursued, is a presumption against its utility (*Ib.*; Minter v. Mower, Web. Pat. Ca. 139). Inutility seems to avoid a patent by making it prejudicial, and therefore illegal (Morgan v. Seaward, *supra*, per Parke, B.), and evidence was refused on a plea that the patent was inconvenient to the king's subjects in general (R. v. Arkwright, B. N. P. 77).

Notice.] In an action for infringement of letters-patent, deft., on pleading thereto, shall give to the plt. notice of any objections on which he means to rely; no objections to be allowed unless deft. prove the objections stated in the notice, but a judge at chambers may give leave to offer the other objections on such terms as he may think fit (5 & 6 Will. IV. c. 83, s. 5). If the nature of the objections be not sufficiently specific, the plt.'s course is to apply to a judge at chambers for an order for delivery of a more specific notice, but if he omit to do so, he cannot object to the generality of the notice at the trial; the only question then is whether the notice is *sufficiently large to admit the objection relied on by the deft. [*764] Neilson v. Harford, 8 M. & W. 806; see Heath v. Unwin, *infra*; Bulnois v. Mackenzie, 4 Bing. N. C. 127; 5 Sco. 419). It may be sufficient in the terms of the plea, but in general it will not (*Ib.*). The deft. pleaded that the nature of the invention and the manner in which it was performed were not particularly described in the specification, and the objections were that the specification did not sufficiently describe the nature of the invention and the manner in which it was to be performed; 2ndly, that the invention was not new, as being wholly or in part used and made public before the obtaining of the letters-patent: held, the first good, the second bad, as not pointing out what portions of the alleged invention were previously in use (Heath v. Unwin, 6 Jur. 1068; 2 Dowl. N. S. 482). *Semble*, that where the objection to the patent is its want of novelty, and the deft. intends to rely on the previous use of the supposed invention by divers persons, he cannot be compelled in his notice to give the names and descriptions of those persons (Bulnois v. Mackenzie, *supra*). The notice is to apprise the plt. of what he has to meet (Losh v. Hague, Web. Pat. Ca.

203); the notice cannot go beyond the pleas (*Macnamara v. Hulse*, 1 Car. & M. 471). The notice of objections must be concise and definite; it is not sufficient to say that the improvements or some of them have been used before; the deft. should set out which (*Fisher v. Dewick*, 4 Bing. N. C. 707; 6 Sco. 587). If the deft. neglect to deliver the notice, with his pleas, it is doubtful if the court have power to allow him to deliver them after, but if they are satisfied on the merits, they will grant him leave to plead *de novò*, and then deliver the objections with the fresh pleas (*Losh v. Hay*, 2 Jur. 157).

By the 5 & 6 Will. IV. c. 83, s. 3, if a verdict pass for the patentee, or his assigns, it shall be lawful for the judge who tried the cause to certify on the record that the validity of the patent came in question before him; and this record, being given in evidence in any future action touching the same patent, shall entitle the patentee or his assigns to treble the taxed costs if he recover a second time, unless the judge, who tries the second action, certify that he ought not to have them. The certificate should be upon each of the objections mentioned in the notice, and not merely upon the issues, as to which the statute has made no difference in the law (*Losh v. Hague*, 5 M. & W. 387). Under a plea that the alleged improvements are not new, it has been held that the patent might be considered as having come in question so as to entitle the plt. to a certificate to that effect (*Gillett v. Wilby*, 9 C. & P. 334).

In an action for pirating an engraving, under 17 Geo. III. c. 57, which gives a right of action against any one who shall copy any print, in the whole or in part, by varying, adding to, or diminishing the main design, the judge directed the jury to consider whether the deft.'s engraving was substantially a copy of the plt.'s: held, that this direction was correct (*Moore v. Clarke*, 9 M. & W. 692; see "COPYRIGHT").

In an action by several plts. for piracy of copyright, it appeared that the deft. had published the work in question pursuant to the conditions of a cognovit given by him to one of the plts. and one P., in an action for not performing an agreement to write the work in question, held a sufficient defence (*Sweet v. Archbold*, 10 Bing. 133; 3 Moo. & S. 299).

Not Guilty in Actions on the Case.] The plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the deft., and not of the facts stated in *the induce-
[*765] ment, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration (R. G. 4 Will. IV. pt. 2, s. 4; Ex. gr. 1). The plea of not guilty puts in issue the malice and want of probable cause in an action for a malicious prosecution (*Cotton v. Brown*, 3 Ad. & E. 312). But in case for maliciously suing out a fiat in bankruptcy, which was afterwards superseded, and the proceedings terminated; held, that this plea merely put in issue the issuing of the fiat, but not the rescinding of it; which, not being denied, was admitted (*Atkinson v. Raleigh*, 11 Law J. 165); nor does the plea in an action for a malicious arrest put in issue the statement of the termination of the suit, which should be traversed specially (*Watkins v. Lee*, 5 M. & W. 270). So, the fact of the reversal of an outlawry, is not put in issue by this plea in an action for maliciously proceeding to outlaw the plt., though the original debt and reasonable and probable cause for proceeding are (*Drummond v. Pigou*, 2 Bing. N. C. 114). The plea puts in issue the *scienter*, as well as the injury in an action for keeping dogs, well knowing them to be used and accustomed to bite cattle (*Thomas v. Morgan*, 2 C. M. & R. 49; *Hogan v. Sharpe*, 7 C. & P. 755);

and in an action on the case for doing an injury to a pond of water of the plt., stating as part of the inducement that the deft. was possessed of a close adjoining the plt.'s land, where the pond was, and used by the deft. as a private way: held, that this part of the inducement was not put in issue by this plea, and that a variance between the proof and this statement was not material (*Dukes v. Gostling*, 1 Bing. N. C. 588; see *Bennion v. Davison*, 2 M. & W. 179). In an action on the case for making a cesspool so near the well and pump of the plt. that the water was contaminated and rendered useless by the oozing out of the soil and filth of the cesspool, the contamination of the water by the oozing, &c., as well as the making of the cesspool, are put in issue by this plea (*Norton v. Scholefield*, 1 Dowl. N. S. 638). Where the declaration alleges by way of inducement that the deft. was possessed of a carriage, and then states the negligent driving, &c., not guilty does not put in issue the property in the carriage; and *quære*, whether it would have done so if plt. had omitted the inducement and only stated the driving of deft.'s carriage (*Taverner v. Little*, 6 Bing. N. C. 678; *Hart v. Crawley*, 12 Ad. & E. 378).

The deft. may show, under the plea of not guilty, that the immediate or proximate cause of the injury was the unskillfulness or negligence of the plt. (*Flower v. Adam*, 2 Taunt. 315; *Williams v. Holland*, 10 Bing. 110; *Vennell v. Garner*, 1 Cr. & M. 21; *Bridge v. Grand Junction Railway Company*, 3 M. & W. 244; *Gough v. Bryan*, *supra*; *Sills v. Brown*, 9 C. & P. 601; *Smith v. Dobson*, 3 Man. & G. 59; *Holden v. Liverpool New Gas and Coke Company*, 3 C. B. 1); and although there may have been negligence on the part of the plt., yet, unless he might by the exercise of ordinary care have avoided the consequences of the deft.'s negligence, he is entitled to recover; if by ordinary care he might have avoided this, he is the author of his own wrong (*Bridge v. Grand Junction Railway Company*, *ante*, p. 752; per *Parke, B.*). Where the plt. relies on the presumption of negligence arising from the circumstance of the coach breaking down, the deft. may show that the coach was examined a few days before the accident, and that no defect was discovered; that the coachman was a skilful driver, and was driving at a moderate pace in the usual track (*Christie v. Greggs*, 2 Camp. 81). In an action for keeping a mischievous animal, it is a good defence that the animal was properly at large, and that the *accident happened through the plt.'s own misconduct (*Brock v. Copeland*, 1 Esp. 203; [*766] *Deane v. Clayton*, 1 Moo. 225, 245).

In an action on the case for placing lighted brimstone in a church tower, whereby the plt., who, with others was ringing the bells, was annoyed by the fumes;—plea, general issue; 2ndly, that the plt. was wrongfully in the church tower making a disturbance, and that the rector desired him to depart, and that as he would not, the deft., by command of the rector, placed and lighted the brimstone, to cause the plt. to depart: held, that to support the special plea, evidence must be given of the request to depart, and of the rector's authority to put the brimstone, and that, to entitle the plt. to a verdict on the general issue, the jury must be satisfied that the deft. sustained some substantial damage from the fumes of the brimstone (*Evans v. Lisle*, 7 C. & P. 562).

In an action for maliciously suing out a fiat in bankruptcy against the plt., the declaration averred that it was duly ordered, to wit, by the Court of Review, such court having competent power and authority in that behalf, that the fiat should be rescinded and annulled, and the proceedings upon the fiat were thereupon wholly ended and determined: held, that the plea of not guilty put in issue the malicious suing out the fiat without reasonable or probable cause, and that a variance between the evidence of the determination

of the proceedings and the allegation thereof in the declaration was therefore immaterial after verdict (*Atkinson v. Raleigh*, 6 Jur. 431). *Semble*, this allegation is supported by evidence that the Lord Chancellor had made an order confirming an order of the Court of Review, which purported to annul the fiat if the Lord Chancellor should think fit to confirm that order (*Ib.*).

In an action by the executors of a stockholder against the Bank of England for refusing to transfer stock to the testatrix, and to pay dividends, the plea of not guilty will let in evidence of the fact that nearly all the stock had been sold and transferred by a relative in the lifetime of the testatrix, her name being forged, and that she had the means of knowing of the transfer, and had been guilty of gross negligence, and that the defts. were not to blame (*Coles v. England (Bank of)*, 10 Ad. & E. 437).

Special Pleas.] All matters in confession and avoidance shall be pleaded specially as in actions of assumpsit (H. T. 4 Will. IV. r. 2). When the breach of duty or wrongful act is admitted, and the deft. seeks to protect himself from the consequences thereof by other circumstances, he must plead them specially. In an action for the negligent management of a train of railway carriages, whereby it ran against another train, in which the plt. was riding, and injured him, a plea that the parties having the management of the other train managed it so negligently and improperly, that in part by their negligence the deft.'s train ran against the other and caused the injury, was held to amount to not guilty, being nothing more than a simple negation of the negligence which makes the deft. liable (*Bridge v. Grand Junction Railway Company*, 3 M. & W. 244). If a deft. plead specially to an action for maliciously indicting the plt. without probable cause, the court will order such plea to be struck out (*Cotton v. Brown*, 3 Ad. & E. 312; 4 Nev. & M. 83); it being admissible under the general issue. So, in an action for maliciously and without probable cause refusing to accept from the plt. the amount of debt and costs for which he was a prisoner (*Houndsfield v. Drury*, 11 Ad. & E. 98; 4 Jur. 24). In an action for negligently driving, the deft.'s possession of the carriage is admitted by not guilty (*Emery v. Clark*, 2 Moo. & R. 260; but see *ante*, p. 765).

*In an action for negligently driving the deft.'s cart and horse [*767] against the plt.'s horse in the usual form: held, that the deft. could not under not guilty show that he was not the person driving, and that the cart did not belong to him (*Taverner v. Little*, 5 Bing. N. C. 678; *Hart v. Crowley*, 12 Ad. & E. 378; see also *Wheatley v. Patrick*, 2 M. & W. 650); nor that the servant was not the deft.'s (*Hart v. Crowley*, *supra*); and permission to amend, refused on argument upon a rule for entering a nonsuit. If the plt. were to blame, the deft. ought not to show the particulars of plt.'s negligence, and conclude with a special traverse, but should plead not guilty (*Gough v. Bryan*, 2 M. & W. 770; 5 Dowl. 765; 1 Jur. 802). Plea that the accident was the result of the negligence of both parties is bad, as amounting to the general issue (*Armitage v. Grand Junction Railway Company*, 3 M. & W. 244; 6 Dowl. 340; *Woolf v. Beard*, 8 C. & P. 373). In case for an injury to plt.'s bridge by carelessly navigating a ship, the defts. pleaded that plts. had wrongfully narrowed the channel and increased the rapidity of the current, and thereby rendered the passage of vessels difficult and dangerous, without this, that the vessel struck the bridge through the carelessness of the deft., with a conclusion to the country: held, that the defts. under this issue might show that the injury had not been caused through their negligence, although they had failed in showing any default on the part of the plts. (*Cross Keys Bridge Company v. Rawlings*, 3 Bing. N. C. 71; 3 Sco. 400). In an action by a reversioner for an injury to his land in the

possession of his lessee, the injurious act alone is put in issue. The reversionary interest of the plt., the demise and the tenancy are admitted (*Raine v. Alderson*, 4 Bing. N. C. 702).

Accord and satisfaction is a good plea in an action on the case, and will resemble that in assumpsit, save that instead of the words "making the said promises," it must be "committing the said grievances." So, a plea of release and former judgment recovered for the same grievances would be good pleas.

Verdict.] The verdict if for plt. is for damages, and if the verdict be for the defts. where there are several, the jury may find *for* some, and *against* the others (*Brotherton v. Wood*, 419; S. C. in error, 6 Moo. 141; *Cooper v. Smith*, 4 Taunt. 802; see *Pozzi v. Shipton*, 8 Ad. & E. 963).

Costs for Plaintiff.] If the plt. recover he is entitled to costs by the Statute of Gloster, 6 Edw. I. c. 1, s. 2. And now, in all actions of trespass on the case, brought or to be brought in any of her Majesty's courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, if the plt. shall recover by the verdict of a jury less damages than forty shillings, such plt. shall not be entitled to recover or obtain from the deft. in respect of such verdict any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the grievance for which the action shall have been brought, or that the grievance in respect of which the action was brought was wilful and malicious (3 & 4 Vict. c. 24, s. 2). With regard to taxing costs where the judge has certified that the validity of the patent came in question before him, see 5 & 6 Will. IV. c. 83, s. 6.

**Costs for Defendant.*] In an action on the case, if one of the defts. was acquitted, he was entitled to costs, unless the judge cer- [*768] tified that there was reasonable cause for making him a deft. (*Dibden v. Cooke*, 2 Stra. 1005; *Tidd*, Pr. 9th ed. 986; 8 & 9 Will. III. c. 11); and where all the defts. joined in pleading, the acquitted deft. was only entitled to forty shillings costs (*Ib.*; *Hughes v. Chitty*, 2 M. & S. 172; *Holroyde v. Breare*, 4 B. & A. 47, 700); and now, by the 3 & 4 Will. IV. c. 42, s. 32, where several persons shall be made defts. in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless in the case of a trial the judge before whom such cause shall be tried, shall certify upon the record under his hand, that there was a reasonable cause for making such person a deft. in such action. This enactment will form a subject of grave consideration in commencing an action, because if a deft. be acquitted, no matter for what cause he was joined, and the judge refuse to certify, his costs may be set off or deducted from the damages and costs recovered by the plt. against the other deft. or defts., and may nearly equal the sum payable to the plt. In an action against three defts. for an irregular distress, two obtained verdicts, and the plt. recovered damages and costs, 45*l.*, against the third; and the costs of the two that had verdicts amounted to 37*l.*, and were set off against the plt.'s demand, (*George v. Elston*, 1 Bing. N. C. 513); and where a police-

man was joined with others, it was held, that he was entitled to costs under 10 Geo. IV. c. 44, independently of the 3 & 4 Will. IV. c. 42 (*Humphreys v. Woodhouse*, 1 Bing. N. C. 506).

Competency of Witnesses.] In case for negligently driving a coach against the plt.'s wagon horse, whereby it died, held, that the plt.'s wagoner was incompetent to prove the negligence of the deft. without a release from the master (*Morish v. Foote*, 8 Taunt. 455; *Sherman v. Barnes*, 1 Moo. & R. 69); at least if there be evidence of fault or any negligence on the part of the plt.'s servant, or if the case, as opened, be evidently one in which either the witness or the deft. must have been in fault (*Rosc. Ev.* 6th ed. 109); and in an action against a broker employed by the plt. to sell goods, for having negligently delivered them without payment, it was held, that the plt. could not call a servant of his own to prove that he, the witness, delivered them by the deft.'s authority, for the effect would be to shift his own *prima facie* liability on the deft. (*Boorman v. Brown*, 9 Ad. & E. 487). So, in case against master for negligence of his servant, the latter is incompetent to prove the negligence, as the verdict would be evidence of the amount of damages in an action by the master against the servant (*Green v. New River Company*, 4 T. R. 589). So, of an agent against his principal for negligence (*Gevers v. Mainwaring*, Holt, 139). But since the stat. 3 & 4 Will. IV. c. 42, ss. 26, 27, it has been held, in an action for negligent driving by deft.'s servant, the servant was held to have been rendered competent by this act without a release (*Yeoman v. Legh*, 2 M. & W. 419; but see *Boorman v. Brown*, *supra*). The statute 6 & 7 Vict. c. 85, still more effectually removes his incompetency (see *post*, "WITNESS").

If a person who sees the carriage of A. do an injury, and demand the address of the owner of the carriage, the address given by the person in the carriage is admissible in evidence; but a statement that the damage done will be paid for, will not (*Beamon v. Ellice*, 4 C. & P. 585). A [*769] nautical witness cannot be asked whether he *thinks, having heard the evidence in the cause, that the conduct of the captain was correct or not (*Sills v. Brown*, 9 C. & P. 601); evidence of practice in construction of a by-law of the river Thames, is not admissible (*lb.*). But experienced nautical men may be asked, whether, in their judgment; particular facts which had been proved, amounted to gross negligence (*Malton v. Nesbit*, 1 C. & P. 70). The deposition of a witness taken before the coronor on an inquiry, as to the death of a person killed by the collision, is receivable in evidence in an action for damages, if the witness be shown to be beyond the sea (*Sills v. Brown*, 9 C. & P. 601).

A licensee, under letters-patent, is a competent witness for the plt. in an action for the infringement of the patent (*Derosne v. Fairie*, Web. Pat. Ca. 155).

Witness's non-attendance at Trial.] In order to maintain an action against a witness for not attending to give evidence in obedience to a subpœna, the plt. must show that he has, in consequence of his absence, sustained some damage; but where there are several issues for trial, the circumstance that the plt. had no good cause of action does not necessarily exclude the plt. from having sustained such damage, as he may have sustained it in respect of the costs of some of the issues on which he might have succeeded by the testimony of such witness (*Cowling v. Cox*, 13 Jur. 101; 18 Law J., C. P. 100).

In an action against a witness for not obeying a subpœna, the declaration, after alleging that the plt. had impleaded one T. F., and that certain issues

joined in that action were to be tried, and that the deft. was served with a copy of subpœna to testify, &c., averred that the plt. had a good cause of action in that suit, and that the testimony of the deft., in obedience to such writ of subpœna, was necessary and material to the trial of the issues; and assigned for breach, the deft.'s neglect to appear and give evidence; by reason of which, the plt. was obliged to withdraw the record, and he was compelled to pay certain costs, and lost the benefit of certain costs, &c. The deft., by his pleas, traversed the averment that the plt. had a good cause of action, and also all the material averments in the declaration, besides pleading leave and license. Issues were joined on these pleas; and the plt. at the trial obtained a verdict on all the issues except that on the plea traversing the plt. had a good cause of action, which was found for the deft.: held, that the plt. was entitled to judgment *non obstante veredicto*, and that there was no necessity for a replader (Ib.).

CHANCERY, PROCEEDINGS IN.

Decree, Judgment, or Order in, Effect and Proof of, p. 769.

Bill in, Effect and Proof of, 770.

Answer in, Effect and Proof of, 771.

Whole of Answer must be read, 772.

Mode of Proof, 772.

Depositions in, Effect and Proof, 773.

Identity of Parties, 774.

Decree, Judgment, or Order in, Effect and Proof of.] A decree, or judgment in this court is admissible in evidence in the same manner as judgments in other courts (B. N. P. 243). On an issue as to the existence of an immemorial right of the deputy day-meters of the City of London to the exclusive right of measuring, &c., all oysters brought in any vessel for sale to the port of London, and to receive reasonable compensation for so doing: held, that a decree of chancery in a cause between third parties touching the same right whereby an issue was directed to try whether certain sums were a reasonable compensation was admissible in evidence (*Laybourn v. Crisp*, 4 M. & W. 320; 8 C. & P. 397); and the party producing the decree need not put in the depositions referred to therein; *semble*, the other party would be entitled to read them as his evidence (Ib.). If a decree be put in and portions of it read at the desire of the opposite counsel with a view of showing its effect, he is too late to object to its admissibility (Ib.). On a trial touching the right to lands, decrees in chancery between other parties concerning the same lands were admitted to show the character in which the possessor enjoyed the land (*Davies dem. v. Lowndes*, ten. 2 Sco. 71; 1 Bing. N. C. 606; 7 Sco. 222; 5 Bing. N. C. 161). A decree for payment of tithe in kind, in a suit by the incumbent against the occupiers of land who set up a modus, is evidence, though not conclusive for him in a feigned issue between him and the landowners to try a modus (*Croughton v. Blake*, 12 M. & W. 205). A decree of an unauthorized court of equity is inadmissible, either as an award for want of a submission, or as reputation (*Rogers v. Wood*, 2 B. & Ad. 245). A. brought an action against the sheriff for a false return to a *fi. fa.* against the goods of B. B. filed a bill of discovery against A.; on which there was a decree that A. should bring into court all letters written by B. or any other person relative to the original debt: held, that none of the letters brought in could be read on the part of the deft. in the present action

without first putting in the *bill and answer (Hewitt v. Pigott, 5 C. & P. 75; 7 Bing. 400; see *post*, "JUDGMENT").

An interlocutory order made to quiet possession *pendente lite* is not evidence of reputation (Pim v. Curel, 6 M. & W. 234). An order for an attachment for non-payment of costs in a suit in equity is in itself *prima facie* evidence that a suit has been pending (Blower v. Hollis, 1 Cr. & M. 393).

It may be proved by an exemplification, or by a sworn copy, or by a decretal order in paper, with proof of the bill and answer (Trowel v. Castle, 1 Keb. 21; B. N. P. 244); but it has been held, that the bill and answer need not be proved, if they are recited in the decretal order (*Ib.*; Com. Dig. Ev. C. 1; Wharton Peerage, 12 Cl. & Fin. 295). However, the rule generally laid down seems to be, that where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic fact (as that the decree was made by the court), he ought regularly to give in evidence the whole proceeding on which the decree is founded. "The whole record," says Comyn, C. B. "which concerns the matter in question, ought to be produced" (Com. Dig. Ev. A. 4; 1 Ph. 373; and see Peak. Ev. Ad. Ca. 74; Hewitt v. Pigott, 5 C. & P. 75; *ante*, p. 769).

In an action against the sheriff for an escape under an attachment issued out of chancery for non-payment of costs, the decree is evidence, without the bill and answer (Blower v. Hollis, 1 Cr. & M. 396; but see Attwood v. Taylor, 1 Man. & G. 289). Where the answer is read as an admission of the debt, he is entitled to have the bill read as part of the plt.'s case (Pennell v. Meyer, 2 Moo. & R. 98; 8 C. & P. 47). But where a bill, answer and decree are put in to establish a fact in issue, the party producing them is not bound also to put in the depositions as part of his own case (Layburn v. Crisp, 4 M. & W. 340).

Bill in, Effect and Proof of.] A bill in chancery is only evidence in the courts of law, to show that such a bill did exist, and that certain facts were in issue between the parties, in order to introduce in evidence the answer, or the depositions of witnesses (Ferrers (Lord) v. Shirley, Fitzg. 196; B. N. P. 233). It is not admissible to prove any facts, either alleged or denied in the bill; not even those on which the prayer of relief is founded; therefore, a bill in equity, or depositions, cannot be received in evidence on the trial of an action of ejectment against a party not claiming or deriving in any manner under the plt. or deft. in equity, either as evidence of the facts therein deposed to, or as declarations respecting pedigree (Doe d. Bowerman v. Sybourn, 7 T. R. 2). But Lord Kenyon is reported to have admitted a bill filed by an ancestor to be evidence of a pedigree there stated as a declaration in the family (Taylor v. Cole, *ib.* 3, n. (a)); and there may be other exceptions to the above general rule, against the admissibility of the bill as evidence. To a question whether a bill can ever be received in a court of law to prove any facts therein alleged or denied, the judges answered that, generally speaking, a bill cannot be received in a court of law to prove any fact either alleged or denied in it, but whether any possible case might be put which would form an exception they could not undertake to say (Banbury Peerage case, 2 Selw. N. P. 714); at all events it is not admissible against one not claiming under the plt. or deft. in the equity suit (*Ib.*; see Pennell v. Meyer, 2 Moo. & R. 98; *post*, p. 773).

A bill filed by A. against B. and others, the answer of B. and his co-defts., an order of the Master of the Rolls directing an issue *devisavit vel* [*771] *non*, that being the issue between the parties, and *the *nisi prius* record with the *postea* thereon containing the finding of *devisavit*

and judgment accordingly, being admitted and read upon the trial of an ejectment by Doe on the demise of A. against B. in which the same question arose, are not even *prima facie* proof of the due execution of the will (Wright v. Doe dem Latham, 3 Nev. & M. 268; 1 Ad. & E. 3).

As to proof of the bill, proof of a decree reciting the bill and answer will suffice (Com. Dig. Evid. C, 1). Evidence of the bill only will be of no avail; the subsequent proceedings also, or the answer must be proved (B. N. P. 235; 1 Sid. 221; Bowerman v. Sybourn, 7 T. R. 3, *supra*).

Answer in, Effect and Proof of.] An answer in chancery is evidence as an admission upon oath (Gilb. Ev. 106), and is strong evidence against the party making it, but it is not evidence against other parties (Goodright v. Moss, Cowp. 591). Therefore, if a person make an admission in his answer which is prejudicial to his estate, it is not evidence against his alienee (Salk. 286); unless the plt. himself make it so, by producing it first (B. N. P. 238). A demurrer or plea to a bill in equity does not so admit the facts charged as to be evidence thereof in a future action, between the same parties (Jenkins v. Ashby, 6 B. & C. 541). As, in an issue out of chancery to try the terms of an agreement, which was proved by one witness, but denied by the deft., the witness being dead before the trial, the plt. was under the necessity of producing the bill and answer, in order to read his deposition, and by that means made the whole answer evidence, which was accordingly read by the deft. (Bourn v. Sir Thomas Whitmore, Salop, 1747). The answer of W. and H. to a bill filed by a third person stating that W. has conveyed a reversion to H., is evidence against H. that he has done so, and if the answer refer to a deed that makes no difference, and notice to produce the deed is not necessary (Ashmore v. Hardy, 7 C. & P. 501). The answer of a guardian, though purporting to be that of the minor, is not evidence against the minor. But it was held, that an answer, purporting to be an answer of a minor by a mother and guardian, may be read against the mother in another cause, in which she is deft. in her own capacity (Beasley v. Magrath, 2 Sch. & Lef. 34). The answer of a trustee is no evidence against the *cestui que trust* (B. N. P. 237). An answer in chancery by a mortgagor to a bill of foreclosure filed by the mortgagee is not admissible in evidence, the mortgagor having conveyed his interest in the estate to another, twenty years before the answer was filed, and the party to whom the estate was conveyed being no party to the mortgage or to the proceedings in equity (Gully v. Exeter (Bishop of), 2 Moo. & P. 266; 5 Bing. 171). In ejectment by an executor it is sufficient *prima facie* evidence that the testator had a chattel interest in the premises to put in the deft.'s answer stating that "he believed the testator was possessed of the leasehold premises in the bill mentioned" (Doe dem. Digby v. Still, 3 Camp. 115). If the plt. read a passage from the deft.'s answer, the deft. has no right to read subsequent matter connected with it by such words as "but" and "and" unless explanatory of the passage (Davis v. Spurling, 1 Russ. & M. 64). An answer by one deft. is not evidence against his co-deft., as no one is bound by the acts or declarations of another, without his assent (Wych v. Meal, 3 P. Wms. 311; Morse v. Royal, 12 Ves. 361). But an admission, by one of two partners concerning the partnership liabilities, is good evidence to charge the other partner, in an action against him alone (Wood v. Braddick, 1 Taunt. 104; Grant v. Jackson, Pea. 203; Lucas v. *De la Cour, 1 M. & S. [*772] 250). The answer of a party is evidence against one who claims under him. Thus, in an action for setting out tithe, copies of a bill and answer in a suit by the vicar for the tithe hay, against J. C., then occupier of the close, and from whom the deft. purchased, denying the vicar's right,

and setting up a right in the ancestor of the plt., were held to be evidence against the deft. (*Dartmouth (Countess of) v. Roberts*, 16 East, 334). It seems doubtful whether the answer of a married woman can be used in evidence against her, in an action after the husband's death, on the ground that, being under the control of the husband, she is not a free agent (*Wrottesley v. Bendish*, 3 P. Wms. 237; but see *Elston v. Wood*, 2 M. & K. 278).

Bills and Answers in Chancery.] A bill in Chancery is not evidence against the party in whose name it is filed, unless his privity to it be shown (*Boileau v. Rudlin*, 12 Jur. 899, Exch.).

When that privity is established the bill is admissible to prove the fact that such a suit was instituted, and what the subject of it was; but it is not evidence by way of admission against the party by whom it was filed of the truth of the facts alleged or stated in it (*Ib.*).

Proceedings after answer of a bill in Chancery tend to diminish the presumption that it might have been filed by a stranger, and may be sufficient to establish the privity of the party in whose name it was filed (*Ib.*).

The answer in Chancery of one who has been a partner in a firm, but who had retired from the firm, and ceased to have any interest in it before the commencement of that suit, is not admissible in evidence against the continuing partners of the firm, although it relates to transactions which occurred with the firm at the time when the retired partner was a member of it (*Parker v. Morrell*, 2 C. & K. 599, Cresswell).

Whole of Answer must be read.] An answer must be taken entire and unbroken; therefore, the party who reads an answer makes the *whole* of it evidence (*Bac. Abr. Ev.* 622; 5 Mod. 9; 3 Sal. 153); and if, upon exceptions taken, a second answer has been put in, the deft. may insist upon having that read, to explain what he swore in the first answer (*B. N. P.* 287). Where the answer charges the deft. by the admission of one fact, and also discharges him by the statement of a distinct and further act, the rule has been said to be, that what is admitted need not be proved by the plt., but the deft. must make out his fact in discharge (*Bowerman v. Sybourn*, 2 Esp. 499). Although deft. may insist on having the whole read, that, by comparing the parts with each other, the precise meaning and extent of admissions may be more correctly ascertained, those parts, however, which he does not state from his own knowledge, but on hearsay, will not be received, either in evidence for or against him (*Roe dem. Pellatt v. Ferrars*, 2 B. & P. 542, 548). Where an answer is produced merely for the purpose of showing the incompetency of a witness, who has, in his answer, admitted himself interested in the event of the cause, that part only is to be read which states the ground of interest (*Spavin v. Drax*, *B. N. P.* 238); for, if the witness be incompetent, his evidence ought not to be received in any form; on the other hand, if he is competent, he ought to be examined *vivâ voce*, in open court (*Ph. Ev.* 342).

Mode of Proof.] As to the *proof* of the answer, it cannot be regularly given in evidence without proof of the bill; for, without the bill, there does not appear to be a cause depending; but, if there be proof by the proper officer that the bill has been searched for in the office, and cannot be found, the answer has been allowed to be read, without a sight of the bill (*Gilb. Ev.* 49). As the defence in chancery is upon oath, it will be presumed, in ordinary cases, that the answer was sworn to by the deft. (*Ph. Ev.* 373). An answer offered in evidence, merely as an admission of the party on oath,

is sufficiently proved by an examined copy, without proof of a decree or of the party's handwriting (*Dartmouth (Lady) v. Roberts*, 16 East, 334). The court does not permit the record to go unless proof of the signature be required, and unless in criminal cases (*Jervis v. White*, 8 Ves. jun. 313). And an examined copy is admissible on a trial at law (*Hodgkinson v. Willis*, 3 Camp. 401). In an action against three as partners, the office copy of an answer to a bill filed by one against the others is admissible, without producing the original in order to establish the partnership (*Studdy v. Sanders*, 2 D. & R. 347). So, to contradict a witness who swore in opposition to what was stated in the answer to which he was a party (*Ewer v. Ambrose*, 6 D. & R. 127; 4 B. & C. 25; 3 B. & C. 746; and see *Highfield v. Peake*, Moo. & M. 109). Where a letter was written by the plt.'s agent, and referred to by the plt. *in his answer to a bill filed by a third person, and was deposited by consent of parties with the clerk in [*773] court, it was held to be evidence against the deft. in an action at law, without reading the answer (*Long v. Champion*, 2 B. & Ad. 284).

Depositions in, Effect and Proof of.] Depositions in chancery taken by the officers of the court, or taken by commissioners specially appointed for the purpose, may be given in evidence in an action at common law, between the same parties, and on the same matter, provided the deponent is not in a state to give evidence himself; and evidence must be adduced at the trial, to show a sufficient reason for his non-appearance; as, that he is dead (*Fry v. Wood*, 1 Atk. 445; *Benon v. Olive*, 2 Stra. 920; B. N. P. 239); or that he cannot be found, after diligent search (*Ib.*); and it must be proved by a witness who knows it otherwise than by hearsay (*Robinson v. Murke*, 2 Moo. & R. 275); or that he is unable to attend, though subpoenaed (*Luttrell v. Reynel*, 1 Mod. 283; 2 Ld. Raym. 1166); or that he is absent from the country, or not within the process of the court (1 Atk. 445); or that he is kept away by the other party (B. N. P. 243). And, where the witness had actually sailed on a voyage, the depositions were allowed to be read, though the vessel was, at the time of trial, driven back into port by contrary winds (*Fonsick v. Agar*, 6 Esp. 92); but it is not sufficient that the witness is a sea-faring man, and that he lately belonged to a vessel lying at a certain place, without proving that some effort has been recently made to procure his attendance (*Falconer v. Hanson*, 1 Camp. 172). Depositions are not evidence of the facts contained in them against a person who does not claim under the plt. or deft. in the chancery suit (B. N. P. 239; *Banbury Peerage*, 1 M. & R. 669). If they relate to a question of custom, or toll, upon which hearsay evidence would be receivable, they may be read against one who was not party to the former suit (B. N. P. 239). But, when taken on interrogatories under a commission, they are not evidence, without production of the commission, unless the depositions are of long standing (*Bayley v. Wylie*, 6 Esp. 85; *Rowe v. Brenton*, 8 B. & C. 765. But see now 1 Will. IV. c. 22). Where depositions on interrogatories are read on the part of the plt., the whole, including the answers to the cross interrogatories, must be read as part of his case (*Temperly v. Scott*, 5 C. & P. 341).

Depositions cannot generally be admitted, without proof of the whole record, bill, and answer, &c. (B. N. P. 240; *Gilb. Ev.* 62); for, as they are, in general, evidence upon the same points between the same parties, or those who claim under them, it must appear that there is a cause depending, and also be shown who were the parties to the suit, and what are the points in issue (*Hard.* 472; *Gilb. Ev.* 55); unless so ancient that no bill and answer can be found (*Gilb. Ev.* 64; *Byam v. Booth*, 2 Pri. 234, n.; *Bayley v. Wylie*, 6 Esp. 85); or that they were used as containing an admission merely or to

contradict a witness (1 Ph. Ev. 375; *Highfield v. Peake*, M. & M. 109); but his memory must first be refreshed with the original, and the costs of the officer who produces it will be allowed (*Bastard v. Smith*, 10 M. & W. 213). The bill and answer are only required to satisfy the judge that the depositions are admissible, by showing him what the issue really was, and the opposite counsel has no right to have them read and to comment upon them to the jury (*Chappell v. Purday*, 14 M. & W. 302). In general, depositions taken *in perpetuam rei memoriam* are not evidence at law, unless an answer be put in and proved; they may however be read on proof of the [*774] bill without the answer, where the deft. in the *chancery suit was in contempt, or neglected to cross-examine (B. N. P. 240; see *Tilley's case*, 1 Salk. 286). Where they were taken on such filed bill against the attorney-general, on a petition of right, they were received against the crown on the trial of the traverse of an inquisition taken on such petition (*Baron de Bode's case*, 8 Q. B. 208). So, they are not admissible in the case of a bill filed to examine witnesses *de bene esse* (*Cazenove v. Vaughan*, 1 M. & S. 4). In trespass *quare clausum fregit*, and not guilty pleaded, the issue being in which of the two counties the *locus in quo* was situated, an exemplification of the depositions taken in an ancient suit, to perpetuate testimony to which the plt. and deft. were privies, was held to be admissible evidence at the trial, though it appeared the interrogatories upon which the depositions were framed were leading ones, and such as could not have been put at the trial (*Williams v. Williams*, 4 M. & S. 497). Upon the trial of an ejectment respecting Black Acre between A. and B., in which it was necessary for A. to prove that he was the legitimate son of J. S.; A., after proving by other testimony that J. S. was his reputed father, offered a deposition in evidence, made by J. S. in a cause in chancery instituted by A. against C. D. to perpetuate testimony to the alleged fact disputed by C. D., that he was the legitimate son of J. S., in which character he claimed an estate in remainder in White Acre, which was also claimed in remainder by C. D.; B., the deft. in ejectment, did not claim Black Acre under either A. or C. D., the parties to the chancery suit. Held, (*Graham dissentiente*) that according to law the deposition of J. S. could not be received, upon the trial of such ejectment, against B., as declarations of J. S., the alleged father, in matters of pedigree (*Berkeley's case*, 4 Camp. 401). An examined copy of an affidavit filed in the Court of Chancery is evidence, without proof of the handwriting of the party making it, if he be shown that he had acted upon it; though in a criminal matter the handwriting must be proved (R. v. James, 1 Show. 397; *Cooke v. Dowling*, 3 Doug. 75, and note; *Rees v. Bowen*, M'Clel. & Yo. 382). Where the Court of Chancery, on directing a trial at law, makes an order that the depositions of a witness shall be read, the proof of the bill and answer will be dispensed with. This order is not made for the purpose of making that admissible in evidence which is not strictly admissible in courts of common law (15 Ves. 176); but it must be shown that the witness is unable to attend, and the court of law will read them, under such order, without going through the regular and strict course, by proving the whole record, bill, answer, &c. (*Palmer v. Aylesbury* (Lord), 15 Ves. 176; 1 Ves. & B. 340; see *Jeremy*, Eq. Juris. 271—280).

Identity of Parties.] Some proof of the identity of the parties should be given (*Hodgkinson v. Willis*, 3 Camp. 401; *Rees v. Bowen*, M'Cle. & Yo. 383); a witness who can prove the signature of the deft. to the original answer will be sufficient, though it be not produced in court (*Dartnall v. Howard*, 1 R. & M. 169). And it is *prima facie* sufficient, if the name and description at law agree with the name and description of the party answering in

equity (*Hennel v. Lyon*, 1 B. & A. 182; but see *Rees v. Bowen*, *supra*; and see *Highfield v. Peake*, M. & M. 109).

The answers to illegal questions put under authority of a commission may be objected to and struck out at *nisi prius*, but not by the party who put the question (*Hutchinson v. Bernard*, 2 Moo. & Rob. 1); but it is no objection to depositions being read that they show on their face that the deponent referred to papers not shown to the commissioner (*Steinkeller v. Newton*, ib. 372). The deponent's name may be indorsed on the [*775] record if he be interested (*Adams v. Garrard*, ib. 400). The judge must receive the depositions, if there were due notice of execution to the other side, although the commission be irregularly issued, or the execution was against good faith. The court, however, will set aside the verdict and grant a new commission (*Steinkeller v. Newton*, 1 Sco. N. R. 148; 8 Dowl. 579; 9 B. & C. 313); certified copies are inadmissible when the commission directs the depositions to be returned (*Clay v. Stephenson*, 7 Ad. & E. 185). The 1 Will. IV. c. 22, extends the powers of 33 Geo. III. c. 63, ss. 40, 44, to all places under her Majesty's dominions, and to all actions in the courts of law at Westminster, these courts having power conferred upon them to order the examination of witnesses by certain officers or other persons named in the order, or to issue commissions to examine out of their jurisdiction. "No examination or deposition to be taken by virtue of that act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear, to the satisfaction of the judge, that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial, in all or any of which cases the examinations or depositions certified under the hand of the commissioners, master prothonotary or other person taking the same, shall and may without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions" (sect. 10; see further, *post*, "DEPOSITIONS").

By 11 & 12 Vict. c. 94, s. 12, it is enacted that every document sealed with the Chancery common-law seal for the time being, and purporting to be a copy of any record or other document of any description, shall be deemed to be a true copy of such record or other document, and shall, without further proof, be admissible and admitted and received in evidence, as well before either House of Parliament as also before any committee thereof, and also by and before all courts, tribunals, judges, justices, officers, and other persons whomsoever, in like manner and to the same extent and effect as the original record or other document would or might be admissible or admitted or received if tendered in evidence, as well for the purpose of proving the contents of such record or other document, as also proving such record or other document to be a record or document of or belonging to the said Court of Chancery, but not further or otherwise. And certificates of inrolment or copies of inrolments, stamped with the seal of the inrolment office, are admissible in evidence as originals. (Sects. 16, 17.)

Where a letter which had been in the custody of the deft. was filed in the court pursuant to the order of the Court of Chancery: held, that secondary evidence of it was not admissible, it being in the power of either party to produce it on application to the Court of Chancery (*Williams v. Mannings*, R. & M. 18).

*CHARACTER.

Moral Character of Parties to Suit, when Evidence as to, is admissible, p. 776.

In Mitigation of Damages, p. 776.

Of third Persons, as Witnesses, &c., when Evidence as to, is admissible, p. 777.

Official or special Character, as public Officers, Executors, &c., how proved, p. 777.

Moral Character of Parties to Suit, when Evidence as to, is admissible.] It is, in general, only when the character of a party to the suit is directly in issue, that evidence in support of it is admissible. And where character is in issue, hearsay evidence of the representation of third parties is admissible (*Foulkes v. Sellway*, 3 Esp. 236). In an action for slander, imputing felony to the plt., to which deft. pleaded in justification of the slander, averring that the charge of felony was true, it was held that evidence of general good character was not admissible for the plt.; *Abbott, C. J.*, observing, "That, if such evidence was to be admitted on the part of the plt., then the deft. must be allowed to go into evidence to prove that the plt. was a man of bad character. It made no difference whatever as to the admissibility of such evidence, that there was a special justification" (*Cornwall v. Richardson*, R. & M. 305; but see *King v. Waring*, 5 Esp. 13; *King v. Francis*, 3 Esp. 116). And so, in an ejectment by an heir at law, to set aside a will for fraud and imposition committed by the deft., he will not be permitted to call witnesses to prove his general good character (*Faro v. Hicks*, B. N. P. 296; and see 2 B. & P. 532). Where, in the cross-examination of a witness, he was questioned as to the plt.'s being a person of dissipated character, and, on its being denied by the witness, other evidence was attempted to be adduced to show the general good character of the plt., *Lord Kenyon* refused to admit it, observing, "That, though the cross-examination of the plt.'s witnesses had been directed to impeach the character and conduct of the plt., he did not think that that authorized him to break through the rule of evidence, by going into evidence of character, as that character stood unimpeached by the testimony of the witnesses examined, who had denied the imputation intended to be conveyed" (*King v. Francis*, 3 Esp. 116; see *Bate v. Hill*, 1 C. & P. 101).

In Mitigation of Damages.] In mitigation of damages, evidence has been permitted on the part of the deft. to show the bad character of the plt.; as, in an action of slander, evidence was held to be admissible that the plt. was generally suspected of the crime imputed to him (——— v. *Moor*, 1 M. & S. 284); "and certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished; and it is competent to show that by evidence" (per *Lord Ellenborough*, *lb.*; and see *Leicester (Earl) v. Walter*, 2 Camp. 251). In actions for crim. con. with plt.'s wife, evidence of her having eloped with other men, or that the husband had turned her out of doors, and refused to maintain her, and that he kept company with other women, or that he was acquainted with and consented to the deft.'s familiarities with her, is proper, in mitigation of damages (*B. N. P.* 27, 296; *Bromley v. Wallace*, 4 Esp. 237; *Wyndham v. Wy-*

combe, *ib.* 16; *Duberley v. Ganning*, 4 T. R. 651, *post*, "CRIM. CON."). But, *according to the case of *Jones v. Stevens*, 11 Pri. 235, this [*777] doctrine is not only doubtful, but positively denied to be correct; it being there decided, that general evidence of bad character will not be allowed, even in mitigation of damages (but see *Mawby v. Barber*, 2 Stark. Ev. 470; *Rosc. Ev.* 404; *Duncombe v. Daniel*, cited 7 Dowl. 472; see *post*, "SLANDER"). In an action for malicious prosecution, *deft.* gave in evidence probable cause; in addition to which, he proposed to show the notorious bad character of the *plt.*; and Lord Kenyon held, that the question might be put in a general way, whether the *plt.* was not a man of bad character; but particular instances could not be asked by *deft.*'s counsel, though they might by the *plt.*'s (*Rodriguez v. Tadmire*, 2 Esp. 721). In a case of seduction of *plt.*'s daughter, it was proved by *deft.* that, previously to her acquaintance with him, she had had a child by another man: Lord Ellenborough held, evidence of general good character was still inadmissible, but that *plt.* was restricted to disproving the specific breach of chastity alleged on the part of the *deft.* (*Bamfield v. Massey*, 1 Camp. 460.) And, in an action for crim. con. or seduction, evidence of general good character cannot be adduced until it be impeached by the opposite party (*Bamfield v. Massey*, *supra*; *Dodd v. Norris*, 3 Camp. 519; see "CRIM. CON.," "SEDUCTION"); and if the evidence be not general, but go only to the specific instance, the *plt.* cannot in reply give evidence of general character, but must be restricted to disproof of the specific instance (*Bamfield v. Massey*, *supra*; 2 Stark. Ev. 371; 2 Phil. Ev. 205; see further, "SLANDER").

Moral Character of Third Persons as Witnesses, &c.] The character of third persons is frequently admissible, as affording a presumption with respect to a disputed fact (2 Stark. Ev. 368). But evidence to support the character of a witness is not admissible, unless fraud is expressly imputed to him (*Durham (Bishop of) v. Beaumont*, 1 Camp. 207). And evidence of the conduct of deceased witnesses has been admitted to attach credit to their testimony, or to destroy its effect (*Wright v. Littler*, 3 Burr. 1245). And, in the case of attesting witnesses, evidence is admissible for the purpose of showing what credit could be attached to their attestation when alive (*Stephenson v. Walker*, 3 Esp. 284; 4 Esp. 50; 1 Camp. 207); and so, in a question of illegitimacy, after probable evidence of non-access, proof will be allowed that the mother was a woman of ill fame (*Pendrell v. Pendrell*, *Stra.* 925; *Salk.* 120).

Official or Special Character, as Public Officers, Executors, &c., how proved.] The official character of public persons is sufficiently established in evidence by proof of their acting in those capacities, as in the case of peace-officers, justices of the peace, and constables (*Berryman v. Wise*, 4 T. R. 366; *Gordon's case*, *Leach*, 581; *Rex v. Shelley*, *Leach*, 381, n.; and see cases collected in *Arch. Cr. Ev.*; see these titles, *post*). In an action by a physician for slander, where, in the declaration, he averred that he was a physician, and had regularly taken his degree, strict proof of his having so done will be required; as, by the books of the university, or production of his diploma (*Rex v. Verelst*, 3 Camp. 432). But mere proof of his acting as such will substantiate a general averment that he is a physician (*Moises v. Thornton*, 8 T. R. 303; *sed vide* *Pickford v. Gutch*, 2 Stark. Ev. 373, n.; *Smith v. Taylor*, 1 N. R. 196; see *ante*, "APOTHECARY," and *post*, "SLANDER"). An allegation of *plt.*'s being an attorney of the court is evidenced by proof of his acting as such (*Berryman v. Wise*,

4 T. R. 366; see *ante*, "ATTORNEY"). *Where a party assumes to act in a particular character, or represents himself as holding a certain situation, it is an admission against him, and no further proof is deemed requisite (see *ante*, p. 177); as where, in an action against an incumbent, proof of his receiving tithes, serving the church, and acting in every way as the parson, is sufficient, without proof of admission, institution, and induction (*Bevan v. Williams*, 3 T. R. 635, n.). As to proof of party being an assignee of a bankrupt, &c., executor, married, partner, &c., see "BANKRUPT," "EXECUTORS," "HUSBAND AND WIFE," "PARTNER;" see also "ADMISSIONS").

CHARTER.

Effect of, and how proved.] Where any obscurity exists in the language of an ancient charter, or where the construction may be doubtful, parol evidence of the constant and immemorial usage under the instrument may be adduced, for the purpose of explanation (2 Ph. Ev. 522; 2 Inst. 282, and cases cited; *Chad v. Tilsed*, 2 B. & B. 406; *Rex v. Varlo*, Cowp. 248; and see *Stewart v. Lawton*, 1 Bing. 377); but in no case will it be admitted with a view of contradicting or annulling the clear words of a charter (*Ib.*); in which case, Lord Mansfield said, "Suppose the words of a charter are doubtful, usage is of great force; not that usage can overturn the clear words of a charter, but, if they are doubtful, the usage under the charter will tend to explain the meaning of them" (*Blankley v. Winstanley*, 3 T. R. 279, *infra*). As, where, by the terms of a charter, the mayor and commonalty were invested with the power of electing aldermen, evidence of usage was admitted to show that aldermen were included in the term commonalty (*Rex v. Osborn*, 4 East, 327); or to show that a presentation given by charter to the mayor, aldermen, and burgesses was properly executed by the mayor and aldermen alone (*Gape v. Handley*, 3 T. R. 288, n.). So, in a crown grant of "tithes," contemporaneous leases, proceedings in causes, and parol testimony, in order to show the species of tithes intended to be conveyed, may be resorted to (*Lucton School (Governors of) v. Scarlett*, 2 Y. & J. 330). And usage will be admitted to prove that the justices of a county and those of a borough have concurrent jurisdictions (*Blankley v. Winstanley*, 3 T. R. 279); or to show that an appointment by the minister and a majority of the churchwardens was good, when the power of such appointment was merely vested in the minister and churchwardens (*Withnell v. Gartham*, 6 T. R. 388, where Lord Kenyon said, "Neither is there any difference in this respect between private deeds and the king's charter; in both cases, evidence of usage may be given to expound them" (*Ib.*; *Stammers v. Dixon*, 7 East, 200). Where a private deed of 1656 gave the nomination of curate to "inhabitants," it was held that the word was properly explained, by past usage, to mean all housekeepers (*Attorney-General v. Parker*, 3 Atk. 576; *R. v. Davie*, 6 Ad. & E. 374; *R. v. Mashiter*, *ib.* 153; *R. v. Davie*, 6 Ad. & E. 374). But evidence of usage, however long, will not be admitted to overturn the clear words of a charter (*Rex v. Varlo*, *supra*; and see *Blankley v. Winstanley*, *supra*, per Lord Mansfield). A by-law cannot explain a doubtful charter, it is the province of the court to expound it (*R. v. Tucker*, 2 Selw. N. P. 1114). Where an integral part of a corporation, composed of a definite number, is required to vote at an election of a corporate officer, a majority of such integral definite part must attend; otherwise there can be no *elective assembly, although

[*779] other parts of the corporation also join in such election, and a ma-

jority of the whole existing body actually attend; and proof of a usage of 300 years continuance was held unavailable to show that the attendance of a majority of the definite body was not requisite (*Rex v. Miller*, 6 T. R. 268; *Rex v. Bellringer*, 4 T. R. 810). In the case of modern deeds, evidence of the acts of the parties is not admissible in the construction of the instrument, to show their understanding of it (*Clifton v. Walmsley*, 5 T. R. 564; *Iggulden v. May*, 9 Ves. 333; 2 N. P. 449). "Charters and grants from the crown may be presumed from great length of possession, not only in suits between private parties, but, in some cases, against the crown itself, if the crown were capable of making the grant" (*Rex v. Brown*, Cowp. 110; *Kingston (Mayor of) v. Horner*, Cowp. 102; *Jenkins v. Harvey*, 1 C. M. & R. 877; Ph. Ev. 149). A charter will not be allowed in evidence to vary the constitution of a corporate body, as settled by act of parliament (*Rex v. Miller*, 6 T. R. 268; *Rex v. Amery*, Selw. N. P. 1139). "While a corporation exists capable of discharging its functions, the crown cannot obtrude another charter upon them; they may either accept or reject it" (per Lord Kenyon, *Rex v. Pasmore*, 3 T. R. 240). So, when an integral part of a corporation is gone, and the corporation has no power of restoring it, or of doing any corporate act, the corporation is so far dissolved, that the crown may grant a new charter (lb. 199). Where a new charter was granted upon the surrender of the old one, and no enrolment of the old charter was effected, the new charter was deemed void; as, till the enrolling the surrender of the old one, both would appear to exist at the same time (*Rex v. Osborn*, 4 East, 335; *Piper v. Dennis*, 12 Mod. 253). "Where a corporation takes it rise from the king's charter, the king, by granting, and the corporation by accepting, another charter, may alter it; because it is done with the consent of all parties who are competent to consent to the alteration" (per Lord Kenyon, *Rex v. Miller*, 6 T. R. 277).

CHARTER-PARTY.(a)

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Form of Remedy on.

If the charter-party be not under seal, the form of remedy for any breach of any promise contained in the same, either in the non-payment of freight, or otherwise, is by action of assumpsit (1 Ch. Pl. 113), or sometimes debt (see *Hooper v. Shepherd*, Stra. 1089). If the charter-party be under seal, covenant or debt is the proper remedy; and, on a covenant to pay freight to

(a) See 3 U. S. Dig. Tit. "Ships and Shipping," p. 449; 2 Supp. U. S. Dig. p. 789; 1 Ann. Dig. p. 445; 2 Id. p. 333; 3 Id. p. 400.

the master of the ship, the owners cannot sue in assumpsit, and the master must sue in debt or covenant for such freight (*Schack v. Anthony*, [*780] 1 M. & S. 573; **Bell v. Kymer*, 3 Camp. 549, n. (a); *Atty v. Parish*, 1 N. R. 104, recognised in *Edwards v. Bates*, *ante*, p. 163; *Beatson v. Shank*, 3 East, 233; *Randall v. Lynch*, 12 East, 179; *White v. Parkin*, ib. 578, 583; see *Leslie v. Wilson*, 6 Moo. 415; see *post*, "COVENANT"). But debt lies only on the deed, if the sum demanded is ascertained thereby, or it sufficiently appears how much is due (*Andr.* 156; *Hooper v. Shepherd*, 2 Stra. 1089; *post*, "COVENANT"). And so, if there be a charter-party between the master and freighter, assumpsit will not lie on the implied undertaking of the owners, that the goods would be safely and securely carried (*Colvin v. Newberry*, 6 Moo. 425, n.; and see *Atkinson v. Cottisworth*, 3 B. & C. 647). Where the owner and freighter covenant by deed that forty days shall be allowed for loading and unloading, the freighter impliedly covenants not to detain the ship longer than that time; and, if he do, the owner's remedy is upon the deed, and not in assumpsit, as upon the implied contract (*Randall v. Lynch*, 12 East, 179; *Bessey v. Evans*, 4 Camp. 131; 2 Ch. Rep. 500). So, if the owner execute a deed to the merchant, containing the usual covenant for a right delivery of the cargo, he cannot be sued by the merchant for not delivering it, in an action on the case or assumpsit, grounded on the bill of lading signed by the master (*Hunter v. Princess*, 10 East, 378). But it would be otherwise if the owners were not charged directly on the contract of charter-party, but upon their general liability. Where a charter-party under seal was made by the master in that character with merchants, who did not know that he was also a part-owner in the ship, as in fact he was, it was held that they might sue him and the other owners, in an action on the case for a breach of such general duties as were not inconsistent with the stipulations of the charter-party; such as the not providing necessaries for the voyage, and employing a negligent and unskillful master (*Leslie v. Wilson*, 3 B. & B. 171; S. C. 6 Moo. 415; see *Colvin v. Newberry*, 8 B. & C. 166, *supra*). Where the master of a ship entered into a charter-party under seal on behalf of the owners with one partner of the firm, the owners cannot maintain assumpsit for the freight against the whole firm, for though the parties are different the interest is the same (*Schack v. Anthony*, *ante*). An action may be maintained on a parol contract, notwithstanding a sealed charter-party, if such contract be distinct in its provisions, and not inconsistent with the deed (*White v. Parkin*, 12 East, 578). It is usual for the parties to charter-parties to bind themselves to each other in a penal sum for the performance of their respective stipulations; but this does not preclude the party from bringing his action on any of the other clauses; and he may recover damages beyond the amount of the penalty (*Harrison v. Wright*, 13 East, 343; *Winter v. Trimmer*, 1 Bla. R. 395; *ante*, 149, 150; but see 1 Camp. 78).

A charter-party having provided that a ship should sail to any safe island or islands on the south-west coast of Africa, agreeably to instructions which were to be given to the captain in due time by the charterers or their agents, and there load, from the factors of the charterers, a full cargo of guano or other lawful produce which the charterers bound themselves to provide; and being so loaded should proceed therewith to a safe port in the United Kingdom, and deliver the same on being paid freight at 3*l.* 18*s.* per ton, the freight to be paid on unloading and right delivery of the cargo, one-third in cash on arrival at port of destination, and the remainder by approved acceptances at three months, or cash equal thereto, &c. And it was further agreed that, in case the charterers' agents should be unable to furnish a cargo [*781] of guano at the ports or places therein provided, *they should

have power to send the vessel to any other safe port or ports, place or places, for the purpose of obtaining a cargo of guano in the manner aforesaid, or of other goods, &c., in which case they were to pay for such service, as hire for the said vessel, after the rate of 15s. 6d. per ton per month, such pay or hire to commence from the day of the vessel's clearing outwards at the Custom House, London, and to terminate upon the vessel's return to her port of delivery, as thereinbefore provided for, and the discharge of the cargo. If the freighters' agents intended so to employ the vessel, they were to give the master written notice of such their intention, on production whereof the freighters engaged to pay the owner, in cash on account, three months' pay for the hire of the vessel, and the balance to be paid on the vessel's return as aforesaid. The charterers instructed their agent on the south-west coast of Africa that the ship should proceed according to his instructions, and that, in case she could not find a cargo, she should proceed where he deemed it likely to procure one. The vessel sailed, pursuant to the charterers' directions, to an island on the south-west coast of Africa, where the agent met her, and informed the captain that there was no guano to be had there, and that she must procure a cargo in Saldanha Bay (another place on the same coast), and must proceed to the Cape for a license to load a cargo there. The vessel accordingly sailed for the Cape, but being there required to enter into an engagement to sign and hand over bills of lading for the cargo, as a security for the charges of the license, the captain refused to do so unless the agent would make the freight payable according to the time employed, instead of according to the weight of the cargo; and the latter accordingly gave the captain notice that he engaged him upon time, according to the latter clause of the charter-party: held, that, under such circumstances, this clause had come into operation, and that the time-freight was recoverable. The vessel, having loaded a cargo of guano at Saldanha Bay, proceeded therewith to England, and, under the charterers' instructions, went to Southampton to discharge her cargo. The charterers wrote to the captain there, stating that, without prejudice to the charter-party, or any dispute connected with the vessel, their wishes were that it should be landed and warehoused in the Southampton Docks, in bulk, which was accordingly done: held, that, upon such landing of the cargo, the balance of the freight became payable (*Fenwick v. Boyd*, 15 M. & W. 632).

The actual earning of freight under a charter-party is not a condition precedent to the right of the ship-broker to his commission for procuring the execution of the charter. A., a ship-broker, procured a charter-party to be made between B., a ship-owner, and C., under which the owner contracted to bring home a cargo of guano, and the merchant agreed to pay the freight at the rate of 4l. 15s. per ton, to be reduced to 4l. 12s. 6d. if the ship did not arrive off Cork or Falmouth on or before a given day. There was no express engagement on the part of C. to ship a cargo: held, that A. was entitled to recover from B., upon a *quantum meruit* for his work and labour in procuring the charter to be executed, without showing the arrival of the vessel on or before the day mentioned, and notwithstanding only a very small quantity of guano had been shipped, and a small amount of freight actually earned; that the amount of compensation due to him was a question for the jury; and that, in estimating such compensation, they were properly guided by evidence of what was customary in similar cases (*Hill v. Kitchen*, 3 C. B. 299).

Assumpsit on a charter-party in these terms: "It is this day agreed between E. O. (the plt.) agent for the owner of the *Lydia*, new ship, now on the docks, of 1000 tons, or thereabouts, now at Quebec, to be launched, and ready to receive cargo in all May, guaranteed to sail in all June, and Messrs.

F. & Co. merchants, the defts. that the ship should proceed to, &c., and there load a full cargo of timber:" held, that the readiness to receive a cargo in all May was a condition precedent to the plt.'s right to recover against the defts. for not loading a full cargo, and that a plea stating that the ship was not ready to receive a cargo in all May, was good (*Oliver v. Fielden*, 18 Law J. 353, Exch.).

Plt. and defts. agreed, by charter-party, that a ship, then at Liverpool, of which plt. was master, should with all convenient speed be made ready, and should, at L., receive and load from the charterers' agents a full cargo, and, being so loaded, should proceed to Stettin and deliver the same, and so end the voyage, restraint of princes, &c., during the said voyage, always mutually excepted; and the ship was to be loaded at L. without detention; and deft. thereby agreed to load the vessel at L., as in the charter-party stated, with the said cargo at L. On general demurrer to a declaration in assumpsit, assigning for breach of the above agreement, that defts. did not load the ship at L. without detention, but detained her at L. an unreasonable time (not negating restraints of princes): held, that the exception as to restraints of princes, &c., was applicable only after the ship quitted Liverpool (*Crow v. Palk*, 8 Q. B. 467),

To an action for not loading a vessel, in pursuance of the terms of a charter-party, the deft. pleaded, setting out the whole of the charter-party, which stated that it was agreed between the plt., original charterer of the ship *Dove*, A. 1, of the measurement of 149 tons or thereabouts, now at sea, having sailed three weeks ago or thereabouts, and the deft., that the ship, being tight, staunch, &c., should proceed to Marseilles (after having delivered her cargo at Genoa), and there load certain goods of the deft., and therewith proceed to a safe port in the United Kingdom, calling at Cork or Falmouth, for a certain rate of freight, thirty working days to be allowed, Sundays excepted. The averment, that time was an essential and material part of the contract; and the probable situation of the vessel, with reference to the date of her sailing and the object of her voyage, was also an essential part of the contract; and that, in point of fact, at the time of making the charter-party, the vessel had not sailed three weeks, but a materially and unreasonably later time, of which the deft. had no notice or knowledge, for which cause the deft. neglected and refused to load the vessel: held, that the time at which the vessel sailed was material; that that statement in the charter-party amounted to a warranty; and that the deft. was entitled to retain his verdict upon the plea, on motion for judgment *non obstante veredicto* (*Olive v. Booker*, 1 Exch. 416). *Semble*, per Parke, B., that the averment that the plt. knew the time the vessel sailed was immaterial (*Ib.*).

Where a charter-party stipulates for seventy-five running days, and twenty days on demurrage, if the ship is detained four extra days, the remedy is not by an indebitatus count for demurrage; but by action on the charter-party itself (*Cropton v. Pickernell*, 16 M. & W. 829).

Where the declaration alleged that the deft. had falsely represented himself as an agent of the master of a vessel, and so entered into a charter-party with the plts.: held, that, under the plea "not guilty," the contract must be proved by the plts., and not the misrepresentation only; and, secondly, that the charter-party, being unstamped, could not be read in evidence, though the deft. was not an agent of any "master, or captain, or owner of a vessel" (*Brink v. Winguard*, 2 C. & K. 656, Wilde).

By the charter-party the ship *P.* was to proceed to Port Phillip, and there load a full and complete cargo of wool, tallow, bark, or other legal merchandise, the bark not to exceed 180 tons, the tallow and hides not to exceed 80 tons, and being so loaded, to proceed therewith to London, and deliver

the same on being paid freight as follows, (stating the price for each article) ; one-third to be paid in cash on unloading, the remainder by bills at two months. The ship took on board a few goods at Port Phillip, and obtained leave, without prejudice to the charter, to go to Sydney, where she was loaded full, and returned to London with 61 tons of wool only, and a large quantity of dead weight. In assumpsit for not loading at Port Phillip, according to the tenor of the charter—held, that the terms of the charter-party meant that the ship-owners should be paid freight for a full homeward cargo, consisting of 180 tons of bark, tallow, and hides, and the residue of wool, and that damages were to be calculated on that basis (*Cockburn v. Alexander*, 18 Law J. 74, C. P.). Held, also, that under the words, “other legal merchandise,” the charterer was at liberty to ship any lawful articles he pleased, due regard being paid to the safety of the vessel, but was bound to pay the same amount of freight as the vessel would have earned if loaded within the terms of the charter (*Ib.*). Held, also, that there was no ambiguity in the terms of the charter-party, and parol evidence was inadmissible to show which party, by the custom at the port of lading, should pay for the cost of pressing the wool (*Ib.*).

Assumpsit by shipper on a contract of affreightment. Declaration stated that plt. had shipped on board deft.’s ship, then in the Bay of Gibraltar, and bound for London, calling at Cadiz, certain goods to be safely conveyed to London, and there delivered in good order, the act of God, the Queen’s enemies, fire, dangers and accidents of the seas, rivers, and navigation, save risk of boats, &c., excepted, the plt. paying freight; promise by deft. so to convey and deliver the cargo, saving the above exceptions; breach, that he failed to do so. Plea, that the ship in the course of her voyage called at Cadiz, and was then within the jurisdiction of the officers of customs there and of a certain court of Spain (described in the plea); that while the ship was there the goods were, according to the law of Spain, lawfully taken out of the ship by the said officers, and against the will and without the default of deft. on a charge of suspicion of their being contraband, according to the law of Spain, and were confiscated by a decree of the said court upon the charge aforesaid. On demurrer, held that the plea alleged no excuse within the express exceptions in the contract; that the decree of confiscation was in itself no answer, and that it did not appear by the plea to have been incurred through any fault of the plt. (*Spence v. Chodwick*, 10 Q. B. 517).

Parties to Suit.] Whether the charter-party be under seal or not, *an action founded on it must be in the name of the party to [*782] it (2 M. & S. 426; 4 Taunt. 252), and not in the name of another, to whom he may have assigned his interest (*ante*, 167). Therefore, the purchaser of a ship previously chartered cannot sue for the freight earned under the charter-party in his own name (*Splidt v. Bowles*, 10 East, 279), although the owner become a bankrupt (*Ib.*); although payment to him will be a good discharge to an action brought in the name of the seller, at least if the purchase be made before the ship sails on the voyage (*Morrison v. Parsons*, 2 Taunt. 407; *Pinder v. Willes*, 1 Marsh. 248). Where goods were shipped in pursuance of a charter-party made by the master with P., and whereby he engaged to receive a cargo from the agents or assignees of P., and deliver the same to him or his assignees, and, upon the shipment, he signed a bill of lading, stating the goods to have been shipped by one S., by order of R. and M., to be delivered to the order of M., and freight to be paid according to the tenor of the contract of affreightment, it was held that M. could not maintain an action against the master for the negligence in stowing the cargo (*Moores v. Hopper*, 2 N. R. 411). Where the cause of complaint

in an action on a charter-party by the freighters against the owners of the vessel was, that a full cargo was not taken in, in consequence of the arrangements in the stowage varying from those contemplated by the charter-party, it was held, that the plts. were not entitled to recover, as it appeared that one of them was present from time to time during the boarding, and cognizant of the arrangements, but did not make any objection (*Hevill v. Stephenson*, 4 C. & P. 469). If a charter-party is expressed to be made between certain parties, as between A. and B., owners of a ship, whereof C. is master, of the one part, and D. and E. of the other part, and purports to contain covenants with C., nevertheless C. cannot bring an action in his name on the covenants expressed to be made with him, nor give a release of them, even though he seals and delivers the instrument (*Scudamore v. Vaudenstene*, 2 Inst. 673). But, if the charter-party is not so expressed to be made between the parties, it would be otherwise (*Cooker v. Child*, 2 Lev. 74). By the custom of the trade in London, a broker procuring a charter-party for a ship-owner is entitled to a commission of five per cent. upon the value of the freight provided for in the charter-party, whether the vessel ultimately be loaded according to the charter-party or not. By the custom of the trade, if A., a broker, introduce B., another broker, to a ship-owner, in order that a charter-party, which B. has the power of procuring, may be effected with the ship-owner, A. is entitled to half the commission paid to B. by the ship-owner in respect of procuring the charter-party. In an action against the ship-owner for the commission payable to the broker for effecting such a charter-party, under such circumstances, held, 1st, that B. only is the proper person to sue, and not A. and B. jointly; 2nd, that A. is a competent witness for B. under 6 & 7. Vict. c. 85 (*Hill v. Kitching*, 7 Law T. 257). The execution of the charter-party by the master, although said to be done on behalf of the owners, does not furnish a direct action, founded upon the instrument itself, against them, though it does against the master himself (see *Wilks v. Bache*, 2 East, 142; 7 T. R. 207; Ab. Sh. 164). All the persons by whom the contract of charter-party is made, and who are jointly interested in it, or the damages to be recovered for its non-performance, must be joined in the action; for otherwise the plt. may be nonsuited at the trial (*ante*, 167). So, all the parties who are joint contractors, and jointly liable to be sued on the contract, must be made co-defts., or deft. may plead the non-joinder in abatement (*ante*, 10).

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Form of Pleadings.

Declaration.] Where the declaration is in assumpsit on the charter-party, it usually commences by setting out the whole charter-party, and the parties to it. Care must be taken that there be no variance. With respect to the date, if the plt. declare upon a deed as dated on a particular day, it shall always be intended it was delivered at that time, and no other; and if, in pleading, he afterwards state or confess it to have been delivered at any other time, it is a departure from the declaration. Where the plt. declared upon an agreement in a charter-party, dated the 9th of October, to pay for the corn which then was or afterwards should be laden on board the ship, and alleged that, upon the said 9th of October, the ship was laden with sixty lasts of corn, for which the deft. had not paid; the deft. pleaded that the deed was sealed and delivered the 28th of October, and that there was not any corn then or afterwards laden on board, with a traverse of the delivery on the 9th of October, or at any time afterwards before the 28th; and, on demurrer, the plea was holden good, the word *then* being referable to the time when the deed takes effect by delivery, and not to the date (*Oshey v. Hicks*,

Cro. Jac. 263; see 3 Lev. 348). After the statement of the charter-party, the plt. must aver the performance of every act which constituted a *condition precedent*; and, as to what constitutes such condition, see 3 Chit. Com. L. 391, Abbott; Card v. Hope, 2 B. & C. 564; Ripley v. Scaife, 5 B. & C. 167; see *ante*, p. 201. Where a charter-party provided that a vessel should proceed to a certain place, and there land a full cargo, *the vessel to sail from England on or before the 12th day of February next*, it was held that the sailing on or before the 4th day of February was a condition precedent (Glaholm v. Hayes, 2 Man. & G. 257). If the performance of such condition be rendered impossible by deft.'s act, or by some other lawful excuse, the same should be stated (*ante*, pp. 209—213); state mutual promises (see Thornton v. Jermyn, 1 Man. & G. 166; see *ante*, p. 206). After the statement of the performance of, or excuse for performance of the conditions precedent, the breach is stated. By a charter-party it was agreed that the ship should proceed to Quebec, and there load from the factors of the plts. a full and complete cargo of pine timber and deals, &c., not exceeding what she could reasonably stow and carry over and above her tackle, &c. In an action upon this charter-party the declaration assigned for breach (among others), that the deft. did not nor would load in and on board the ship a full and complete cargo not exceeding what she could reasonably stow and carry over and above her tackle, &c.; but, on the contrary, loaded on board the ship a cargo much exceeding what the said vessel could reasonably stow and carry over and above her tackle, &c.: held, that this breach was ill assigned, and the jury having found a verdict for the plts., with general damages, the court awarded a *venire de novo* (Gould v. Oliver, 2 Sco. N. R. 241; 2 Man. & G. 208). Declaration on charter-party that deft. had agreed to put a cargo on board at Marseilles and pay freight by a bill upon London, at three months; breach, that deft. did not put any cargo on board, by which plt. was put to expenses, or give the bill in the charter-party mentioned contrary to promise: held, an unobjectionable breach, on motion in arrest of judgment (Hoggett v. Exley, 6 Bing. N. C. 607; 8 Sco. 480). Plt. and defts. agreed by charter-party that a ship then at Liverpool, of which plt. was master, should with all convenient speed be made ready, and should at L. receive *and load from the charterers' agents a full cargo; [*784] and, being so loaded, should proceed to Stettin and deliver the same, and so end the voyage, "restraints of princes, &c., during the said voyage always mutually excepted," and the ship was to be loaded at L. without detention; and defts. thereby agreed to load the vessel at L., as in the charter-party stated, with the said cargo at L. On general demurrer to a declaration in assumpsit, assigning, for breach of the above agreement, that defts. did not load the ship at L. without detention, but detained her at L. an unreasonable time (not negating restraints of princes, &c.): held, that the exception, as to restraints of princes, &c., was applicable only after the ship quitted Liverpool (Crow v. Falk, 8 Q. B. 467; 15 Law J. 183, Q. B.; see *ante*, p. 215—220).

A ship's husband covenanted that his ship should take in at one port a quantity of brandy, and convey it to another, and there receive a cargo of fruit, &c., &c., which the freighters of the fruit covenanted to supply; he did not take the brandy, and the freighters did not furnish a full homeward cargo, for which he recovered damages against them: they afterwards brought an action against his widow and representative to recover damages for his breach of covenant; held, that they could not recover in any shape in that action, either the damages they had paid or the costs they had incurred in defending the former action, although they were prevented from obtaining the homeward cargo by the neglect of the ship's husband in not taking in the

brandy (Walton v. Fothergill, 7 C. & P. 392). As to declaring for a penalty, see *ante*, "ASSUMPSIT." Where the breach is for not loading, &c., within specified lay days, three days are reckoned from the time of the arrival of the ship at the usual place of discharge (Brecreton v. Chapman, 7 Bing. 562; Kell v. Anderson, 10 M. & W. 498); and unless there be a custom to the contrary, Sundays are included (Brown v. Johnson, 10 M. & W. 331). The merchant must pay demurrage for any delay beyond the specified time, even though it be not his fault, but arises from some unforeseen impediment in loading or unloading (Barker v. Hodgson, 3 M. & S. 267; Barritt v. Dutton, 4 Camp. 333; Harmer v. Clarke, *ib.* 159; Jesson v. Solly, 4 Taunt. 52). The delay must however be for the purpose of loading and unloading (Pringle v. Mollett, 6 M. & W. 82). The observations as to a declaration in assumpsit, in general, will apply to the necessity and mode of making the above averments (see *ante*, pp. 201—223).

Two counts on the same charter-party are not to be allowed (R. G. H. T. 4 Will. IV. r. 5). But a count for freight upon a charter-party, and for freight *pro rata itineris* upon a contract implied by law, are to be allowed (*Ib.*); but a count on a charter-party for not carrying or delivering according to agreement, and another stating generally that in consideration that the plt. had caused goods to be shipped in deft.'s vessel, deft. promised that due care should be taken of them, alleging a loss, were both allowed (Vaughan v. Glenn, 5 M. & W. 577; 8 Dowl. 398; see "FREIGHT," "DEMURRAGE," &c., and *ante*, pp. 221—225).

In an action to recover freight or demurrage, or other thing claimed in pursuance of a charter-party by *deed*, the declaration must be specially framed on the deed itself (Atty v. Parish, 1 N. R. 104); *sed quære* of this decision, as to an action brought by and against the parties to the deed, whether the declaration may not be framed in debt generally, and the deed given in evidence on a demand for freight or demurrage (see Ab. Sh. 164, n. (d); Tilson v. Warwick Gas-light Company, 4 B. & C. 968; see *ante*, p. 163). As to the statement of the date of the deed, see *ante*, p.

[*785] 783. As to *the mode of declaring in debt or covenant in general, see *post*, "COVENANT," "DEBT."

Plea.] The rules as to the plea are the same as in other cases. See "ASSUMPSIT," "DEBT," "COVENANT," and the various titles of defence throughout the work: see also *post*, "PLEA."

Where the covenants in a charter-party are mutual and reciprocal, the breach of one covenant cannot be pleaded in bar to an action upon another (Cole v. Shallet, 3 Lev. 41; Jon. T. 416). But a contrary rule holds where the cause of action is nullified by the non-performance of the act disclosed by the deft.'s plea (Sty. 186). A plea to an action on a charter-party, alleging a custom which would enure as a bar to the action, is, however, bad (Gibbon v. Yony, 8 Taunt. 254, 369).

In a declaration on a charter-party, by which a vessel was to sail from Hamburgh, being light, &c., in the course of the next November, and proceed to Lima, and having discharged her outward cargo, to proceed to Costa Rica, and take on board a cargo, and then proceed to Liverpool: breaches, that the vessel was not in November, or afterwards, until or when she sailed, to wit, on the 20th of November, tight, &c.; and although she did then sail, yet by reason of her not being tight, &c., she was obliged to put back into Altona, and was detained there for a long time, to wit, &c.; though she did then again set sail on her voyage from Altona, she did not proceed according to its due course, or with dispatch, but was unnecessarily detained, &c., by reason of which, &c. (damage). Plea as to so much of the declaration

as related to the vessel not being fitted for the voyage, and by reason thereof being obliged to put back into Altona, and being detained there for such time as was necessary to put further ballast on board, payment into court of a shilling, and no damages *ultra*. And as to such as related to her being detained at Altona beyond the time necessary to put the ballast on board, that she was not detained there by reason of her not being tight, &c., *modo et formâ*: held, on special demurrer, that the latter plea was bad as answering only a part of the plea to which it applied, viz., the detention at Altona, and the subsequent delay and deviation, even if that were a breach, and was not merely a statement of special damage (Porter v. Izat, 1 M. & W. 381).

In an action on a charter-party made between the plts. and the defts., the declaration alleged, as a breach, that the deft. did not ship a full cargo of linseed according to the terms of the charter-party. The deft. pleaded, setting forth the charter-party, which stated that it was mutually agreed between the plts., as the original charterers of the vessel called the *Dove*, A. 1, "now at sea, having sailed three weeks ago," and the deft., that the said ship should sail to Marseilles, and there load a full cargo of linseed, and should then proceed to one safe port in the United Kingdom, and deliver the same on being paid freight. Averment, that upon the making of the said charter-party time was an essential part of the contract, and that the probable situation of the vessel, with reference to the date of her sailing, was also a material and necessary part of the contract; that, at the making of the charter-party, the vessel *had not sailed three weeks before*, but, on the contrary, had sailed at a materially and unreasonably later time, to wit, one week later, which plts. at the time of the making of the charter-party *knew*, wherefore the deft. declined to load any cargo. Replication *de injuriâ*. A verdict having been found for the deft. on this issue, held, on motion for judgment *non obstante veredicto*, that the fact of the vessel having sailed three weeks was a condition precedent to the deft.'s liability to load, and *that the [*786] deft. was entitled to judgment. *Semble*, per Parke, B., that the averment of the plt.'s knowledge was an immaterial averment (Olive v. Booker, 17 Law J. 21, Ex.).

Declaration in *assumpsit* upon a charter party, by which the plt. let a ship to the defts., to proceed to T. and there load from the defts. a cargo of coals, the ship to be loaded in turn. First breach, that the defts. did not, within a reasonable time after the arrival of the ship at T., load a cargo. Second, that they did not load the ship in turn. Pleas, first, that the defts. did load a cargo within a reasonable time after the arrival of the ship at T. Second, that they did load in turn. Third, that after the arrival of the ship at T., and before the defts. could load any cargo, and while the plt. was the master of the ship, and had the care, direction, and management thereof, the ship was damaged by the carelessness, mis-direction, and mis-management of the master and crew, and rendered unfit to receive any cargo. The jury found that the ship was damaged by the carelessness of the master and crew, and their disobedience to the orders of the harbour-master of T., while the latter, who by law had authority to direct and control all ships there, was superintending her entrance into the port. The ship was loaded by the defts. as soon as she was in a fit state to receive a cargo, having been delayed two months by the damage: held, that these facts entitled the defts. to the verdict upon all the issues; for that the "reasonable time" and "the turn" were to be calculated from the time the ship was ready to receive a cargo, not from the time of her arrival at T., and that the plt. had the care and management of the ship within the meaning of the third plea. Held, also, that the jury were properly directed to find for the defts. on the last issue, if the plt.'s misconduct contributed to the damage done to the vessel,

though it did not entirely cause it (*Taylor v. Clay*, 16 Law J. 44, Q. B. ; 11 Jur. 277).

By charter-party between plt., owner of a ship, and defts., it was agreed that the ship should load, from defts.' agent at Nantes, a full cargo, and being loaded, forthwith proceed to London and deliver the cargo on being paid freight upon unloading and delivery, twenty-five running days being allowed for loading and discharging at Nantes and London, with penalty for demurrage beyond. A declaration in *assumpsit* set out the charter-party, and averred that the vessel arrived at Nantes, whereof the defts.' agent there had notice ; that the ship was ready to load the cargo, and defts.' agent was requested, during the running days, to load it, and plt. was ready to detain the ship on demurrage over those days ; but defts. refused to load. Plea, that after the making the charter-party, and before proceeding to Nantes, the vessel proceeded to Newcastle, contrary to the intent of the charter-party, and, by reason thereof, arrived at Nantes a long and unreasonable time after the time at which she should have arrived at Nantes, had she sailed direct according to the intent of the charter-party : held bad, on demurrer, for not showing that the delay frustrated the object of the voyage (*Clipsam v. Vertue*, 5 Q. B. 265).

By a charter-party, the owner of the ship agreed that she should proceed direct to Ichaboe, and there load a full and complete cargo of guano, by the ship's boats and tackle, and by the labour of the crew ; and, being so loaded, should proceed therewith to Cork or Falmouth, &c., and deliver the same on being paid freight at 4*l.* 15*s.* per ton, restraints of princes and rulers, the acts of God and the Queen's enemies, fire, and perils of navigation always excepted. Twenty-one working days to be allowed to the charterers, if the ship were not sooner discharged, at the port of unloading. The [*787] charterers *to ship bags and other materials requisite for loading the ship, and to supply the stores for the vessel, at cash prices, for the voyage, and to deduct the amount from the balance of freight ; but in the event of the vessel being lost, or any unforeseen causes preventing the completion of the charter-party, the owner agreed to pay the charterers the amount of their disbursement for such stores. To a declaration on this charter-party, alleging as a breach of it that the deft., the shipowner, did not load a full and complete cargo of guano on board the ship at Ichaboe, he pleaded a plea, which stated, in substance, that he was prevented from doing so by an unforeseen cause, namely, that on the arrival of the ship at Ichaboe, and within a reasonable time afterwards, no guano was to be found there, and that he had paid to the plts. the amount of their disbursements for stores for the vessel : held, that this plea was bad in substance, for the fact of no guano being to be found was not such "an unforeseen cause preventing the completion of the charter-party" as entitled the deft. to pay the amount of the disbursements, and treat the charter-party as at an end, but that he was bound nevertheless by his positive contract to load a full cargo (*Hills v. Sughrue*, 15 M. & W. 253).

Precedents.

The forms of declarations on charter-parties varying so much, on account of the breach complained of, and being of such length, none are here given. See form of declaration in *assumpsit* on, by owner against freighter, for not loading and for demurrage, 2 Ch. Pl. 161, 7th ed. ; against the master for deviation, *Andrew v. Adams*, 1 Bing. N. C. 29. For not loading the ship on her homeward voyage, *Freeman v. Taylor*, 8 M. & W. 124 ; for not loading a full cargo, *Irving v. Clegg*, 1 Bing. N. C. 53 ; by owners against assignee of freighter for damage in detaining ship beyond days of demurrage, and for freight, 2 Ch.

Pl. 161, 7th ed.; debt on, for penalty for not loading cargo, and for freight, ib. 308; covenant on, for freight and demurrage, ib. 376; covenant on, for not loading in time, and not paying pilotage, ib. 378; covenant on, by freighter against owner, with special damage, ib. 379; against captain, for not doing acts essential to comfort of passengers, ib. 382.

See several forms of pleas throughout the work, and in debt and covenant, denying the breaches, and pleading non-performance of a condition precedent.

Evidence for Plaintiff.

The evidence to be adduced must necessarily depend upon the issue taken by the pleadings. In *assumpsit*, the plea of the general issue shall operate as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract, or promise alleged, may be implied by law (R. G. H. T. 4 Will. IV. r. 1; *ante*, p. 226—229). In debt or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, all other defences must be specially pleaded, including those which make the deed absolutely void, as well as those which make it voidable (Ib. r. 2; *post*, p. 869, and *post*, “DEED”).

Evidence cannot be adduced to control or vary the particular covenants in a charter-party. Therefore, where the ship was chartered to wait for convoy at Portsmouth, Lord Kenyon would not suffer a parol agreement to be set up on the other side, to substitute Corunna for Portsmouth (*Leslie v. La Torre*, cited 12 East, 583). *And this doctrine was sustained by the Court of King’s Bench, in the case of *White v. Parkins*, 12 [*788] East, 578, though they held that it did not apply to that particular case. The terms of the charter-party may be *explained* by usage (*Gibbon v. Yong*, 2 Moo. 224; 8 Taunt. 254). A charter-party provided that the cargo should be put on board plt.’s ship at dest.’s expense; the captain employed men to do this upon a refusal by the dest.’s agent: held that the plt. might recover the expenses from the dest. on an implied contract to repay them (*Fletcher v. Gillespie*, 3 Bing. 635).

Proof that the ship was not complete, and prepared with everything to fulfil the voyage, would render the owners liable on the covenant for sea-worthiness, &c. (2 Holt, Sh. 77; *Shields v. Davis*, 6 Taunt. 65; *Davidson v. Gwynne*, 12 East, 381; *Coggs v. Barnard*, 2 Ld. Raym. 909). But, to constitute a breach of sea-worthiness, &c., it must be proved the ship was so at the time of her departure (*Eden v. Parkison*, Doug. 732); though, indeed, this would in general be presumed, where the ship became leaky during the course of the voyage from no particular cause, and especially if it became so very shortly after the commencement of the voyage (Park. 333; 2 Dow. 233); and the onus of proof lies with the assured to show that the inability arose from causes subsequent to the commencement of the voyage (*Watson v. Clark*, 1 Dowl. 344; *Douglas v. Sangal*, 4 Dowl. 269).

In an action for the improper manner of stowing, lading, &c., the cargo, evidence of the usage and custom of the place where it is stowed, laden, &c., is admissible, where there is no express stipulation as to the mode of stowage, lading, &c. (2 Holt, 86; *Cobban v. Down*, 5 Esp. 41); and as to the master’s and owner’s duties in this respect, see 3 Ch. Com. L. 393; Ab. Sh. 275, 340. When the course of the ship on the voyage comes in question, and the same is not pointed out by the charter-party, it will be a question for a jury to decide on (Ab. Sh.; 4 Camp. 112). In an action for improper conduct in delivery of the cargo, evidence of the custom and usage of particular places and trades is admissible, in the absence of an express stipulation on the question (Ab. Sh. 378; 2 Esp. 603; 4 T. R. 260; 5 T.

R. 397; Pea, 150). The deft. by charter-party of Oct. 20, 1832, agreed to go in ballast from P. to St. M., and bring back a cargo of fruit direct to L.; the charterer was to be allowed thirty-five running days for loading and unloading, to commence on December 1st, then next, and if the vessel did not arrive by the 31st of January, 1833, the charterer was to be allowed to rescind the charter-party: held, that the deft. was bound to proceed at once to St. M., and was not at liberty to make an intermediate voyage for his own purposes, although notwithstanding, he arrived at St. M. on the 31st of January, 1833 (M'Andrews v. Adams, 4 M. & Sc. 517). The deft. having cross-examined the plt.'s witnesses in order to show a custom in the trade to carry a deck cargo: held, that it was competent to the plts. in order to rebut the inference sought to be raised from that course of examination, to inquire whether when deck cargo was lost, or thrown overboard, it was not usual for the shipowner to pay for it (Gould v. Oliver, 2 Sco. N. R. 241). The defts. had paid money into court upon a second count, claiming general average in respect of the deck cargo, which plts. took out of court in satisfaction of the damages on that count; these circumstances were offered by the defts. as evidence of admission by the plts., that the deck cargo was properly loaded: held, not admissible (Ib.). The judge told the jury that *prima facie* the deck was not the proper place for the stowage of the cargo, or any part of it; that in some cases custom might sanction the practice, but that without reference *to any custom, if it increased the perils [*789] of the navigation, the damage of the ship or of the cargo, it was an improper stowage: held, correct in the absence of any evidence of general custom to load deck cargo at the risk of the shipper (Ib.). One of the plts. resided at Quebec, the timber was loaded at about three miles distant therefrom, where it was furnished by one Jameson, the agent of the plts.: held, that the knowledge or assent of the resident plt. to a portion of the cargo being stowed on the deck, could not be inferred from the fact of Jameson having such knowledge, and offering no objection (Ib.). In Batavia, parties about to make a contract go before a notary, who writes in his book the contract, which is then signed by them. Copies of this contract may be obtained by either party in the absence of the other. A notarial copy of a charter-party entered into at Batavia, held not to be evidence either of the original contract, nor properly secondary evidence of it (Brown v. Thornton, 1 Nev. & P. 339; 6 Ad. & E. 185).

A charter-party contained the words "to load wool, tallow, bark, or other legal merchandise." Held, that a ship-broker could not be asked whether the words "or other legal merchandise" had a known technical meaning in the trade, the words being in themselves plain and intelligible, and if any obscurity were thrown over them by their context in the charter-party, this could only be explained by the construction of the charter-party itself. Under the charter-party it was likely to become a question at what rate the freight on some of the ship's home cargo, for which no rate was named in the charter-party should be calculated. It was proposed to ask the witness what was the usual rate of charge, according to the custom of merchants, for the freight of goods under such circumstances: held, that this question also could not be put, because the rate of freight in such cases must depend on the construction of the charter-party (Cockburn v. Alexander, 10 Law T. 268, C. P., Wilde).

A vessel was chartered by the deft. from London to Bombay, addressed to G. and Co. the deft.'s agents at the latter place; and it was stipulated by another charter-party of the same date, that the vessel should discharge her cargo at Bombay, and then take in a homeward cargo, the deft. agreeing to pay freight as to one-half the cargo at 3*l.* per ton; and as to the rest at the

current rate of freight when the ship should be loading. It was also agreed, that the master of the vessel and the agents at Bombay should be at liberty to make such alterations in the charter-party as they might mutually think proper, without prejudice to the agreement. Shortly after the arrival of the vessel at Bombay, G. and Co. agreed by a memorandum indorsed on the charter-party, that, before loading her homeward cargo, the vessel might proceed to Aden with government coals and stores, and return to Bombay with all possible despatch. The plts. accordingly entered into a charter-party with the East India Company; and the vessel proceeded to Aden in February, and returned thence in May, having earned freight, which was paid to the plts.: held, that G. and Co. had authority to permit the voyage to Aden, and that the deft. was bound by the alteration in the charter-party; and, therefore, that he was bound to pay the charter-rate of 3*l.* per ton for half the cargo, although that exceeded the current rate of freight at the time of loading, and although the alteration might be prejudicial to him; and that he was not entitled to bring into the account the freight earned by the owners on the Aden voyage (*Wiggins v. Johnston*, 15 Law J. 202, Ex.; 14 M. & W. 609).

A ship being chartered to take coals to Algiers, it was stipulated in the charter-party that the ship should be unloaded, weather *permitting, at a certain rate *per diem*, to reckon from the time of the [*790] vessel being ready to reload, and "in turn to deliver." In an action by the owner against the charterers for an alleged detention, the defts. proved at the trial that the coals in question were for the use of the French marines, who made special regulations with all their contractors with respect to "the turn to deliver;" that, according to these regulations, the delivery was "in turn;" and that these regulations formed part of the general regulations of the port: held, that the defts. had a right to prove that the contract was entered into with reference to a known recognised use of the words "in turn to deliver" among persons conversant with the trade; and that a question put by the defts., whether there was any general understood meaning of those words among shipowners and merchants entering into charter-parties with respect to the commerce then under investigation, was unobjectionable (*Robertson v. Jackson*, 15 Law J. 28, C. P.; 10 Jur. 98; 2 C. B. 412).

By a charter-party it was stipulated that a ship should proceed to Limerick with her then present cargo, and there take a cargo of oats for London, at a freight of 2*s.* 8*d.*, a quarter; six days being allowed for loading at Limerick. Before the expiration of the six days, the freighter's agent offered the captain a cargo at 2*s.* 6*d.*, and said that the freighter's broker would pay the difference. The captain refused to take anything not according to the terms of the charter-party: held, that, as the contract had not then been broken by the deft., the captain was not bound to accept this offer; but that, if the contract had been broken by the freighter not putting any cargo on board within the six days, it would have been the captain's duty to have taken a cargo at the most he could get, so that the damages to be paid by the freighter should be reduced as much as possible (*Harris v. Edmonds*, 1 C. & K. 686).

Damages.] These must depend on the facts of the case (see "*DAMAGES*"). Where a jury, in an action on a charter-party, assesses damages generally, the court will not allow interest, though the demand arises for special as well as unliquidated damages (*Martin v. Emmote*, 8 Taunt. 530). As to damages where there is a penalty declared on or not, see *ante*, p. 784. As to when the owner is entitled to the whole freight, though there be a de-

viation and breach of the charter-party, and the merchant is driven to his remedy for damages by cross-action, see *Bornman v. Tooke*, 1 Camp. 377; 4 Camp. 112; *Havelock v. Giddes*, 10 East, 555; *Ritchie v. Atkinson*, 10 East, 295; *Davidson v. Gwynne*, 12 East, 381.

Evidence for Defendant.

The main burden of evidence, as we have seen, lies on the plt., and all deft. will have to do will be to rebut the same, either by the cross-examination of plt.'s witnesses or from fresh evidence adduced by himself.

[*791] *COMMON, ACTION FOR INJURY TO.

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Form of Remedy.

By the Lord.] If he be disseised, he may have recourse to the action of ejectment (Ad. Ej. 28; Woodf. 520, 5th ed.). The same action lies for the owner of wastes, not being lord of any manor. When the lord is disturbed on his soil, by persons having no colour of right, or has his waste surcharged

by his tenants; as, where a man, having no right whatever to enter on the lord's waste, puts his cattle there; or, where one, having a right, puts in cattle which are not commonable, as hogs, goats, &c.; or strangers come upon the soil, and take away wood; or, where the commoner surcharges, or puts more cattle on the waste than the pasturage or herbage will sustain, or than he has a right to place there: the lord might, for these disturbances, before the 3 & 4 Will. IV. c. 27, s. 37, have a writ of *quo jure*, an action of trespass, or a special action on the case (3 Bl. Com. 237). But the former writ is now abolished by that act. He has also, on some occasions, a remedy by distress, in cases of surcharge, and by writ of admeasurement; and he may maintain an action for any trivial trespass, because of the entry and trespass (Ib.: 9 Rep. 113); unlike to the commoner, who can only proceed when his profit is diminished (Ib.). It is not necessary that the owner of the soil should actually be in possession, in order to enable him to maintain *an action (Queen's College, Oxford v. Hallett, 14 East, [*792] 489). As to the lord's power to distrain, he may take the beasts of a stranger, damage feasant, on his waste in this manner (3 Lev. 41; 1 Saund. 346, n.; 2 Saund. 328).

And, where the number of beasts which a commoner may depasture is limited, the lord may distrain a surplusage (1 Rol. Abr. 665). And, in a case of surcharge by a commoner, having a right for beasts *levant* and *couchant*, it was held, that the lord might distrain (Freem. 273). If, in making a distress, the lord chose the commoner's beasts, in order to separate them from those of a stranger, which he is about to impound, it has been held, that he shall not be answerable in damages at the suit of the commoner, but he may justify such act in pleading to an action of trespass (3 Lev. 40).

By the Commoner for a Disseisin.] The commoner being seised, is in a situation to proceed against all parties who molest him in the enjoyment of his rights. Where he is completely ousted from an appendant or appurtenant common, whether of pasture, estovers, &c., he may maintain an action of ejectment (Newman v. Holdmyfast, Stra. 54); or where he is disturbed in the exercise of his right he may maintain an action on the case, but he cannot bring an action of trespass (Bro. Abr. Trespass, pl. 174; 2 Rol. Abr. 552, pl. 8). A right of common is also frequently tried through the contrivance of a feigned issue.

For disturbances of common, in the nature of a disseisin, such as overstocking the waste, &c., and if any damage or annoyance whatever take place upon the land, whereby he loses his common, the commoner may bring his action on the case, and the smallness of the damages constitutes no objection to such action (Pindar v. Wadsworth, 2 East, 161; Wool. Com. 230; see 3 & 4 Will. IV. c. 27, s. 36). An action of trespass does not, in general, lie by the commoner, because he has no ownership in the soil (Smith v. Kemp, 2 Salk. 637). If, indeed, the commoner's cattle be taken on the ground of his having no right of common, then trespass or replevin lies; and that is the more preferable form of remedy, as debt must justify the right specially. The owner of a common may erect thereon a house necessary for the habitation of a woodman to protect the woods and underwoods on the common. So he may erect a house necessary for the habitation of beast-keepers for the care of the cattle of himself and the other persons having a right of common there; and a plea justifying the erection of a house for such beast-keepers, need not state the names of the other commoners, nor that they assented to the appointment of beast-keepers (Patrick v. Stubbs, 9 M. & W. 836).

One tenant in common can maintain trespass against another for an actual

expulsion from a messuage of which they are tenants in common (*Murray v. Hall*, 18 Law J. 161, C. P.). So, also, one tenant in common of personal chattels can maintain trover against the other for a destruction of the subject-matter of the co-tenancy (*Mayhew v. Herrick*, 18 Law J. 179, C. P.).

By Commoner for Partial Disturbance.] When the lord erects buildings, fences, or hedges, &c., to the prejudice of the commoner's rights, besides the remedies above spoken of, the commoner may apply an instant redress, and abate them, overturning every impediment that disturbs his profit (15 H. VII. 10). Where a house has been unlawfully erected on a common, a commoner, where enjoyment of the common is interrupted by it, may pull it down, but not whilst there are persons in it (*Perry v. Fitzhowe*, 15 Law J. 239, Q. B.; 10 Jur. 799). So, if the lord approve, without leaving sufficient common, the commoner may break down the whole inclosure (2 Inst. 88). And it is generally agreed, that a commoner may abate hedges erected on his common (*Mason v. Cæsar*, 2 Mod. 65). So that, if the commoner be only abridged of his right, he cannot abate; but, if he be entirely *excluded, he may do any act likely to give him access to his common [*793] (per Lord Kenyon, 6 T. R. 66). A commoner cannot justify cutting down trees planted by the lord in the waste, if it be not a total destruction of the common, though there be not a sufficiency of common left, his remedy being by action on the case (*Kirby v. Sadgrove*, in error, 1 B. & P. 13; 6 T. R. 483). Obstructing a way to the waste is also an injury, for which the commoner may proceed against the lord by action (11 H. IV. 25; Bro. Com. Pl. 32). Where the owner of the soil ploughs up waste, an issue or action may be had, but not an action of trespass (2 H. IV. 11). And it seems the commoner may eat the corn wrongfully sown, for the wrong begins first from the terre tenant (*Godby*, 124). However, the commoner cannot fill up trenches or pits, as that would be a meddling with the soil (5 Vin. Abr. 39); but he cannot himself remove the nuisance, even though his cattle fall into pits, and are hurt (2 Bulst. 115). If the commoner's right is disturbed by coneys, or animals of that description, he may have an action upon the case (*Palm*, 319), against the owner of the soil. The estovers, turves, and other rights which a commoner has appurtenant to his tenement, may be unduly invaded by the lord; and here, as in other cases, an assise will lie for freeholders. The 3 & 4 Will. IV. c. 27, s. 36, has however abolished real and mixed actions, and now it seems that an action on the case is the proper remedy (1 Ch. 159; *Ashmead v. Ranger*, in error, 11 Mod. 18; 1 Ld. Raym. 551; 2 Salk. 638; 12 Mod. 379). The commoner has no interest in the soil, or its fruit or produce; he cannot cut the grass, wood, &c.; nor even mole hills (*Harcourt's case*, 12 H. VIII. 2 a; 1 Rol. Abr. 406, pl. 10). The last disturbance particularly to be noticed as proceeding from the lord, is surcharging the common with his own beasts, or those of others with his license. It is clear that, on such an occasion, a remedy is open by assise (F. N. B. 125); or action (*Sty.* 164). But the latter would seem to be the proper remedy now (see 3 & 4 Will. IV. c. 27, s. 36).

Where a fellow-commoner disturbs another commoner, an action on the case lies for the consequential injuries; and, where the common is stinted, there is a remedy by distress; but not if admeasurement be necessary, as where the stint has relation to the quantity of the commoner's land (*Hall v. Harding* 1 Bl. R. 673; 4 Burr. 2426). In general, if a man be disturbed by another, who has an equal right with himself to the profits of the soil, either by surcharging the waste, taking unreasonable estovers, turves, fish, &c.,

digging pits and holes in the common, whereby cattle are injured, &c., the party may have immediate recourse to his action on the case. But a commoner cannot take estovers which have been cut tortiously by another commoner, any more than he can take those which may have been cut by the lord; and the same rule extends to other commonable privileges (Wool. 244). It has been decided, that one surcharge cannot be set off against another, as one tort cannot be so set off; and so, where it appeared in evidence that the plt. had himself surcharged much more than the deft., and he was nonsuited, the court will set aside the nonsuit (Hobson v. Todd, 4 T. R. 71). With respect to distresses by commoners on the beasts of other commoners, the general rule is, that they cannot be made (Wool. 245).

As to disturbances by *strangers*, the most ample remedies are allowed by the law against them. An action on the case, or a distress are ready remedies to punish acts of disturbances done by these persons. Thus, if, by their cattle, &c., they eat the common of a freeholder, he may consider it as a disseisin, and bring an assise (1 Bowl. 197; but see 3 & 4 Will. IV. c. 27, s. 36, *supra*); *or an action on the case; and a copyholder may have an action on the case (1 Rol. Abr. 89). Where clay was [*794] dug by a stranger, and the grass spoiled, it was holden by three judges against one, that an action on the case would lie (Godb. 343; Wool. 249).

In action for injury by the disturbance of a commoner, trespass or replevin are in many instances preferable to an action on the case, in order to compel the deft. in his plea to state his supposed right of common, or other justification. An ancient grant of a right of common of pasture to a corporation for the benefit of the resident freemen paying scot and lot, does not enure to the freeman resident within a new parish added to the borough by the 2 & 3 Will. IV. c. 64, and 5 & 6 Will. IV. c. 76 (Beadsworth v. Torkington, 1 Gal. & Dav. 482; 1 Q. B. 782). The owner of a common may approve under 20 Hen. III. c. 4, and 13 Edw. 1, st. 1, c. 46 (Patrick v. Stubbs, 9 M. & W. 830).

By 9 & 10 Vict. c. 70, s. 1, provisional orders of commissioners, under 8 & 9 Vict. c. 118, may be varied or amended before certificate, in the general report or notice of intention to allotment, and a supplemental provisional order may also be issued, which is to be binding, after due deposit and notice, unless said persons possessing in the aggregate one-third in value of the land proposed to be inclosed, dissent; or, by sect. 2, certain other persons dissent; sects. 4, 5, relate to allotments for exercise, &c., and to give the lord of the manor for right of soil a perpetual rent-charge in lieu of allotments: sect. 6 relates to cases of intermixed copyhold, customary, or freehold lands and the boundaries of leaseholds; and sect. 11 to the exchange of shares of land, and cattle gates, and stints. By sect. 10, a steward or deputy may consent in writing on behalf of the lord. Sect. 11 requires that the inclosure commissioners, "after examination under their direction of the accuracy thereof," shall sign any new survey, map, or plan used under these acts, and seal it with "their official seal, in testimony of such examination."

Form of Pleadings.

Declaration.] The venue is local (see *post*, "DECLARATION"). In the declaration in case for injuries arising from the disturbance of plt.'s common appendant or appurtenant, the plt. must show his right to the profit which he complains to have been abridged, and then state that the deft. interrupted him in the enjoyment of it (Blythe v. Topham, 3 Wils. 288, per De Grey, J.; Cro. Car. 158).

Plaintiff's Title.] With respect to the inducement stating plt.'s title, giving him the right, formerly the declaration usually stated the plt.'s seisin in fee (see Lit. Ent. 62). But it is unnecessary to state in a declaration any title to the common, either by prescription or otherwise; and that mode of declaring is sanctioned by 3 & 4 Will. IV. c. 71, s. 5 (*post*, p. 108); and it is sufficient to allege that the plt. was possessed of certain lands, &c. (as the case may be), and, by reason thereof (Cowlam v. Slack, 15 East, 108; 3 Taunt. 24), had a right of common in such a place for his commonable cattle, *levant* and *couchant* upon his land, and that the deft. disturbed him, whereby the plt. could not enjoy his common in so ample a manner as he ought to have done (1 Saund. 346, n. 2; 2 Saund. 113, n. 1; Com. Dig. Action on Case for Disturbance; Crowther v. Oldfield, 2 Ld. Raym. 1230; Downey v. Cushford, 1 Ld. Raym. 286; Grimstead v. Marlowe, 4 T. R. 718; see 6 B. & C. 703). And it has been held, that a declaration, which alleged a possession by plt. of 100 acres in a common arable field, and that, by reason thereof, he had common of pasture for all his common-
 [*795] able *cattle, *levant* and *couchant*, in and upon his said land, with the appurtenants in and over the whole of the said common field, at certain times, was correct (Cheesman v. Hardman, 1 B. & A. 706). A copyholder may declare on his possession as well as a freeholder (Chapman v. Cowlam, 13 East, 8). The usual allegation, "by reason of the possession," &c., is improper, if the right do not depend thereon (Fentiman v. Smith, 4 East, 107; Tewkesbury (Bailiffs of) v. Diston, 6 East, 438); and, as a title need not be shown, it should seem that these words may be omitted see Cowlam v. Slack, (*supra*). If the plt. undertakes to state his title fully, but does so insufficiently, it will be fatal (Crowther v. Oldfield, 2 Ld. Raym. 1230; 3 Salk. 363; Cro. Eliz. 153). But, in general, a variance in the title, which is set out by way of inducement only, is immaterial (Bertie v. Beaumont, 16 East, 33; 4 Moo. 218; Cro. Eliz. 336; 3 Taunt. 137). Where plt. states that he was entitled by reason of his possession of a messuage and land, and the proof was possession of land only: held, sufficient (Ricketts v. Salway, 2 B. & A. 360); otherwise, if words of connexion, as "thereunto belonging," had been used (Ib., per C. J.: *semble*, that a prescription for a right of common for a messuage and land, with the appurtenances, would not be supported by evidence of a prescriptive right appurtenant to the land only (see Ib.; Yarley v. Trewick, Palm. 269; 7 Co. 5; Hickman v. Thorney, Freem. 211; B. N. P. 59; 3 Stark. 1549). Where the declaration alleged a right for all the freemen inhabiting within the borough of A., and it appeared the limits were enlarged by the 5 & 6 Will. IV. c. 76: held, a variance; for the right being prescriptive was confined to the ancient limits, and it was immaterial that the plt. in fact inhabited the old limits (Beadsworth v. Torkington, 1 Q. B. 782). As to the statement of title in a plea, *post*, p. 806.

Common in Gross.] A common in *gross*, arising from a deed, must be claimed, by setting out the legal effect of that instrument, and making a profer of it in court; for, where the plt. established his right of common by grant, except the bringing in of the indenture, judgment was given against him, because he had omitted to show the foundation of his title (Farmon v. Hunt, Cro. Car. 271). But, where it is claimed by prescription, the pleading should be, that he, and all his ancestors, whose heir he is, from time whereof, &c., have had common in the place where, &c., for all their cattle, omitting of course the mention of levancy and couchancy, the right not being annexed to land (1 Saund. 346). And it is, of course, necessary, whether

it be claimed by grant or prescription, to show for what beasts the right be demanded (Keilw. 197; Wool. 281).

Common of Estovers.] The declaration for a disturbance of estovers, turbarry, fishery, &c., is similarly framed with that of an injury to pasture (*supra*); the plt. states a right to take so much wood; turf, &c., and then complains that the deft. has carried away his profits, whereby he is injured.

Nature of Property giving the Right.] As to the statement of the nature of the property which gives him the right, it usually is, that he is possessed of a messuage, and so many acres of land, where he claims common of pasture, or estovers; where he claims turves or fish, of a messuage only, situate in such a parish and county, and generally describes each commonable profit, as appertaining to that which best agrees with its quality (Wool. Com. 265), it ought not to be pleaded, that the common is appurtenant to a "farm" only, as that is uncertain (1 Raym. 726). But it is not always necessary, in pleading, *to state the common as appurtenant to land [*796] *eo nomine*; for, if it be laid as appurtenant to a thing, as a messuage, &c., which, in intendment of law, *prima facie*, comprehends land, it is sufficient (1 Saund. 346 b). Plt. should state the nature of the property with exactness (4 Mod. 423); but, in mentioning the land to which the right may attach, the precise number of acres is immaterial (Palm. 269; Cro. Jac. 629; Strode v. Begot, 4 Mod. 423). And where plt. stated he was possessed of a messuage and land, when in fact he was possessed of land only, it was held he might recover *pro tanto* (Ricketts v. Salway, 2 B. & A. 360). And no more particularity need in general be observed in framing the declaration, than what is requisite to exclude any uncertainty (Hockley v. Lamb, 1 Raym. 726), and to avoid a variance (Ricketts v. Salway, *supra*; S. C. 1 Ch. Rep. 104); and the courts will construe all allegations with reference to their meaning as settled in common parlance, unless they contain terms which have a peculiar legal signification.

Averment.] In describing the *right of common* of pasture, it must be stated that it exists for the *plt.'s* cattle (1 Saund. 346 c; 2 Show. 328); an allegation, that the right was for *all* the plt.'s commonable cattle, will be supported in evidence, though proof be adduced that the common was not sufficient to support *all* plt.'s cattle (2 Ch. Rep. 297). If there be any doubt as to the extent of the number of cattle, or right, it is proper to qualify the statement of the right, and the plt. need not show more than what makes for him (2 H. Bl. 234; How v. Strode, 2 Wils. 269). It should be stated, that the cattle, &c., are commonable, if the prescription be for such (2 Lutw. 1467). If there be any doubt as to the reality of the cattle entitled to depasture, such only as are known to be so entitled should be averred; though, if the plt. should happen to prove a fuller right, as for more, or a different head of cattle, his declaration will not be vitiated (5 Co. Rep. 78; B. N. P. 29; Johnson v. Throughgood, Hob. 64; 3 Stark. Evid. 1560; Phil. Ev. Variance; 2 H. Bl. 234; 2 Wils. 269; Bushwood v. Pond, Cro. Eliz. 722; Wool. 270-1); *aliter* in a plea (Wool. 270). The right alleged must not be larger than can be proved (see Beadsworth v. Torkington, 1 Gal. & Dav. 482; 1 Q. B. 782). Also, it should be stated, that the cattle are *levant* and *couchant*, unless the right be for a certain number (1 Saund. 28, n. 4, 346 b, c; 2 Saund. 327; 2 Roll. R. 379; Cro. Jac. 27; 2 Mod. 85). A lease to plt.'s testator, for years determinable upon lives, of a farm, &c., together with *reasonable common* of pasture, &c., will support an allegation of the right being for "all reasonable cattle, *levant* and *couchant*," &c. (6 M. & S. 47). Care must

be taken to state the right to be incident only to the premises in respect of which it is claimable. An averment, that the plt. is entitled to common of pasture for all his cattle, *levant and couchant*, upon his land, is well supported by evidence that the plt. was a part-owner with deft. and others of a common field, upon which, after the corn was reaped, and the field cleared; the custom was for the different occupiers to turn out in common their cattle, the numbers being in proportion to the extent of their respective lands within the common field, although such cattle were not maintained on such land during the winter, and though the custom proved was to turn out in proportion to the extent, and not to the produce of the land in respect of which the right was claimed (*Cheseman v. Hardman*, 1 B. & A. 706). Generally speaking, the prescription should be set out entire; but, if a condition be super-added to the enjoyment of the common, an omission to set that forth, if such omission does not affect the title, will not vitiate the pleading (*Wool*, 267). Where the plt. prescribed for common generally, and the [*797] jury found that he had such a right, on *paying a penny by the year, the claim was disallowed, for this payment formed part and parcel of the prescription itself (*Lovelace v. Reynolds*, Cro. Eliz. 546, 563; *infra*).

Time of Right.] The allegation relating to the *time* for enjoying the common should be accurately stated. If the right of common be only at certain times of the year, it must be so described (*Musgrove v. Cave*, Willes, 318; 2 Saund. 2, 3). Where a prescription was laid for every commoner every year, at all times of the year, and the evidence showed that the sheep of the commoner ought to be folded at night on the lands of the farm giving a right, it was held that the words "all times" must be taken to mean all usual times, and that the folding of the sheep was a condition, or rather a condition subsequent to the enjoyment of the right, and that therefore the above prescription was well laid (*Brook v. Willet*, 2 H. Bl. 224). As to describing the right from *Old St. Thomas's day*, &c., see *post*, *Smith v. Flower*, 3 Bing. 401.

Locus in quo.] The *locus in quo* over which the common is claimed should be accurately described. If the plt. has some land of his own in the *locus in quo*, it should be averred that the right was over such *locus*, plt.'s own land therein excepted (see *Musgrave v. Cave*, Willes, 320; Vin. Abr. Presumption and Pl. 23). But this is not absolutely necessary (*Cheeseman v. Hardman*, 1 B. & A. 706; 6 B. & C. 16). It is necessary to have the number of acres of the common or waste proved (2 Lutw. 1231; 1 Raym. 332; 1 Saund. 347).

Usual Words descriptive of Right.] The usual words concluding the statement of the right, viz., "as to the said messuage, &c., belonging and appertaining," are the usual words descriptive of a right of common (*Lit. Ent.* 62). If the right be not by virtue of prescription, but by grant or demise, they should be omitted (*Fentiman v. Smith*, 4 East, 107; *Tewkesbury (Baillifs of) v. Diston*, 6 East, 438; 1 Taunt. 205; 1 B. & P. 371). It is not necessary to allege in express terms whether it be common appendant, appurtenant, or in possession (*Musgrave v. Cave*, Willes, 319). A common appendant need not be pleaded as by prescription, as appendancy implies a prescription (*Lat.* 88; *Dy.* 299 a; *Co. Lit.* 122 a). Thus, it is sufficient to say, that the plt. was seized of such an acre, and had common in the place where, &c. on which account he used his common (33 H. VI. 32; 31 Lib. Ass. pl. 23). So, where the plt. declared to have common as appendant to the site of a manor and other lands, and did not prescribe to have it as belonging to the other lands, it was said that a claim for common was good by the title of appendant

only, and judgment was given for the plt. (*Carvill v. Holt*, Palm. 560). It seems, however, that the more prudent way in such cases, would be to insert counts for a common appurtenant, lest some unforeseen variation in the prescription should appear in evidence, which might enlarge the claim from the strictness of appendancy to a more general right. In another case it was said, that it appears only from the nature of the common pleaded whether it be appendant or appurtenant (*Willes*, 323; *Wool*. 275).

Statement of Injury.] In describing the injury itself, it has been held sufficient for plt. to state the deft.'s injury, with the damage generally, without stating the deft.'s right of common, as in the following precedent, whether in an action against a commoner or a stranger (*Atkinson v. Teasdale*, 3 Wils. 278; 2 Bla. R. 817; 1 Saund. 346 a); and although the plt. have been guilty of a surcharge himself (*Hobson v. Todd*, 4 T. R. 71). But, in actions against the lord *of the soil, a particular surcharge, as of [*798] so many sheep, &c., must be shown; and it will not be enough to say that plt. could not enjoy his common as he had been accustomed (*Lutw.* 107; 2 Mod. 6; 3 Wils. 290; 1 Saund. 346). In case for surcharge of a common the plt. need not show that he turned on any cattle of his own at the time of the surcharge, but only that he could not enjoy his common so beneficially as he ought (*Wells v. Watling*, 2 Bla. R. 1233).

It is sufficient to allege a disturbance generally without showing the particular means adopted (*Anon.* 3 Leon. 13; *Anon.* 1 Ld. Raym. 452; 1 Ch. Pl. 406).

Uses of Common.] The plt. need not show that, at the time of the injury, he was using the common with cattle (2 Bla. R. 1233). If a grant be made of common wherever the grantor's cattle feed, there should be an averment that his cattle were feeding in such a place at the time when the plt.'s common was disturbed (——— *v. Stringer*, 1 Cro. Car. 599).

Damage.] It is necessary to state that plt. could not enjoy the common in so ample and beneficial a manner, in consequence of the injury (1 Saund. 346 a; 9 Co. 113 a; *Wills v. Walling*, 2 Bla. R. 1235); but no evidence of any specific damage need be adduced, the infraction of the right being a sufficient injury (*Ib.*; *Pindar v. Wadsworth*, 2 East, 154, *post*, p. 804).

In declarations for disturbances of *common* by *building* houses or enclosing it, you may insert other counts, besides the one stating the particular injury, for a continuance of the building or inclosure, and for a general obstruction (2 Ch. Pl. 615; see *infra*).

By R. G. H. T. 4 Will. IV. r. 5, several counts shall not be allowed unless a distinct subject-matter of complaint be intended to be established in respect of each.

Plea, &c.] The subsequent pleadings to these kinds of actions will be the same as in other actions on the case, &c. (See "CASE," "TRESPASS.") The plea of not guilty puts in issue merely the wrongful act or injury complained of and not the inducement (R. G. H. T. 4 Will. IV. r. 2, s. 4). If the lord avows in replevin, the plt. must plead in bar his right; or, if sued in trespass for some collateral injury to the waste, deft. must set forth at length the special matter of his defence (*Wool*. 294). As to the mode of setting forth such right, and defence in general, see *post*, "COMMON, DEFENCE OF RIGHT OF." To trespass deft. may plead, *liberum tenementum*. A license may sometimes be pleaded, as a plea of license by deed from the lord to dig turves, leaving sufficient common for plt. (*Willes*, 621; 1 Show. 350; *Cro. Jac.* 574;

2 Saund. 320; Wool. 299). A release of common may be pleaded; and a continuing license will sometimes operate by way of release (Wool. 300, 299). A breach of by-law will sometimes afford a plea (Ib.; see *post*, "DEFENCES," p. 806, *et seq.*)

To an action on the case for a continuing disturbance of common the deft. pleaded an approvement of the *locus in quo*, "leaving sufficient common of pasture for the said plt. and all other persons entitled thereto, together with sufficient ingress and egress to and from the same, according to the form of the statute," &c.: held, that the plea sufficiently showed that enough of common was left at the time of the approvement, and on the place where the plt. was entitled to enjoy it (Patrick v. Stubbs, 9 M. & W. 830).

In pleading the right of the lord of a manor to inclose and approve part of the common against tenants having common of pasture, it must be stated that there was sufficiency of common left for the *commoners (Arlett [*799] v. Ellis, 9 D. & R. 897; 7 B. & C. 346; 9 B. & C. 671). But the right of the lord may be given in evidence on an issue joined on the right of common over the *locus in quo*, at the time the trespass was committed, and need not be specially pleaded. Where a part and not the whole of a common has been inclosed, a commoner, in asserting his right of common, may throw down the whole of the hedge erected on the common, and a plt. in trespass cannot recover against him on a new assignment because he had thrown down more than sufficient to admit his cattle (Arlett v. Ellis, *supra*). Where the overseers of the poor of a parish inclosed a part of the waste of a manor within the parish, for the purpose of employing the poor, in furtherance of stat. 39 Geo. III. c. 12, and 1 & 2 Will. IV. c. 42, and the deft., a parishioner, but having no right of common on the waste, broke down the fences; in an action of trespass against him by the overseers, he pleaded the land was not the property of the plts. and at the trial the plts. failed to prove that they had the consent of the lord of the manor to the inclosure, yet the court held that the plts. were entitled to recover, for they had the actual possession, and that was sufficient against the deft. who was a stranger and had no right (Matson v. Cook, 4 Bing. N. C. 392).

Where a house has been unlawfully erected on a common, a commoner whose enjoyment of the common is interrupted by it may pull it down. But he is not justified in pulling it down if there are persons in it at the time. And therefore to a declaration in trespass for pulling down a house, which stated that plt. and his family were actually present and residing in the house at the time, a plea by the deft., a commoner, that the house interrupted his enjoyment of common, and that he therefore pulled it down, was held ill. A parol license by a commoner to build a house on a common will not, though executed, run with the land in respect of which the right of common is claimed, so as to bind a subsequent owner of such land. *Quære*, if it would have been binding as between the original parties (Perry v. Fitzhowe, 15 Law J. 239, Q. B.; 10 Jur. 799).

Precedents.

Declaration in case for disturbance of common of pasture appendant.

In the K. B. (C. P. or Ex. of P.). On the day of A. D. 1850.
[*Venue local*] to wit A. B. by E. F. his attorney (or in his own proper person) complains of C. D who has been summoned to answer the said A. B. in an action on the case. For that whereas the plt. before and at the time of the committing the grievances hereinafter next mentioned was and continually and from thenceforth hitherto hath been and still is lawfully possessed of a certain messuage and divers to wit 50 acres (*a sufficient number, ante*, p. 794) of land with the appurtenances situate in the county of &c. and by reason thereof

for and during all the time aforesaid of right ought to have had and still of right ought to have common of pasture for all his commonable cattle *levant and couchant* in and upon his said messuage and land with the appurtenances in a certain place waste or common called the _____ in the parish of _____ in the same county every year at all times of the year as belonging and appertaining to his said messuage and land with the appurtenances. Yet the deft. well knowing the premises but contriving and wrongfully and unjustly intending to injure prejudice and aggrieve the plt. in this behalf and to deprive him of a great part of the profits benefit and advantage of his common of pasture whilst the plt. was so possessed of his said messuage and land with the appurtenances as aforesaid, and whilst he was so entitled to such common of pasture as aforesaid to wit on the _____ day of _____

A. D. _____ and on divers other days and times between that day and the commencement of this suit wrongfully and unjustly surecharged the said place waste or common called &c. and depastured eat up and spoiled the grass then growing on *the same with more cattle than of right he ought to have depastured thereon [*800] to wit with 100 horses 100 mares 100 geldings 200 oxen 200 heifers 200 cows 200 calves 20 bulls and 500 sheep (*according to the facts though indeed the averment need not be strictly proved*), and kept and continued the same so depastured thereon at each of these times for a long space of time to wit from the putting the same there respectively as aforesaid until the commencement of this suit, whereby the plt. on these several days and times and during all the time aforesaid was and is greatly injured hindered and obstructed in the enjoyment of his said common of pasture there and could not nor can use have or enjoy the same in so large ample and beneficial a manner as he otherwise during all the time aforesaid might and could have had and enjoyed the same but hath lost and been deprived of a great part of the benefit and advantage thereof to the plt.'s damage of £ _____ and thereupon he brings suit &c.

Other forms.

See other forms of declarations for disturbance of common of pasture, 2 Ch. Pl. 611; for not suffering fields to lie fallow in rotation, ib. 613; by building, &c., ib. 615; by enclosing, ib.; by digging turves, ib.; by rabbits, ib.; by taking off dung, ib.; by putting heaps of dung on, ib.; by trespassing with horses, ib. 616; for disturbing common of turbary, ib.; Wool.; for disturbing common of estovers, ib. See form of declaration against the lord, Herne, 125; 1 Saund. 346 a. For avowries and cognizances respecting, see *post*, "RECOGNIZANCE."

Evidence for Plaintiff.

In an action for disturbance of common, the plt. will have to prove, 1st, his title to the right of common, as stated in the declaration; 2nd, the right of common; 3rd, the disturbance and injury done to such right by deft.; and, lastly, the plt.'s damages.

Proof of Title to the Right.] The plt.'s title must be proved, as stated in the declaration. But we have already seen that the title need not be proved to the same extent as that stated; it suffices to prove the substance of the issue (*ante*, p. 794, see the instances). It will suffice to prove the plt.'s possession of some messuage or land, to which such common belongs, or of a house so entitled, where the claim is for common of turbary, &c.

Proof of the Right of Common.] This should be proved as stated; though, indeed, as we have already seen, the substance of the statement need only be proved (see *ante*, p. 796, for instances), for the disturbance is the gist of the action, and the title is only inducement (B. N. P. 75; 1 Saund. 346, n. (a)). Therefore where the plt. states that he was possessed of a messuage and so many acres of land, with the appurtenances, and by reason thereof ought to have common, &c., this allegation is divisible, and he may prove that he was possessed of the land only (Ricketts v. Salway, 2 B. & A. 360); the proof must be as large as the prescription alleged (Pring v. Henley, B. N. P. 59). But the prescription must not be larger than the proof (Beadsworth v. Torkington, *infra*). A prescription is an entire thing and must be

proved as laid (Ricketts v. Salway, *supra*, per Holroyd, J.), unless when aided by the new rules of pleading (*infra*); and, therefore, where the plt. declares for a trespass and digging stones in C., and the deft. pleads a prescriptive right to dig in a certain waste containing Close C., and this right generally over the waste is traversed; proof that the right does not extend to C. defeats the whole plea (Morewood v. Wood, 4 T. R. 157; Evans v. Ogilvie, 2 Y. & J. 79). So, in trespass for breaking plt.'s several fishery in four places in a river, the deft. pleaded that it was a public *navigable [*801] river, and the plt. replied a prescriptive right to dredge in the four places; rejoinder traversing this prescription: held, the plt. must show a right in all four places, and not only where the trespass was committed (Rogers v. Allen, 1 Camp. 309; and see Maxwell v. Martin, 6 Bing. 522). A grant 80 years ago to one of the deft.'s ancestors does not prove a prescriptive right (Wilcome v. Upton, 5 M. & W. 398). An ancient grant without date is not necessarily at variance with prescription, it being a question for the jury (Addington v. Clode, 2 Bla. R. 989). Where the plt. claimed a right of common for all his commonable cattle, and the proof was that he had turned on all the cattle he had kept, but that he never had kept any sheep, it was held that this was evidence of a right for all commonable cattle to be left to the consideration of a jury (Manifold v. Pennington, 4 B. & C. 161; 1 Ch. Pl. 401). Where the deft. prescribed for all cattle at all times of the year, and sheep were excepted for a certain time of the year, held that the prescription was not proved (R. v. Hermitage, Carth. 241). But proof of a larger prescription than that alleged will not be a variance; therefore where the plt., in reply to a plea of distress, *damage feasant*, prescribed for a right of common for 100 sheep, and the jury found a right for 100 sheep and 6 cows, the prescription was held to be proved (Buckwood v. Pond, Cro. Eliz. 722); though not if the proof had been of 150 sheep, and although the right proved may be larger than the right alleged, it must be a right which includes the one alleged (Bailey v. Appleyard, 3 Nev. & P. 257; 8 Ad. & E. 161).

An allegation of right of common for all the plt.'s cattle, *levant* and *couchant*, is supported in evidence, although the common is not sufficient to feed all the cattle for any length of time (Willis v. Ward, 2 Ch. Rep. 297). So, "for all commonable cattle, *levant* and *couchant*," is proved by a grant of reasonable common of pasture (Doidge v. Carpenter, 6 M. & S. 47); and an averment "for all cattle, *levant* and *couchant*," upon his land, was held to be proved by evidence that the plt. was part owner with the deft. and others of a common field, upon which, after the corn was reaped, the custom was for the different occupiers to turn out in common their cattle (the number in proportion to the extent of their respective lands) within the common field, although they were not maintained upon the land during the winter, and although the custom proved was to turn out according to the extent, and not to the produce of the land, for which the right was claimed (Cheeseman v. Hardman, 1 B. & A. 706). Where common of pasture is claimed in the declaration for cattle *sans nombre*, i. e. *levant* and *couchant*, the right must be proved as laid; viz., for as many cattle as can be foddered during the winter on the messuage to which the right belongs; and it is a rule, that every custom on which the right of common depends must be proved. Suppose, for instance (as is the case in some places), it has been the usage that cattle depasturing a certain common should lodge within the hamlet, or parish, or vill, wherein the common is: it must be in evidence that the cattle which the plt. has been in the habit of depasturing have been so *levant* and *couchant* within the vill (Wool. 326). In case for disturbance of common, it turned out that plt. was a butcher; that his house had neither land, cur-

tilage, nor stable, annexed to it; but that, under his shop-window there was a sheepfold, which would contain four sheep at a time, but neither a horse nor a bullock; it further appeared that plt.'s father had always exercised the right of common, but never without the occupation of some land, and the plt.'s custom was to turn out the sheep he did not kill the preceding day till the morning of the next; no levancy and couchancy being proved, as stated in the declaration, Lord Kenyon nonsuited the *plt.: 1st, because there was no land on which cattle could be *levant* and [*802] *couchant*; 2nd, because the right was claimed for all cattle; and said, even supposing a good right had been made out for sheep *levant* on the hold above spoken of, still no horse or bullock (and the plt. had claimed a right for such cattle) could be kept there (*Scholes v. Hargraves*, 5 T. R. 46; Wool. 327). Where, however, the claim is for a *certain number*, of course the levancy and couchancy need not be proved, but a right for the defined number (1 Raym. 726). Still it is not necessary for the plt. to prove his actual user of the common at the time of the deft.'s tort, for the greatness or smallness of the wrong, and not the plt.'s exercise of his right is the question. On the plea of "not guilty" to an action on the case for injuring the plt.'s common, the plt. proved that he had been accustomed to turn from 100 to 300 sheep on the common; but, because it did not appear that he had turned any on during the year in which the deft. committed the wrong complained of, the verdict, which was for the plt., was submitted to the opinion of the court, and it was objected that he had suffered no damage, but it was holden that he had shown what was material to his action, and that such proof was sufficient (2 Bla. R. 1233).

The plt. prescribed, amongst other things, for a right of simple turning on cattle for twenty years; held, that proof of his enjoyment of pasture for twenty-eight years did not include proof of the right of turning on for twenty years, this latter right being an easement only, and a right of a quite different nature (*Bailey v. Appleyard*, 8 Ad. & E. 161; 3 Nev. & P. 257). But since the 2 & 3 Will. IV. c. 71, s. 1, the proof of the right of common, where there is no express grant, is much facilitated; that section enacts, that no claim that may be lawfully made at common law, by custom, prescription, or grant, to a right of common, or other profit or benefit, from or upon any land of our sovereign lord the king, his heirs or successors, or any land being parcel of the Duchy of Lancaster or the Duchy of Cornwall, or any ecclesiastical or lay person or body corporate (except such matters or things as shall be specially provided for, ways or easements, watercourses, or the use of water and lights), and except tithes, rents and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years: but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated, and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some covenant or agreement expressly made or given for that purpose by deed or writing. By sect. 4, the period shall be taken to be the period next before some suit wherein the claim or matter shall have been or shall be brought in question, and no act shall be deemed to be an interruption unless it shall have been submitted to or acquiesced in for one year after the party interrupted shall have notice thereof, and of the person making or authorizing it to be made (see *Flight v. Thomas*, 11 Ad. & E. 688; 3 Nev. & P. 442;

7 Dowl. 7). By sect. 6, no prescription shall be allowed in favour of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period or number of years than the period or number mentioned in the act applicable to the case. By sect. 5, if the right alleged generally in the action on a case be denied, all matters mentioned and provided in the act, which shall be applicable to the case, shall be admissible *in [*803] evidence to sustain or rebut such allegation. Evidence of an enjoyment of a right of pasture for 28 years is not sufficient for a jury to presume an enjoyment for thirty years, as stated in a plea under this statute (*Appleyard v. Bayley*, 8 Ad. & E. 161; 4 Nev. & P. 257; see also *Parker v. Mitchell*, 11 Ad. & E. 788; 3 P. & D. 655). The plt. prescribed under the statute, 1st, for a right of pasture thirty years next, &c.; 2nd, for a right of simply turning on cattle for twenty years; evidence was given of acts of depasturing at a period commencing more than thirty years before the suit, but that more than twenty-eight years before (1809) a rail was erected so as to interrupt the enjoyment of pasture, and that afterwards, the rail having been removed, the plt. depastured for twenty-eight years. Held, that the deft. was not bound to prove that the rail was laid down adversely to the plt.'s right, but that the onus lay on the plt. to prove affirmatively his actual enjoyment of pasture for thirty years, and that no presumption could be admitted in his favour on proof of an enjoyment for a less period (*Bailey v. Appleyard*, *supra*). Evidence of encroachments made on one part of 217 acres, is not conclusive evidence of an interruption of an enjoyment of a right of pasturage, pleaded under this statute to an action for a trespass by taking cattle *damage feasant* in another part (*Wilcome v. Upton*, 6 M. & W. 536). There may be a substantial enjoyment for thirty years though the claimant did not use his common for a year or two, whilst he had no commonable cattle, and it is a question for the jury (*Carr v. Foster*, 3 Q. B. 581).

Right, how proved.] The right is usually proved from the testimony of old inhabitants, who have no interest in the event of the suit, such as supporting or enlarging their rights by the issue of the verdict (see *post*, p. 805). Where such witnesses cannot be procured, recourse must be had to other proofs: such as ancient grants, reputation, &c. Where an appendant right is in issue, unless a grant beyond time of legal memory be introduced, there does not seem to be any other method of sustaining a right of this nature, which neither appears from old inhabitants or ancient writings, than by reputation. But it is doubtful whether evidence of reputation is admissible to prove a presumptive right strictly private (*Morewood v. Wood*, 14 East, 331; 5 T. R. 123; 1 Esp. 324); and some foundation should always be laid for the admission of proof by reputation, as an exercise of the right by plt. &c. (1 M. & S. 679; *Wool*. 320; 14 East, 328). Hearsay is admissible to prove a customary right of common, but not to prove a prescriptive right strictly private (*Manifold v. Pennington*, 4 B & C. 161). The declarations of deceased persons will be received, where there is no controversy on the very point their words are employed to illustrate (*Nichols v. Parker*, 14 East, 331; and see further as to evidence by reputation, *post*, "HEARSAY EVIDENCE"). Where the right claimed is for common appurtenant, ancient parchments and writings, containing grants of commonable rights, are often made available, and they will be received in evidence, if proved to be drawn from a proper custody (*Wool*. 322; 3 Taunt. 91; *Addington v. Clode*, 2 Bla. R. 989; *post*, "DEED"). Sometimes a new grant will be presumed; as, where an uninterrupted possession for a considerable number of years, fifty for instance, is proved (*Wool*. 323; *Cowlam v. Slack*,

15 East, 108), and unanswered by rebutting evidence; long enjoyment is a strong and substantial proof (*Drury v. Moore*, 1 Stark. 102). But, if there be any evidence which savours of encroachment, an exercise of a supposed right of common for 100 years will not confirm it (*Dawson v. Norfolk* (Duke of), 1 Pri. 246; *Hetherington v. Vane*, 4 B. & A. 428). Acts done on one part of the common may be given in evidence *to show the usage on another part of the same common, even against parties [**804*] reaping benefits from that other part (*Bryan v. Winwood*, 1 Taunt. 208).

Where a party is possessed, as appurtenant to a messuage, of the sole right of pasture for sheep on a common, he has no right to feed there the sheep of others "taken on tack;" therefore, on an issue as to such a right of pasture in the plt., evidence of his having depastured there unmolested the sheep of others "taken on tack," though admissible, is not evidence of the right, as it tends to show an usurpation only (*Jones v. Richards*, 6 Ad. & E. 530; 2 Nev. & P. 747).

Proof of Disturbance and Injury by Defendant.] This should be substantially proved as stated (see *ante*, p. 797), and is put in issue by the plea of not guilty. Where the plt. sues the lord of the waste, he must particularly show the surcharge or disturbance which he complains of, as of so many supernumerary sheep, &c., and he must prove it by showing that there is not a sufficiency of common left for him (*Smith v. Feverell*, 2 Mod. 6; 1 Saund. 846 b, n.; but where he proceeds against the commoner, he need not (*Atkinson v. Teasdale*, 3 Wils. 278, *ante*, p. 797).

Proof of Damage.] Some damage must be proved (see *ante*, 798), however little; the least possible mischief, such as the taking a small quantity of dung, to the value of a farthing, from the common, will be sufficient to prevent a nonsuit (*Pindar v. Wadsworth*, 2 East, 154: *ante*, p. 798); and in an action against another commoner for surcharging, it is sufficient to prove that the deft. put on the common more cattle than he had had a right to do without proving any specific damage (*Hobson v. Todd*, 4 T. R. 71).

Common in Gross.] The proof of a common in *gross*, when claimed by grant, is by putting in the deed, and then giving evidence of the deft.'s injury to the right of common described in it, or, if by prescription, by calling as many old witnesses as can be found to speak to the long enjoyment which the plt. or his ancestors have had of the profits in question, of which the deed becomes a corroborating auxiliary. Where a common appurtenant is by deed, the same course should be observed.

Common of Turbary Estovers, &c.] In actions for disturbance of estovers, turbary, piscary, &c., the plt. proves his possession of the house to which these rights appertain; he then shows his custom to take the profits for the purposes of repairing his house, &c., for fuel or for sustenance, and then gives evidence to the deft.'s entry into the waste, and his spoliation of the estovers.

In an action of trespass upon the case, the plt. declared he was possessed of a certain messuage, by reason whereof he ought to have common of turbary in a certain bog, and in proof of that right relied upon a lease demising to him certain lands, together with the benefit of turbary in a certain

bog, convenient to the demised premises, in common with the other tenants of the lessor: held, that there was no variance between the right claimed in the declaration and that which passed by the lease. *Quære*, does such a grant amount to a grant of common appendant or appurtenant (Metcalfe v. Rorke, 8 Ir. Law Rep. 137).

Evidence for Defendant.

The evidence for deft. will necessarily consist in rebutting the plt.'s proofs, either from the cross-examination of plt.'s witnesses, or, which is more advisable, by the evidence of his own witnesses. He may show (under a traverse of the right) that the common has *been en-
[*805] closed and held in severalty adversely for upwards of twenty years, which bars the entry of the commoner (Hawke v. Bacon, 2 Saund. 156; Richards v. Peake, 2 B. & C. 918); or, under the same traverse he may show an extension by unity of possession (see *post*, "WAX"); or he may show that the common has been used in mistake (Hetherington v. Vane, 4 B. & A. 428; 1 Pri. 426); or that he has been licensed by the lord to commit the alleged injury, provided there be a sufficiency of common left for plt. (1 Saund. 346 *b*; *post*); or he may show a release (*ante*, p. 798). But the plea of not guilty merely denies the wrongful act, but not the right (*ante*, p. 798).

Competency of Commoners and Persons claiming the same Right.] If the issue be on a customary right of common, by the establishment of which the witness would be benefited, the general rule is that he is incompetent; but that, where he gives evidence to establish the private prescriptive right of another, he is competent (Bent v. Baker, 3 Saund. 32). For, as per Buller, J., "If the issue be on a right of common which depends on a custom pervading the whole manor, the evidence of a commoner is not admissible; because, as it depends upon a custom, the record in that action would be evidence in a subsequent action brought by that very witness to try the same right" (Walton v. Shelley, 1 T. R. 302). But it is otherwise when the right of common is claimed by prescription in a *que* estate (Harvey v. Collison, 2 Selw. N. P. 1118); and now since 3 & 4 Will. IV. c. 42, a customary commoner is equally competent to prove the custom (Hoyle v. Coupe, 9 M. & W. 450; Beadsworth v. Torkington, 1 Q. B. 785, n. (a)). And where, in an action on the case against the deft. for not repairing his fences contiguous to a common on which plt. prescribed for common appurtenant, one of the points in issue was, whether the deft. was liable to repair by reason of his occupation, it was determined that other persons who claimed a right of pasture over the same common were not competent witnesses for the plt. (Anscomb v. Shore, 1 Taunt. 261). And if, by showing that the deft. had no right, the witness would enlarge his own commonable privilege, his testimony will not be admitted (Kennett v. Foster, Selw. N. P.). Thus, where the corporation of Kingston, being lords of a manor, had enclosed lands, and the plt., as the lessee, brought an action of trespass; on an issue, whether sufficient common was left, he was not permitted to call freemen of the corporation; as, however small the interest, it was enough to disqualify one of the members from appearing to sustain the plt.'s action (Burton v. Hinde, 5 T. R. 174). But witness will not be excluded where common is claimed by prescription in right of a particular estate; for, if A. has a prescriptive right of common belonging to his estate, it does not follow that B., who has also an estate in the same manor, has the same right; and the judgment for A. would not be evidence for B. (per Buller, J., 1 T. R. 303). Still, where the

witness comes to narrow his own right, he may be received, though he claims under the same title he is about to support. So, if several persons have common exclusively of others on Dale, and the common of one of these comes in dispute, one of the latter may be called to substantiate the right of the former, because it, in effect, charges himself, by admitting another person to have common with him (1 Ld. Raym. 731). Nor is it a good exception to a witness that he has common because of vicinage in the lands in question; for this is no interest, but only an excuse for a trespass (B. N. P. 285). A verdict for or against one customary commoner is evidence for or against another claiming the same right (Reed v. Jackson, 1 East, 357).

*COMMON, DEFENCE OF RIGHT OF.

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Nature and Form of Plea, &c.

Plea.] In an action of replevin or trespass to real or personal property, if the defence be founded on a right of common, the same must be pleaded specially (2 Wils. 51; Yelv. 104; 3 Wils. 126, 291; 1 Saund. 25, 346; Com. Dig. Piscary; 6 T. R. 748); and the plea must not amount to the general issue (1 Sid. 106; 1 Keb. 391, 453; 2 Mod. 274). If the deft. would drive the plt. to a new assignment, he should plead *liberum tenementum*, either in himself or another person (Stevens v. Whistler, 11 East, 51). A freeholder or copyholder, or his tenant, may plead this right (Com. Dig. Pleader, 3, K, 24); and see further, as to who is entitled to and may consequently plead it, Woolw. Com.; as to the effect of not guilty, see *ante*, p. 798.

Form of Plea.] If the deft. claims the right as a freeholder, or through he should prescribe for the right (Com. Dig. Pleader, 3, K, 24; 1 Saund. 348, n. 10); if, as a copyholder, he should allege a custom within the manor, either for all copyholders within the manor, or for the tenant of the deft.'s land in particular, in consequence of the baseness of his estate (Ib.; Co. Lit. 21 b; Co. R. 60 b). Or, where a copyholder claims the common in the soil of a stranger, which is not parcel of the manor, he must prescribe in the name of the lord: viz. that the lord of the manor and his ancestors, and all those whose estate he hath, have immemorially had common, &c., in the

locus in quo, for themselves and their customary tenants (1 Saund. 349, n. 11; Com. Dig. Pleader, 3, K, 24).

The commoner must set out his *title* to the right accurately (Underwood v. Saunders, 2 Lev. 178); and it will not suffice for him to state a mere possessory title, as in a declaration. If a freeholder, or one claiming through him, he ought to show a *seisin in fee* of the land to which he claims his right in himself or others, under whom he derives his title (Stringer's case, Cro. Car. 599; Grimstead v. Marten, 4 T. R. 718; Hutchinson v. Jackson, 2 Lutw. 1324). A freeholder may plead his right in a *que* estate (Fallet v. Troake, 2 Ld. Raym. 1188). A copyholder should state his estate, but he need not show it in certain (2 Taunt. 320), but only allege that every customary tenant of the premises has had, from time immemorial, the right of common which he claims on a certain waste parcel of the manor (*supra*; Davy v. Watts, 1 Keb. 652; Hoskins v. Robins, 2 Saund. 326); and it will not be a material variance where it is stated that they are demisable in fee, and a less estate is proved (1 Saund. 348, n. 8). *The

right to a given substratum of coal lying under a certain close, is a right to land, and cannot be claimed by prescription, but *aliter* of a right to take coal in another man's land (Wilkinson v. Proud, 11 M. & W. 33). Care must be taken not to join irreconcilable interests in such plea (2 Wils. 258). It is not necessary to aver that the commoner was in possession, as that it is implied from the allegation of a *seisin in fee*, until the contrary be shown (Stott v. Stott, 16 East, 343; 4 M. & S. 392). An inaccuracy in the words denoting the prescription may be cured by the verdict (3 T. R. 147). The various customs of particular manors must be attended to in framing this plea: therefore, in putting out cattle on a common of vicinage, it is indispensable to state the mutual rambling of the cattle, from immemorial usage, and such other facts as may be necessary to establish a mutual privilege of intercommoning (Gullet v. Lopes, 13 East, 348; see Jones v. Robins, 9 Jur. 1007). The ground of common from *cause de vicinage* is the long acquiescence of the parties (Clarke v. Tincker, 6 Law T. 126). Common *pur cause de vicinage* may exist between two proprietors of neighbouring farms, independently of any rights of common on either side; but *semble*, a claim of such a right by an individual, as annexed or incident to a private estate, cannot be good by custom, but must be pleaded as a prescription in a *que* estate (so held in Exchequer Chamber, Jones v. Robin, 17 Law J. 121, Q. B.; 12 Jur. 308). It is a good custom for the commoners to have common in exclusion of the lord for a part of the year, but not for the whole year (2 Rol. Abr. 267, L. pl. 1; Co. Lit. 122 a; 1 Rol. Abr. 396, A. pl. 2; Potter v. North, 1 Lev. 268).

The Right.] The right itself should be stated specifically, and with certainty (1 Ld. Raym. 645). It is not absolutely necessary to state the right of common to be appurtenant to land *eo nomine*; it suffices if laid as appurtenant to a messuage (Patrick v. Loure, 2 Brownl. 101; Hockley v. Lamb, 1 Ld. Raym. 726), or a cottage (Co. Ent. 649 a; Emerton v. Selby, 2 Ld. Raym. 1015); for the law, on demurrer or after verdict, will presume that there is at least a curtilage belonging to them on which cattle may be *levant* and *couchant* (Scamber v. Jackson, Jon. 227); yet, where put in issue, it must be proved that the cattle are *levant* and *couchant* on the tenement in respect of which the right is claimed (1 Saund. 346 c). The name of the manor wherein the waste is, should be stated, but the omission is cured by 16 & 17 Car. II. c. 8 (5 T. R. 412, n.). The nature of the common claimed should be distinctly set forth; for where a deft. justified under a right of fishery, but did not say whether it was free, several, or common, his plead-

ing was adjudged bad (Fitzg. 2; 1 Roll. R. 525). If the right be for any particular cattle, or any particular number of cattle, it should be qualified accordingly in the plea (*ante*, 796). Common of pasture, paying so much for it, must not be pleaded as an unqualified common (Gray's case, 5 Co. R. 79). The levancy and couchancy of the cattle should be stated, except in certain cases (see *ante*, 801). The duration and extent of the right should be stated with certainty, and accurately (6 T. R. 748; 2 T. R. 376). A man may prescribe to have the sole and several pasture, herbage or vesture for a limited time in every year, to the exclusion of the lord of the soil (Fitz. Abr. Prescription, 51; Co. Lit. 122 a; 2 Rol. Abr. 267, L. pl. 6; Sparke's case, Win. R. 6; Pitt v. Clark, Hut. 45); and it is not requisite that this right should be appurtenant to land, it may be claimed in gross (Welcome v. Upton, 6 M. & W. 538, where see form). A prescription for a sole and several pasture, in exclusion of the owner of the soil, is good (Hopkins v. Robins, 2 Saund. 234).

An averment that A. B. and all those whose estate he has, *from time immemorial, were accustomed, and, during all the time afore- [*808] said ought to have common, was, on demurrer, holden inadequate to show a right of common during a whole year (Hawkins v. Eckles, 2 B. & P. 359). Where the plt. prescribed for a right of sole pasture, from the feast-day of St. Thomas, until the 18th April, and proved the exercise of the right between those periods, it was held, on motion to set aside a nonsuit, that it was not necessary to allege the right in the pleadings from *Old St. Thomas's Day* (Smith v. Flower, 3 Bing. 401). As to the words, "as to the said messuage, &c., appertaining," &c., see *ante*, 797; they seem to be necessary (1 Saund. 346 c; 3 Lev. 104; sed vide Styl. 428). It seems necessary to state, that deft. could not enjoy the common so beneficially as he might (see *ante*, 798). The right should be amply stated, so as to answer the whole declaration; otherwise it will fail. Where trespass was brought for damage done by horses, oxen, and cows, and there was a justification to have common for two geldings only, it was holden bad (Thornel v. Lassels, Cro. J. 27; and see 8 Mod. 120). It means the possession of such land as will keep the cattle claimed to be commoned during the winter (Patrick v. Lowre, *supra*; Leech v. Widsley, 1 Vent. 54; Scholes v. Hargreaves, 5 T. R. 46). The time alleged in the declaration should also be strictly followed in the plea (2 Saund. 1, 63 d; 2 Rol. Abr. 676). Although the plea be good in one part of its justification under the right if bad in the rest, it will wholly fail (1 Saund. 27). Duplicity must be avoided; but, though issue must be taken upon a single point, it is not necessary that this single point should consist only of a single fact; as, where the point is, that cattle are entitled to common, they must be both his own cattle, and also *levant* and *couchant*, which are two different circumstances of their being entitled to common (Robinson v. Roley, 1 Burr. 316; 2 Lutw. 1395; 1 Saund. 346 c. See "PLEA"). And, where it was urged that the plea was double, as stating a right of common which doth *not* lie in *prendre*—for the plt. cannot cut and take away the grass from off the common, but only feed and take it by the mouths of his cattle—and a right to cut and take away rushes, which lies only in *prendre*, it was held that both together constituted but one united right (Bean v. Bloom, 3 Wils. 456; S. C. 2 Bl. 926). A plea claiming for twenty years before the commencement of the suit a right for the occupier of, &c., every year, and at all times of the year, to turn his cattle upon the *locus in quo* without stating for what purpose, is demurrable (Bailey v. Appleyard, 8 Ad. & E. 161).

Where a deft. pleaded that he was entitled to the *locus in quo* under a deed of grant by a former owner, which had since been destroyed by acci-

dent and length of time, and therefore not proffered to the court, of which the date and the parties were unknown: held, that the plea could not be supported (*Handy v. Stephenson*, 10 East, 55.). But the common-law mode of pleading a prescriptive right of common has, by the 2 & 3 Will. IV. c. 71, s. 5, been much simplified (see *ante*, p. 794); by that statute it is enacted, "That in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned and provided which shall be applicable to the case shall be admissible in evidence to sustain or rebut such allegation, and that in pleadings to actions of trespass, and all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, as of right, by the occupiers of the tene-
[*809] ments *in respect whereof the same is claimed for and during such of the periods mentioned in this act (30 and 60 years, s. 1) as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

Since this enactment, pleas of right of common need not contain any allegations of seisin in fee of any person (see *post*, "CUSTOM," p. 876; see the form, *post*).

If the deft. set up a claim under this act, he must bring himself within the strict words of it (*Holford v. Hankinson*, 13 Law J., N. S., 116, per Lord Denman). The words of the above act, s. 2, "enjoyed by any person claiming right," and "enjoyment thereof as of right," s. 5, mean an enjoyment not secretly or by tacit sufferance, or by permission asked from time to time; but an enjoyment had openly, notoriously, without particular leave at the time, by one claiming without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription or adverse user, or by deed, or shall have been merely lawful so far as to excuse a trespass (*Tickle v. Brown*, 4 Ad. & E. 369). Where, during the alleged enjoyment, the estates over which and in right of which it has been exercised were held by the same person, as this fact destroys the enjoyment "as of right," it need not be specially pleaded, but is admissible under a mere traverse of the enjoyment (*Clayton v. Corby*, 2 Q. B. 813).

If a replication of disability be anticipated under this statute, it will be advisable to plead also a plea at common law; or if the plt. reply such disability, and there be any ground for doubt, it will be advisable to apply to a judge for leave to add a plea at common law; the proof of the plea under the statute being required to be so very strict, it will be easier to prove the prescription. If there be evidence to support it, add also a plea of 60 years. The deft. may also plead *liberum tenementum*; and a right of common of turbary and of estovers are distinct and to be allowed. But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed (*R. G. H. T. 4 Will. IV.*). In trespass the deft. pleaded under this statute an uninterrupted enjoyment, under a claim of right of common over the *locus in quo*, "for the full period

of 30 years before the commencement of the suit :” held, sufficient, without alleging the enjoyment to have been for 30 years next before the commencement of the suit (*Jones v. Price*, 3 Sc. 376 ; 3 Bing. N. C. 52). To the like action for chasing the plt.’s sheep elsewhere than in the said closes, and detaining them for a long space of time), the deft. pleaded as to the chasing the sheep elsewhere and detaining them, that at the time when, &c., he was in the lawful possession of a certain messuage, &c., and prescribed for himself and the occupiers thereof for 30 years next before the several times when, &c., to have common of pasture in the *locus in quo*, and then justified distraining the sheep damage feasant: held, that whether or not a deft. at common law could justify a trespass to personal chattels by virtue of possession generally of the *locus in quo*, this plea was framed on the above statute, and was bad on special demurrer, for *not alleging the user to [*210] have been for 30 years next before the commencement of the action (*Richards v. Fry*, 7 Ad. & E. 698 ; 2 Jur. 641). *Semble*, it is not necessary to allege the user to have been without interruption (*Ib.*). A claim to a profit à *prendre* in gross, under the first section of the act, should be pleaded for the periods therein mentioned, although the fifth section does not in terms apply to such case. A plea claiming a profit à *prendre* in gross on behalf of A. and his ancestors, commencing previous to legal memory, is disproved by showing a grant to the ancestor of A. eight years before from B., for a valuable consideration, and is not aided by 2 & 3 Will. IV. c. 71, s. 1 (*Welcome v. Upton*, 7 Dowl. P. C. 475). In pleading a prescription to enter and dig for minerals, making compensation, it is not necessary to allege that compensation has been made or tendered (*Paddock v. Forrester*, 3 Man. & G. 903).

In an action on the case for disturbance of common, where the deft. justifies on the days and times, &c., under a right of common, for his cattle, *levant* and *couchant*, the plt. must new assign, if he intends to prove a surcharge (*Bowen v. Jenkins*, 2 Nev. & P. 84 ; 6 Ad. & E. 911).

Replication.] To a plea claiming a right of common, the plt. cannot reply *de injuriâ* (*Willes*, 101), but must either deny the seisin in fee, or other title to the estate, as appendant to which the deft. claims his right, or may deny the right of common, as stated in the plea (*Ib.*); for, although a right of common may exist in the manner, it may be restricted in various particulars (*Gerrish v. Rodburne*, 3 Wils, 165); or show such grounds as will establish a ground for the plt.’s complaint (1 Show. 350); or that the cattle were the deft.’s own commonable cattle, *levant et couchant*, on the premises, concluding to the country, and not with a formal traverse (1 Burr. 320). But the existence of the privilege has been sometimes traversed (*Hickman v. Thorne*, 2 Mod. 104), and, under certain circumstances, is generally adopted; as, where it is intended to set up another prescription (1 Burr. 316), inconsistent with the one first relied on (1 Bla. R. 94; in which case it is necessary that the whole of a prescription should be traversed (4 T. R. 157). It need not, however, be so in express terms, if, from the nature of the common, it appear that the averments are tantamount to a direct traverse (1 Wils. 339); and a traverse should not be adopted after a sufficient confession and avoidance (2 Saund. 1); nor made use of to negative an inference of law (2 H. Bl. 182). It is said, that where the deft. has turned out other cattle, as well as his own commonable cattle, the plt. should new assign, stating, that he brought his action for depasturing the common with other cattle, and ought not to traverse the levancy and couchancy stated in the plea of justification (1 Saund 346 a); and it will not be enough to deny that all the cattle were *levant* and *couchant*, for this amounts only to a

denial that any were so (Bowen v. Jenkin, 6 Ad. & E. 911). Plt. may also reply an approvement, if it be common of pasture (3 T. R. 445; 1 Saund. 353 b, n.); or that the *locus in quo* has been inclosed from the common more than thirty years, and enjoyed adversely (2 B. & C. 918; and see 2 Taunt. 156); but, if only part of the close wherein the alleged trespass was committed has been so inclosed, the plt. should reply that fact, and it would be too much to reply the whole close had been inclosed (Ib.). If the plt. new assigns to a plea of *liberum tenementum*, care should be taken that the closes newly assigned are the same with those to which the deft.'s plea applies (Pratt v. Dome, 15 East, 235). A departure must be [*811] avoided (3 Rep. 247). And *where plt.'s surrejoinder admitted deft's right of common, but complained of a surcharge, it was held to be a departure (Ellis v. Rowles, Willes, 638; 2 Wils 96).

Trespass for distraining sheep. Second plea stated that J. R. was possessed of a close, being within and part of a farm, situate in the parish of N., and justified, under authority from J. R., because the sheep were wrongfully in the said close, doing damage. Replication, that the farms of the plt. and deft. have immemorially adjoined each other, not separated by any fence sufficient to turn sheep; and "that the sheep, from time to time, during all that time, duly put in and on the plt.'s farm to feed on the grass there then growing, from time immemorial have gone, escaped, and rambled, and have been used and accustomed to go, escape, and ramble therefrom into the deft.'s said farm in which the said sheep were so taken and distrained, and into the said several closes of the said J. R. so being part and parcel thereof, and to intermix there and to feed with sheep from time to time feeding on the grass growing in and on the said last-mentioned farm and closes; and in like manner," &c., stating the mutuality as to the other farm. Rejoinder, after admitting certain matters alleged in the replication, that the other matters in the replication alleged are not true in substance or in fact. Held, that the custom stated in the replication was not applicable to the case of two farms held in severalty and lying undivided. Admitted that the rejoinder was bad (Jones v. Robins, 9 Jur. 1007).

The 2 & 3 Will. IV. c. 71, s. 7, contains a proviso that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any of the parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible; but these disabilities must be replied, otherwise they cannot be given in evidence at the trial (see sect. 5, *ante*, p. 808). If the plt. intend to rely on this exemption, he should reply it specially, as well as any cause or matter of fact or law, not inconsistent with the simple fact of enjoyment, for they shall not be received in evidence on any general traverse or denial of the allegation of the party claiming (see Arlett v. Ellis, 7 B. & C. 346; Tapley v. Wainwright, 5 B. & Ad. 395).

Precedents.

Avowry for a distress, damage feasant, by a freeholder, having right of common over *locus in quo*, pleaded at common law.

The deft. by G. H. his attorney well avows the taking of the said as in the said declaration mentioned in the said close in which &c. and justly &c., because he says that

before and at the said time when &c. the deft. was and still is seised in his demesne as of fee of and in a certain messuage and land with the appurtenances situate &c. and before and at the said time when &c. was in the actual possession thereof and that the deft. and all those whose estate he now hath and at the said time when &c. had of and in the said messuage and land with the appurtenances for the time being from time whereof the memory of man is not to the contrary have had &c. and been used and accustomed to have and of right ought to have had and the deft. still of right ought to have for himself and themselves and his and their tenants farmers occupiers of the said messuage and lands with the appurtenances common of pasture in upon and throughout the said place in which &c. called for all his and their commonable cattle *levant and couchant* in and upon the said messuage and land with the appurtenances in every year and at all times of the year as to *the said messuage and land with the appurtenances [*812] belonging and appertaining and because the said cattle in the said declaration mentioned at the same time when &c. were in and upon the said place in which &c. called depasturing and destroying the grass then there growing and being and doing damage there so that the deft. could not have or enjoy his said common of pasture there in so ample a manner as he ought to have had and enjoyed the same the deft. well avows the taking of the said cattle in the said declaration mentioned in and upon the said place in which &c. called and justly &c. as for and in the name of a distress for the said damage so there done and doing as aforesaid. And this &c. (as *post*, "REFLEVIN").

Plea in trespass, justifying by a copyholder under a prescriptive right of common of pasture.

And for a further plea in this behalf as to the (*state the trespass to the land and things offered to it, as in the declaration, as far as it is intended to be justified*) the defts. say that the said close in which &c. before and at the said several times when &c. was and is within and parcel of the manor of H. in the said county of M. and that a certain messuage and divers to wit fifty (*not material*) acres of land with the appurtenances situate and being within the parish of T. in the county of M. aforesaid now are and at the said several times when &c. were and from time whereof the memory of man runneth not to the contrary have been within and parcel of the said manor and a customary tenement thereof demised and demisable by copy of the court rolls of the said manor by the lord of the said manor or his steward of the court of the said manor or his deputy for the time being to any person or persons willing to take the same in fee simple at the will of the lord according to the custom of the said manor and the deft. further saith that there is and from time beyond which the memory of man runneth not to the contrary there hath been within the said manor a certain ancient and laudable custom used and approved of that is to say that every customary tenant of the said customary tenement last aforesaid with the appurtenances for the time being from time whereof &c. hath had and hath been used and accustomed to have and of right ought to have had and still of right ought to have for himself herself his or her farmers occupiers of such customary tenement with the appurtenances common of pasture upon in and throughout the said close in which &c. for all his her and their commonable cattle *levant and couchant* in and upon the same customary tenement with the appurtenances every year at all times of the year at his (or her) and their free will and pleasure as belonging and appertaining to such customary tenement and the deft. further saith that long before any of the said several times when &c. to wit on the day of A. D. one then being lord of the said manor of H. at his court held in and for his said manor before gentleman then deputy steward of the said court by copy of the court rolls of the said manor granted to the deft. the said customary tenement with the appurtenances to hold to the said deft. his heirs and assigns for ever by copy of the court rolls of the said manor at the will of the lord of the manor according to the custom of the said manor by virtue of which said grant the deft. afterwards and before any of the said several times when &c. to wit on the day and year last aforesaid entered into the said customary tenement with the appurtenances and then became and was and still is thereof seised in his demesne as of fee at the will of the said lord according to the custom of the said manor and at the said several times when &c. and was in the actual occupation thereof and entitled to such common of pasture as aforesaid therefore at the said several times when &c. the deft. having occasion to use the said common of pasture entered the said close in which &c. for the purpose of putting and did then put into and upon the same the said cattle in the said declaration mentioned being his own commonable cattle *levant and couchant* in and upon the said last mentioned customary tenement to use the said common of pasture and in so doing the deft. at the said several times when &c. with his feet in walking necessarily and unavoidably trod down trampled upon and spoiled consumed and destroyed a little of the grass and hay herbs roots shrubs and bushes there growing and being and with the said horses mares geldings cows oxen and sheep in the said declaration mentioned necessarily and unavoidably trod down trampled upon spoiled eat up depastured consumed and destroyed some little more of the grass and hay herbs &c. there also growing and being as he lawfully might for the

*cause aforesaid doing no unnecessary damage to the plt. on the occasions aforesaid which are the said several supposed trespasses in the introductory part of this plea mentioned whereof the said plt. hath above complained against the deft. and this the deft. is ready to verify.

Plea under 2 & 3 Will. IV. c. 71, of right of common.

And for a further plea in this behalf as to the (*stating the trespass to the land, &c. as in the declaration*) the deft. saith that before and at the said time when &c. the deft. was and is still the occupier of a certain messuage and land with the appurtenances situate &c. and that the deft. and the occupier of the said last-mentioned messuage and land for the time being for the full period of thirty years next before the time when &c. and before the commencement of this suit without interruption have and each of them hath continually had taken and enjoyed as of right and been used and accustomed to have take and enjoy as of right and the deft. still of right ought to have take and enjoy for himself (herself) and themselves his and their tenants occupiers of the said messuage and lands with the appurtenances common of pasture in upon and throughout the said close in the said declaration mentioned in which &c. for all his (her) and their commonable cattle *levant* and *couchant* in and upon the said messuage and land with the appurtenances every year and at all times of the year as to the said messuage and land with the appurtenances belonging and appertaining. Wherefore the deft. in his own right at the said time when &c. entered into and upon the said close in which &c. for the purpose of turning and putting and did then turn and put into and upon the same the said horses mares &c. in the said declaration mentioned being the deft.'s own commonable cattle *levant* and *couchant* in and upon the said last-mentioned land with the appurtenances to use the deft.'s said common of pasture there and because the said close in which &c. before and at the said time when &c. had been and was wrongfully inclosed with and by means of the said ditches fences and gates in the said declaration mentioned before then wrongfully dug made and put and placed in and upon the said close in which &c. so that without filling up and levelling the said ditches and fences and removing the said gates the deft. could not use or enjoy his said common of pasture in upon and throughout the said close in which &c. in so ample and beneficial a manner as he otherwise might and would and ought to have done the deft. in his own right and the said E. F. as the servant of the said deft. and by his command at the said several times when &c. with the said pickaxes hatchets saws and mattocks and other instruments in the said declaration mentioned filled up and levelled the said ditches and dug up threw down and prostrated the said fences and gates in the said declaration mentioned and took and carried the said gates to a short and convenient distance where they left the same for the use of the plt. doing no unnecessary damage to the plt. on the occasion aforesaid as they lawfully might for the cause aforesaid (*conclude as above*).

Plea in bar to avowry damage feasant by a commoner; denial of his right of common.

And the plt. as to the avowry of the deft. saith that the deft. by reason of anything by him in that avowry above alleged ought not to avow the taking of the said cattle (*or goods and chattels*) in the said place in which &c. and justly &c. because he saith that the deft. and all those whose estate he now hath and at the said time when &c. had of and in the said messuage and land with the appurtenances for the time being from time whereof &c. have not had nor have been used and accustomed to have nor of right ought to have had nor ought the deft. still of right to have for himself and themselves his and their tenants and farmers occupiers of the said messuage and land with the appurtenances common of pasture in upon and throughout the said place in which &c. called for all his and their commonable cattle *levant* and *couchant* in and upon the said messuage or land with the appurtenances in every year at all times of the year as to the said messuage or tenement and land with the appurtenances belonging and appertaining in manner and form as the deft. hath above in his said avowry in that behalf alleged. And this the plt. prays may be inquired of by the country &c.

Other forms.

See form of pleas in case justifying under the lord the erections of dwellings for woodwards, *Patrick v. Stubbs*, 9 M. & W. 830; a plea of right of common appurtenant for cattle, *levant* and *couchant*, to an action by commoner for *disturbance of his right, 3 Ch. Pl. 276; in trespass by freeholder and his tenant under a prescriptive right of common of pasture, 3 Ch. Pl. 376, 7th ed.; by a copyholder, ib. 377; by a rector, ib. 379; *per cause de vicinage*, ib. 380; of common of estovers, ib. 381; of common of fishery, ib. 370; pleas of prescriptive right to enter and dig for materials, ib. 382; of custom of tenants of copyhold to dig for coals, ib.; pleas in bar in replevin of plt.'s right of common, ib. 486; replication of approvement of common, ib. 500; replication that *locus*

in quo had been inclosed from the common thirty years, *ib.* 500 (Richards v. Peake, 2 B. & C. 918; and Hawke v. Bacon, 2 Taunt. 159); in replevin traversing right of common, 3 Ch. Pl. 510; rejoinder asserting right of common, *ib.* 520.

Evidence for Defendant.

The requisite evidence to support rights of common, where they are pleaded in excuse or denial, is proof of the *title* to the right of common itself; the exercise of that right; and by deft.'s cattle, *levant and couchant*.

Title.—Right.] We have already seen what proof of *title* is requisite, and the mode of such proof (*ante*, 800); also, how the *right* of common should be proved (*ante*, 803). In addition, it may be observed, it may be shown by the testimony of old uninterested individuals, or by a grant beyond time of memory. In the absence of such proof, reputation may be resorted to (Morwood v. Wood, 14 East, 329); especially if supported by confirmatory evidence (Weeks v. Sparke, 1 M. & S. 679); and, therefore, a declaration of a former tenant of a messuage, in respect of which a right of common is claimed, is admissible in evidence of such right (Walker v. Broadstock, 1 Esp. 458). Where the plt. claimed the *locus in quo* as part of his freehold estate, and the deft. insisted that it was parcel of the waste of the manor, it was holden that the deft. might give in evidence the declaration of a former owner of the estate that the *locus in quo* was parcel of the waste of the manor, and that he had no interest in it beyond a right of common, although such former owner was in court, and might have been called (Woolway v. Rowe, 3 Nev. & P. 849). The declarations of deceased persons may be even, in some cases, made available; and it has been held, that a paper, signed by many deceased copyholders of a manor, importing what was the general right of common in each copyholder, and agreeing to restrict it, was evidence of reputation even against copyholders not claiming under those who signed it (Chapman v. Cowlan, 13 East, 10). And a variance between an allegation as to the extent of the land in respect of which the right is claimed, and the proof is immaterial (Palm, 269; Cro. Jac. 629; Cro. Eliz. 531; *ante*, p. 800). And a plea under the statute must be proved by showing a constant exercise without interruption of the right for thirty or sixty years as pleaded, for, no presumption of right shall be made on proof of the right claimed for a less period (ss. 1 & 6 of 2 & 3 Will. IV. c. 71; see Bayley v. Appleyard, 8 Ad. & E. 161; Welcome v. Upton, 6 M. & W. 536, 540; Richards v. Fry, 7 Ad. & E. 698); and although a prescription presupposes a grant beyond the time of memory, the court will allow the production of ancient grants, without date, the probability of the existence of which beyond time of memory must be left to the jury (Addington v. Clode, 2 Bl. R. 989). In some cases, a new grant will be presumed, as from an uninterrupted possession for several years (Cowlan v. Slack, 15 East, 1802); unless, from the proximity of the lands, a trespass might easily pass unnoticed by the commoners intruded on (Dawson v. Norfolk (Duke of), 1 Pri. 246); or, the waste has been depastured through mistake *and ignorance of the boundaries of two adjoining commons (Hetherington v. Vane, 4 B. & A. 428). Evidence of long enjoyment of a right of common is, however, strong proof, unless rebutted by contrary presumptions (Drewry v. Moore, 1 Stark. 102; *ante*, p. 803).

Where the right of common set out in the plea is traversed by the plt. in his replication, the onus of proof is upon the deft., and should his evidence show a right of common over the whole close, except that particular part

where the trespass was committed, his plea will not be supported (Maxwell v. Martin, 6 Bing. N. C. 522); but he will be entitled to a verdict by showing a right of common in the part of the close in which the trespass was actually committed even should he fail in proving a right throughout the whole (Tapley v. Wainwright, 5 Ad. & E. 395).

The exercise of the right must be proved to justify the tort; and that the supposed tort was necessary to obtain the enjoyment of such right (Lit. Rep. 295; Bryan v. Winwood, 1 Taunt. 208).

By the R. G. H. T. 4 Will. IV. where pleas of right of way or common of pasture, or other similar right, are so pleaded that the allegations as to the extent of the right are capable of being construed distributively they shall be taken distributively. Thus if the deft. plead a right of common for divers kinds of cattle, and the jury find a right of common only for some particular kind; a verdict shall pass for the deft. for such trespasses as are justified by the right found, and for the plt. for those that shall not be so justified (Ib. r. 5). But where a right of folding cattle without limit is pleaded, and the right proved is of common of cattle, the court refused to enter a verdict to the extent of the right proved (Ivatt v. Mann, 3 Man. & G. 691). Proof of less than the party is entitled to will substantiate his claim (Tewkesbury (Bailiffs of, &c.) v. Bricknell, 1 Taunt. 143; Bushwood v. Pond, Cro. Eliz. 722).

Property in Cattle.] The *property* in the depasturing cattle must be proved: this is material and traversable (Manneton v. Trevellian, 2 Show. 333).

Levancy and Couchancy.] The *levancy* and *couchancy* of the cattle must be proved, under a plea justifying the entrance of them in the *locus in quo*, in exercise of right of common (see Rogers v. Brustead, Selw. N. P. 440; Tewesbury (Bailiffs, &c. of) v. Bricknell, 1 Taunt. 142). It has been holden unnecessary to support a claim for cattle *levant* and *couchant*, that the common should be adequate to the support of the cattle for any length of time (Willis v. Ward, 2 Ch. Rep. 297).

It must appear that the cattle were commonable cattle; this may be done by showing that the deft. had land upon which they may be *levant* and *couchant*, *i. e.*, land which can keep them during the year (Scholes v. Hargreaves, 5 T. R. 46; Leech v. Windsley, 1 Vent. 54; Patrick v. Lowre, 2 Brownl. 101); and this is indispensable, even where the right is laid in respect of a messuage or cottage (1 Saund. 346 a; Scholes v. Hargreaves, *ib.*; see Benson v. Chester, 8 T. R. 396; Say's case, Mar. 83, pl. 37; Chadley v. Miller, 1 Sid. 313).

Where the deft. pleaded a right of common appurtenant for cattle *levant* and *couchant*, that the cattle in the declaration mentioned were the deft.'s own commonable cattle, *levant* and *couchant*, and that he put them on to use the common which is the same, &c., and the plt. replied that "all the said cattle in the said declaration mentioned" were not the deft.'s own commonable cattle, *levant* and *couchant*, in manner, &c., concluding to the country: held, that the deft. maintained his issue by showing that on the occasion of any *alleged disturbance, some of the cattle put on [*816] were *levant* and *couchant*, and that on these pleadings the plt. could not insist on a surcharge (Bowen v. Jenkin, 6 Ad. & E. 911. The word "all" means, the *levancy* and *couchancy* was untruly alleged as to all the cattle, not that it was truly alleged of some, and falsely of others (Ib.). A claim of common "every year and at all times of the year" should be proved as laid, but now, it should seem that the plea would be taken dis-

tributively (R. G. H. T. 4 Will. IV.). As to the mode of proving a plea under the 2 & 3 Will. IV. c. 71, see *ante*, p. 802; see also "WAX;" for the cases there cited in support of a plea of right of way are mostly applicable to other rights, except as to the period of time. A prescription to enter and dig for minerals, making compensation, is an entire prescription, and will not support the affirmative of an issue taken upon a plea justifying under a prescription to enter and dig for minerals, omitting the qualification as to making compensation (*Paddock v. Forrester*, 3 Man. & G. 903).

Pur cause de vicinage.] Common *pur cause de vicinage* cannot be set up as an excuse for cattle rambling from downs subject to common of pasture into downs of which the owner has exclusive possession, notwithstanding there be no bounds, fence, or visible boundary separating the downs (*Heath v. Elliott*, 4 Bing. N. C. 388; 6 Sco. 172).

A plea of common *pur cause de vicinage* is not supported by proof that sheep have been accustomed to stray from wastes subject to common of pasture, into adjoining lands, not separated from the wastes by any fence or visible boundary, it appearing that the owners of the sheep which so strayed, as well as the owners of the respective lands, made a regular practice of turning them back to the place whence they had strayed (*Clarke v. Tinker*, 15 Law J. 19, Q. B.; 10 Jur. 263).

Common *pur cause de vicinage* cannot be claimed as a matter of customary right by the owner of a farm against the owner of the adjoining farm, though there is no fence or inclosure between them. Such a right could only have its origin in a grant or in manorial custom (*Jones v. Robin*, 15 Law J. 15, Q. B.; 17 Law J. 121, Q. B.; 12 Jur. 308).

Since the statute 2 & 3 Will. IV. c. 71, common of vicinage from time immemorial may be claimed by a commoner, who states his right to have existed for thirty years; the substance of the custom being, that cattle lawfully on one common have been used to stray upon the other. Evidence of reputation is admissible to prove a right of common *pur cause de vicinage* (*Pritchard v. Powell*, 15 Law J. 166, Q. B.; 10 Jur. 154).

Where lands are subject to mere common of shack, which is *pur cause de vicinage*, those rights may be put an end to by the common consent of all the parties interested, or by the severance of one man's field from the common lot, and the growth thereon for thirty years of crops which are inconsistent with the existence of such common rights. Where, therefore, in an action brought to enforce Lammas rights of common over a certain close, it appeared that the deft. had grown thereon for thirty years potatoes and raspberries: held, that the rights of common, if they ever existed, had been put an end to, and the close severed from them by such cultivation (*Antrobus v. Barwell*, 9 Law T. 462, Pollock).

Evidence for Plaintiff.

Where the plt. traversed that the cattle were the deft.'s own cattle, and that they were *levant* and *couchant* upon the premises, *and commonable cattle, he will fail if it appear that some of the cattle were [*817] the deft.'s commonable cattle, *levant* and *couchant*, for the number is not material (1 Saund. 346 e, n.); *Ellis v. Bowles*, Willis, 638). The plt. should new assign, and it will not suffice to deny that all the cattle were *levant* and *couchant*, for this amounts only to a denial that *any* were so (*Bowen v. Jenkin*, 6 Ad. & E. 911).

Where, in answer to the right, an inclosure is set up by the lord, some act of approval should be adduced, to show his intention to inclose, and:

the courts will take notice judicially of his right to do so. Where the lord has put in issue that the *locus in quo* is his soil, and freehold, he should be prepared with old grants, deeds, leases, &c. (Wool. 334). An issue is frequently joined on the sufficiency of common left for the tenants; in which case the lord must prove that he has not taken so much as to deprive them of pasturage for their cattle; but he will not be allowed to do this under a replication of *de injuriâ* to a justification of right of common: he ought to plead his inclosure specially, and aver that he has left sufficient common (D'Ayrolles v. Howard, 3 Burr. 1385). Owners of common fields may show a custom to inclose, which may be done by the production of old deeds, and the testimony of aged witnesses (see How v. Strode, 2 Wils. 269). The lord may show a long custom to erect houses on the waste, in exclusion of the commoners; or his tenant claiming under him, sued by a commoner, may prove a constant usage on the part of lords of the manor to grant strips of land, for the purpose of building, which is usually done with the consent of the homage (Wool. 335; 5 T. R. 417). Counter-parts of old leases, from the muniments of a manor, showing that part of the waste has been demised by the lord, although unaccompanied by proof of enjoyment, will be evidence to establish a custom for the owners of moss- dales to hold them in severalty after they have been entirely cleared of turves by the tenants of the manor (Clarkson v. Woodhouse, 5 T. R. 412, n.). By 6 & 7 Will. IV. c. 70, s. 1, the lords of manors may convey any part of commons or wastes as sites for poor-schools. Allotments under inclosure acts may also be given in evidence, both at the instance of lords and commoners (Wool. 336).

To destroy a plea of common of vicinage, no further proof is needful, than that the lord of either of the wastes has entirely inclosed some part, however small (3 Co. Rep. 24; Wool. 336). But, if there be the least avenue for egress and ingress (not being a defect of fencing), whereby the cattle may mutually escape, the common of vicinage continues (Gullet v. Lopez (Bart.), 13 East, 348). However, on a plea of inclosure, care must be taken to prove that every part of the *locus in quo* has been inclosed (2 Taunt. 656). When issue is joined on a replication, that the common has been inclosed for upwards of twenty years, and it appear that *part* of the common had been inclosed for twenty years, and that the trespasses were in fact committed in such *part*, the plt. is entitled to recover though the rest of the common is uninclosed (Tapley v. Wainwright, 5 B. & Ad. 395; overruling Hawke v. Bacon, 2 Taunt. 157). When an issue is joined on a right of common, the plt. may prove a legal extinction of the right over the *locus in quo* before the exercise of it by the deft.; thus he may show a custom for the lord of the manor to inclose parcels of the waste, and a grant to him of the *locus in quo* under such custom (Arlett v. Ellis, 7 B. & C. 346). In trespass for breaking and entering the plt.'s close, and throwing down fences, the deft. in his plea prescribed for a right of common of pasture on a down, whereof the close was parcel, and justified because the close in which, &c., was wrongfully inclosed; replication that it was a close called B. C. G., and had for thirty years and more been separated and inclosed from the down, and enjoyed all that time in severalty *and [*818] adversely to the person holding the land in respect of which the right of common was claimed; rejoinder that the close in which, &c., had not been enjoyed for thirty years and upwards in severalty and adversely: the jury found that *part* of the garden had been inclosed *within* the thirty years, and that the trespass was committed in that part of the garden only: held, that the deft. was entitled to the verdict, for if the word "close" were an entire allegation, it comprehended the whole of B. C. G.,

and then the plt. was bound to prove that the whole had been inclosed upwards of thirty years, or if it were a divisible allegation, it was confined in its meaning to the spot in which the trespass had been committed, and which the jury found had not been inclosed thirty years (*Richards v. Peake*, 2 B. & C. 918). The allegation is divisible, and means only the particular place in which the trespass was committed (*Tapley v. Wainwright*, *ante*, p. 815). Evidence that the cattle of a former tenant of the premises, in respect of which the right is claimed, have been impounded, will (if uncontradicted) be material evidence to negative such a right (1 Esp. 459). A release is also good evidence to destroy an alleged prescription: as, where a claim was made for common appendant, and it was shown that a release had been executed as to five of the acres in which the party prescribing had common (*Rotheram v. Green*, Noy. R. 67). An allegation of a restricted right of common may be rebutted by parchment writings, which show that there existed once a general right; and, if they unfold a private prescription or grant, it will fail. Where a right of common is claimed in respect of an ancient house, it will be a good answer, to show the house to have been built within twenty years (*Dunstan v. Tresidor*, 5 T. R. 2).

As to Competency of Witnesses, ante, p. 805, see "WITNESS."

COMPOSITION.(a)

ITS EFFECT.

When entered into by Deed, p. 818.

Where Debtor assigns all his Effects, p. 820.

Where several Creditors mutually stipulate, p. 820.

Where a different Security is accepted, p. 822.

Where a third Person is Security, p. 822.

Where the Creditor is discharged, p. 822.

Where the Surety is discharged, p. 823.

Where it operates as an Escrow, p. 824.

PLEA OF, p. 824.

REPLICATION, p. 825.

EVIDENCE ON, p. 825.

Its Effect.

When entered into by Deed.] The mere consent or accord of the creditor to accept a composition from his debtor, will not operate as an accord and satisfaction of the original debt, and is a mere *nudum pactum*: (*Heathcote v. Cruickshanks*, 2 T. R. 24; *Lyn v. Bruce*, 2 H. Bl. 317; *Lowe v. Egington*, 7 Pri. 604). However, if it be made by deed, containing a release or covenant not to sue, it will be binding; but, if made verbally, or by instrument not under seal, there must be some sufficient consideration to warrant the creditor in giving up his original debt; as, 1st, where the debtor assigns *his effects to trustees (*Butler v. Rhodes*, 1 Esp. 236; (*Brady v. Shiell*, 1 Camp. 147; *Cork v. Saunders*, 1 B. & A. 46); 2nd, [*819] where a third person becomes surety for the payment (*Steinman v.*

(a) See 1 U. S. Dig. Tit. "Composition with Creditors," p. 534; 1 Supp. U. S. Dig. p. 386; 1 Ann. Dig. p. 123; 3 Id. p. 97.

Magnus, 11 East, 390; Bradley v. Gregory, 2 Camp. 383); and even when no property is vested in the trustees, and no surety has engaged for the payment of the debts, or any portion of them, an agreement by the creditors to give time to their debtor, and accept payment of their debts by instalments, would be a good consideration (Boothby v. Lowden, 3 Camp. 175; Good v. Cheeseman, 2 B. & A. 328); 3rd, where several creditors, on the faith of each other's undertaking, compound, &c. (*infra*). In which case, the acceptance for a smaller sum is a satisfaction for a larger, and will discharge the debtor.

Creditors by an instrument not under seal agreed to accept 12s. in the pound, payable by instalments, in full satisfaction of their debts, and that they would release their debtor from all demands. One of the creditors, who signed for the whole amount of his debt, held a bill drawn by the debtor, and accepted by a third person for a good consideration, as a security for part of his debt; the amount was regularly paid by the acceptor; held, that the creditor was entitled to retain it, as there was no stipulation for giving up securities, the effect of the agreement not being to extinguish the original debt (Thomas v. Courtney, 1 B. & A. 1; but see Lewis v. Jones, 4 B. & C. 506; and see Mallett v. Thompson, 5 Esp. 178; see Stock v. Mauson, 1 B. & P. 286). But in Cowper v. Green, 7 M. & W. 638, it was decided that by the release of a debt by a composition deed, the creditor loses also the right to retain a written instrument deposited with him by the debtor as a security for the debt, and therefore the relinquishment of such a security forms no consideration for a parol promise by the debtor to pay the residue of the debt, beyond the amount of the composition reserved under the deed. A., a creditor of a firm, held securities of one of its members for money advanced by him to the firm, but claimed a balance beyond what these securities would cover; all the creditors of the firm agreed to accept a composition; A. signed the deed first, and added, "without prejudice to any securities whatever, that I hold:" held, that A.'s rights were not affected upon his previous securities, but that the composition only related to the balance beyond the sum they would cover, and that he might enforce them in equity (Duffy v. Orr, 1 Cl. & Fin. 253; 5 Bli. N. S. 620). But where the instrument stipulated for a release of all claims and demands in respect of the debts due by the debtor, as well as for the delivery up of all securities held by the creditors, some of whom refused to sign unless the debts, signed the deed, and they did so on the debtor assigning to them a policy of insurance, which he had previously placed in their hands, as a security for the residue of their debt; held, that the assignment of this policy was a fraud upon the rest of the creditors, and the retention of it was a violation of the stipulation that all securities should be given up (Alsager v. Spalding, 6 Sco. 204; 4 Bing. N. C. 407). A. being indebted to B. in a large amount, and greatly embarrassed, called a meeting of his creditors, at which B. refused to attend or to sign any composition deed unless a part of his debt was secured to him. A., accordingly, for that purpose, drew a bill on C. for 150%, which C. accepted, and at the same time wrote a letter to B. authorizing him to sign the composition deed without prejudice to the security of C., which B. then held, namely, the bill for 150%; immediately afterwards B. signed the composition deed, annexing to his signature the words, "without prejudice to C.'s securities which he held;" held, that these words were not sufficient to put [*820] the general *creditors on inquiry as to what such securities were, and that the bill being given by C. to B. as a consideration for his signature to the composition deed, B. could not recover on this bill against C. (Lindsay v. Rogerson, Jr. Law R. 179). Although the amount of the debt be not set opposite to the creditor's name in the deed, yet he is bound

by the terms of it to the amount of his then existing debt (*Harrhy v. Wall*, 1 B. & A. 103; *Reay v. Whyte*, 3 M. & P. 77, *infra*); but where they are named the creditor is only bound as to those specified (*Read v. Wrouth*, 9 Law J. 4, Q. B.). An action was brought against the defts. as acceptors of a bill of exchange for 1000*l.* odd. It appeared the defts. owed the plts. 321*l.*, which they compounded along with other creditors for 5*s.* in the pound, by notes at four and eight months; there was however a dispute as to the amount, the defts. insisting that it was only 250*l.* The defts.' attorney afterwards called on the plts.' attorney and tendered the composition on 321*l.*, the sum really due, but the plts.' attorney refused, and said they must have the whole, but no tender was made: held, not necessary under the circumstances, and that the plts. could only recover the amount of the composition on the balance (*Wray v. Whyte*, 1 C. & M. 748; 3 Tyrw. 597).

An agreement to sign a composition deed does not bar the creditor from proceeding for his debt if the debtor and trustees refuse to allow such creditor to sign it, &c. (*Garrard v. Woolner*, 8 Bing. 258).

Where the Debtor assigns all his Effects to trustees, in order to make an equal distribution amongst all his creditors, he will be discharged (2 T. R. 24-8); as, by assigning all his effects, he deprives himself of all means of payment (*Cork v. Saunders*, 1 B. & A. 48-9). And he will be discharged when a creditor, by his undertaking to accept a composition, induces the debtor to part with his property to his creditors, or induces other creditors to discharge the debtor (*Wood v. Roberts*, 2 Stark. 417), to enter into a composition deed, or deliver up securities to him (*Butler v. Rhodes*, 1 Esp. 236; *Cranley v. Hillary*, 2 M. & S. 120; 2 Stark. 417); and, in this case, though he remain in possession as servant to the trustees, he will not be liable for the neglect of the trustees, nor will such neglect remit the creditors to their original right, unless that event be provided for by the terms of the agreement (*Cork v. Saunders*, 1 B. & A. 46). An assignment to trustees for the benefit of all creditors who may execute the deed, is not valid as against creditors who do not execute, if it authorize the trustees to carry on the debtor's trade, and contain such terms that the creditors subscribing would become partners in the business (*Owen v. Body*, 5 Ad. & E. 281; 6 Nev. & M. 448).

Where several Creditors mutually stipulate, on the faith of each other's undertaking, and with the knowledge of each other, to give time to, or accept a composition from a debtor, though for a less sum than the original debt, such agreement will be binding on every creditor who is a party to it, as it secures the creditors in general "an equality of benefit, and mutuality of security" (per Lord Ellenborough, *Leicester v. Rose*, 4 East, 381; *Boothby v. Sowden*, 3 Camp. 175; *Cranley v. Hillary*, 2 M. & S. 122; 16 Ves. 374). But an agreement with one creditor for a composition entered into on the faith that the general body of the creditors would join is not binding unless it appear that the rest of the creditors were applied to and have concurred in accepting the composition (*Reay v. Richardson*, 2 C. M. & R. 422). If one creditor, by undertaking *to discharge his debtor, [*821] induce any other creditor to discharge that debtor on receiving a composition for his demand he cannot afterwards recover from the debtor (*Wood v. Roberts*, 2 Stark. 417; see *Reay v. Richardson*, *supra*; per Lord Abinger, *Clark v. Upton*, 3 Man. & R. 89). And any secret bargain between the debtor and one of the creditors, to pay a further sum of money, or give a better or other security than that stipulated for by the rest of the creditors, is void, as a fraud on the other creditors (*Cockshott v. Bennett*, 2 T. R. 763;

Jackson v. Lomas, 4 T. R. 166; Smith v. Bromley, 2 Doug. 695; Jackson v. Davidson, 4 B. & A. 695-7; Leicester v. Rose, 4 East, 372, 381; 4 Moo. 78; Alsager v. Spalding, 4 Bing. N.C. 407; 6 Sco. 204; Bradshaw v. Bradshaw, 9 M. & W. 29; see Collingworth v. Loyd, 2 Beav. 385). Nor is any security obtained by virtue of such secret bargain valid (Wells v. Girling, 1 B. & B. 447; S. C. 4 Moo. 78; Alsager v. Spalding, 6 Sco. 204); as it is a general rule, "that every private bargain, the effect of which is to give one creditor an advantage over the others, is void, the principle of composition being, that all creditors shall stand on the same footing" (per Littledale, J., Lewis v. Jones, 4 B. & C. 515); and the creditor cannot recover on the debt's bills the amount of the composition money, even although he has received nothing on the bill indorsed to him by the debt (Howden v. Haigh, 11 Ad. & E. 1033; 3 P. & D. 661). However, where there is nothing said in the agreement about collateral securities, a creditor will not, by availing himself of them, commit a fraud upon the other creditors, who have no such securities; unless the persons against whom he enforces those securities have their remedy against the insolvent and the estate be ultimately diminished (Thomas v. Courtney, 1 B. & A. 1, 6). A debtor entered into a negotiation for a compromise with his creditors, but there did not appear to have been any general meeting of them or any agreement entered into by them generally. One of the creditors stipulated that he should have the benefit of a mortgage security which he held in addition to the amount of composition. He accepted the composition, but did not then execute the deed; he however, having afterwards realized his mortgage security, executed the composition deed, by which he purported to release his debtor altogether without any reservation of the mortgage security; another creditor subsequently executed the deed. The agreement was not communicated to the other creditors, but there was no fraudulent concealment. Held, on grounds of public policy, that the creditor was not entitled to retain his mortgage security in addition to the amount of the composition (Collingworth v. Loyd, 2 Beav. 385). As to pleading fraud of this kind, see Tuck v. Tooke, 9 B. & C. 437. A gratuitous payment or additional security to a particular creditor after he had signed the deed, would not be a fraud if it were not done in pursuance of a prior agreement to induce the creditor to accept the general arrangement (see Bright v. Hunt, 5 Bing. 432; but see Ex parte Hall, 1 Deac. 171). If it be agreed that securities shall be given up, any creditor receiving money thereon will be held to recover for the debtor's use (Stock v. Mawson, 1 B. & P. 286). A. advanced 100*l.* to B., on his and C.'s joint and several promissory note, C. at the time giving A. 65*l.* on his own account; C. failed, and at a meeting of his creditors, A. and others entered into a resolution that C. should assign certain property for the benefit of his creditors, and that they should give him a release; A. at this meeting stated his debt to be 65*l.*, on which sum he afterwards received a dividend; subsequently to this B. failed: held, that A. could not sue C. on the note (Seagar v. Billington, 5 C. & P. 456). It is a fraud in a creditor who agreed to the composition, [*822] though reluctantly, to sue the debtor (Cranley v. Hillary, 2 M. & S. 120; Steinman v. Magnus, 11 East, 390; Boothby v. Snowden, 3 Camp. 175; Mackenzie v. Mackenzie, 16 Ves. 372; Knight v. Hunt, 5 Bing. 432).

Where a different Security is accepted by the creditor in satisfaction of his debt, the debtor will be discharged on the payment of a smaller sum; however, the party must have received the benefit of such security (Drake v. Mitchell, 3 East, 259; Walker v. Seaborne, 1 Taunt. 526).

Where a third Person is Security for the whole or part of the composition-money, all persons who agreed to accept such security will be bound thereby, and it will operate as a satisfaction: therefore, an agreement, whereby the creditors agreed to receive 20 per cent. in satisfaction of their several demands, and released the remainder, in consideration that half of the composition should be secured by the acceptances of certain of the creditors, which was done, will be binding, if, upon the faith of it, a third person be lured in to become surety for any part of the debts, on the ground that the party will be thereby discharged of the remainder of his debts; and still more, when other creditors have been lured in, by the agreement, to relinquish their further demands, will the agreement be binding; and it would be a mixed question of law and fact to go the jury, whether, after the plts. had entered into this composition, in conjunction with the other creditors, it were not a fraud upon those persons, within the principle of the case of *Cockshott v. Bennett*, 2 T. R. 763, to endeavour to obtain a further payment from the deft., whom they all purposed to liberate upon the terms of that agreement (per Lord Ellenborough, *Steinman v. Magnus*, 11 East, 394).

But the money must be *paid*; for, although a debtor compounding with his creditors for 12s. 6d. in the pound, gives them the security of a third person for the payment of 7s. 6d., he is not discharged upon the payment of that sum only, if the residue of the 12s. 6d. be unpaid (*Walker v. Seaborne*, 1 Taunt. 526).

When, by Fraud, the Creditor is discharged from his Agreement.] If any fraudulent representations have been made, whereby the creditor is induced to agree to accept a composition, it will not be binding if such representations be untrue (*Cowling v. Noyes*, 6 T. R. 263; *Reay v. Richardson*, 2 C. M. & R. 422; 1 Gale, 219; *Lewis v. Jones*, 8 D. & R. 567; 4 B. & C. 506; see "FRAUD").

If it appear that there has been a wilful withholding by the debtor of information respecting his estate, it will avoid the composition, and remit the creditor to his right to sue for the whole (*Vine v. Mitchell*, 1 Moo. & R. 337; *Wenham v. Fowle*, 3 Dowl. 43). Where a creditor for two distinct demands had seized under an execution for one of the debts the goods of his debtor, and afterwards at a meeting of the other creditors, when a composition was proposed, declared that he would not agree to a composition unless the debt for which the goods had been seized were secured to him, and, on receiving the guarantee of one who was not a creditor, withdrew his execution, and signed the deed: held, that the guarantee was void, as a fraud upon the rest of the creditors (*Coleman v. Waller*, 3 Ves. jun. 212). The plts. and several creditors of the deft. executed a composition deed, the amount of their debts was set opposite to their names in a schedule. The deed contained a general release by all the creditors who had signed. The plts. held two *overdue bills of exchange, drawn by the deft., when they [*823] signed the deed; but at the deft.'s request they inserted only the amount of one bill in the schedule, because the plts. might recover the other from the acceptor who refused payment, and the plts. sued the deft. as drawer. Held, that this was a concealment of part of their debt, and was a fraud on the rest of the creditors; and that the general words of the release were not restrained by a previous recital in the deed that the deft. was indebted to his creditors in the several sums set opposite to their names in the schedule (*Britten v. Hughes*, 5 Bing. 460). But misrepresentations as to the legal effect of the agreement are immaterial, and do not avoid it, as every man is supposed to know the legal effect of the instrument which he signs (*Lewis v. Jones*, 4 B. & C. 506, 512; vide *ante*, p. 821).

A. agreed to purchase an estate, and paid a deposit; B., the seller, is unable to make a good title by the stipulated day; A. afterwards, upon negotiating a compromise with his creditors, states his apprehension that he may be compelled by B. to complete the purchase, and applies to B. to cancel the contract, and return the deposit, who refuses, but says he will never take any steps against A. to enforce the contract. Upon this footing the composition proceeds, C. engaging to secure seven shillings in the pound. It would be a fraud upon the creditors, and upon C. if B. were to enforce the contract; and therefore A. cannot maintain an action against B. for the deposit (*Clark v. Upton*, 3 Moo. & P. 89). Plt., holding two bills drawn by deft., one for 400*l.* the other for 456*l.* 19*s.* 10*d.*, executed a composition-deed, containing a general release of the deft., and a schedule of the sums due to the creditors who executed the deed, after the plt.'s name was put the latter sum only, at the deft.'s request, who expected that the plt. would recover the 400*l.* by suing the acceptor. The creditors knew nothing of the debt of 400*l.*: held, that plt. could not sue the deft. on the bill for that amount (*Britten v. Hughes*, 5 Bing. 460; see *Margetson v. Atkin*, 3 C. & P. 338). Where a creditor compounds with his debtor under a false impression in which the debtor knowingly leaves him, as to the extent of the debtor's estate, the creditor is not estopped from suing for the balance of his debt (*Vine v. Mitchell*, 1 Moo. & R. 337). Where the trust deed contains a consideration that he shall make a full disclosure of his property, but he conceals a portion of it, the creditors signing the deed may still proceed against him (*Wenham v. Föwle*, 3 Dowl. P. C. 43).

Where Sureties are discharged.] Sureties will be discharged if misrepresentation is used, or time given to, or there is a compounding with the original debtor, as there would be a fraud on the sureties. And *misrepresentation* will avoid the contract; "for it is the duty of a party, taking a guarantee, to put the surety in possession of all the facts likely to affect the degree of his responsibility; and, if he neglect to do so, it is at his peril, and the concealment of a material fact avoids the contract" (per Bailey, J., *Pidcock v. Bishop*, 3 B. & C. 610). And any secret bargain between the debtor and creditor to pay a further sum, or old debt, or to give further security, will discharge him (*Cockshott v. Bennett*, 2 T. R. 763; *Jackson v. Duchaire*, 3 T. R. 552, 553; *Pidcock v. Bishop*, 3 B. & C. 655; *Williams v. Rawlinson*, 3 Bing. 71; *Lewis v. Jones*, 4 B. & C. 506, 515, n. (a); *English v. Darley*, 2 B. & P. 61; *Leicester v. Rose*, 4 East, 372; *Constantein v. Black*, 1 Cox, 287; *Wells v. Girling*, 4 Moo. 78; *Coleman v. Waller*, 3 Y. & J. 212; *Wood v. Roberts*, 2 Stark. 417). But see *Feise v. Randall*, 6 T. R. 146). But see *Feise v. Randall*, 6 T. R. 146). But such agreement would be binding if voluntarily made after execution of [*824] the *composition-deed (*Cockshott v. Bennett*, *ante*, p. 823); but see *Turner v. Hoole*, Dow. & Ry. N. P. 27; 6 Ves. jun. 300; 13 Ves. jun. 586). A composition discharging the principal discharges also the surety (*Lewis v. Jones*, *ante*, p. 821; see note to that case, as to the general effect of signing a composition-deed in regard to existing securities; see also *Thomas v. Courtney*, 1 B. & A. 1; *Mallett v. Thompson*, 5 Esp. 178). And, if A. be induced to pay B. a composition on the debt due to him from C., and B. agrees to take the money in full of his claim, he cannot afterwards sue C., or a person who was before surety for him, unless A. assented to the surety remaining liable (*Lewis v. Jones*, 4 B. & C. 506).

Giving Time to or compounding with the debtor, will, on analogous principle, discharge the surety, as it alters his situation, or extends his risk

(*Ib.*; *Twopenny v. Young*, 3 B. & C. 208; *Emes v. Widowson*, 4 C. & P. 151; *Thomas v. Courtney*, 1 B. & A. 1; *Nicholls v. Norris*, 3 B. & Ad. 41). And it would also be a fraud on the original debtor, if the party, by giving time to the debtor himself, were allowed to sue the surety thereon, as, if the creditor recovered, the surety would have his remedy against the original debtor forthwith (*English v. Darley*, 2 B. & P. 61; 6 Ves. jun. 805, 818; *ib.* 20; 4 B. & C. 515, n. (a)).

When an Agreement, or Deed of Composition, operates as an Escrow.]

An agreement for a composition ought to contain a clause, that the instrument would be void unless all the creditors signed it: for, otherwise, the object of the instrument may be defeated; for, if a creditor sign such instrument generally, he becomes a party to it, and will be bound by it unconditionally, and then the legal effect of the instrument must be collected from the instrument itself, and not from verbal declarations made by the parties at the time when they executed it (*per Bayley, J., Lewis v. Jones*, 4 B. & C. 512). But, in a deed where such a proviso was omitted, but before the deed was executed by a person who was to be surety for the composition-money, it was stated, in his presence, that the deed should be void, if not executed by all the creditors, and he at the same time delivering the deed in the usual way, and with the usual words, it was held, that it was delivered as an escrow, and that the surety, on the failure of some creditors to execute it, was not bound by the deed (*Johnson v. Baker*, 4 B. & A. 440). But, where a deed, reciting debts to A. and B., upon judgment, who were to be paid first, and then the other creditors to be paid in composition, contained a proviso, "that if any creditor, whose debt amounts to 150*l.*, should not execute the deed within the three months, it should be void;" and A. and B., whose debts respectively exceeded that sum, not executing the deed, it was held not to avoid it, the intention manifestly being, that those creditors only who were to receive the composition were to execute it (*Wells v. Greenhill*, 5 B. & A. 869; see "*Escrow*").

A party, who executes a composition-deed, is bound to the extent of the whole debt due to him, if he do not specify the amount opposite his signature (*Harroby v. Wall*, 1 B. & A. 103).

Plea of.

We have seen where several creditors agree to take a composition from their debtor, they cannot, after such composition has been received by or tendered to them, sue upon the original debt; and to such an action the agreement may be pleaded in bar. Formerly *it might have been given in evidence under the general issue. If the deed or agreement [*825] purport to be signed by all the creditors of the debtor, he must state in his plea, and show by evidence, that it was signed by all or by a great body of the creditors, otherwise the plea will be bad, even after verdict (*Reay v. Richardson*, 2 C. M. & R. 422). The debtor must show that he has done all that was requisite on his part to be done, as that the composition notes have been given or tendered to the creditor (*Reay v. Whyte*, 1 C. & M. 748; *Cranley v. Hillary*, 2 M. & S. 120; *Oughton v. Trotter*, 2 Moo. & M. 71). This plea may be pleaded with a plea of payment or release (R. G. H. T. 4 Will. IV. r. 2). A plea stating that the plt. and the deft.'s other creditors agreed to accept a composition, and to release their debts; that several creditors relying upon the agreement executed a release, and that the plt. afterwards obtained and accepted the bond in suit for the residue of the plt.'s debt by fraud and covin, and without the knowledge or consent,

and in fraud of the other creditors, is tantamount to an allegation not of fraud and covin generally, but of fraud and covin effected by the particular means described in the inducement, and as the facts stated do not show any stipulation for the giving of the bond contemporaneous with the agreement for the composition, the plt. is entitled to judgment *non obstante veredicto* (Tuck v. Tooke, 4 Moo. & R. 393; 9 B. & C. 437; nom. Tooke v. Tuck, 4 Bing. 224). Where the agreement contained a proviso, that it "was to be void unless the creditors, whose names and descriptions were stated on the other side of the agreement, should concur in the arrangement:" held, that this was not a condition precedent, the performance of which the debtor was bound to aver on setting up the agreement as an answer to an action by one of the creditors (Matthews v. Taylor, 2 Man. & G. 667; 3 Sco. N. R. 52).

In *assumpsit* the deft. pleaded that after the causes of action accrued, the deft. and M., who was jointly liable with him to the plt., became unable to pay their creditors in full; and, thereupon, it was agreed by the deft., and M., the plt., and other creditors, that a composition of 4s. 6d. in the pound should be paid upon their debts, and that, upon receiving that sum, the plt. and the other creditors should execute to deft. and M. a general release; that a deed of release was prepared for execution, and that the creditors, except the plt., received the composition, and executed the release; that the deft. has always been ready to pay the plt. the composition of 4s. 6d. in the pound upon his executing the release, of which plt. had notice, and was requested by deft. to accept the composition and execute the release: held, bad, for not showing that the deft. and M. offered to pay the plt. the composition money, or tendered the release to him for execution (Rosling v. Muggeridge, 16 M. & W. 181).

Where original Debt revived.] Where the non-performance by the debtor of the composition agreement on his part revives the original debt, see *Ex parte Crosby*, 2 M. & Ayr. 393; 1 Deac. 107.

Replication.] Where the deft. pleaded that as to 9*l.* parcel, &c., he accepted a bill at two months, for 20*l.*, without any drawer's name to it, for the plt., in satisfaction of the said 9*l.*; and, for the plt.'s accommodation, as to the residue, which the plt. accepted in satisfaction: replication, that the bill still remained in the plt.'s hands un-negotiated, without any drawer's name to it, and unpaid, held bad, for until the bill was due and dishonoured the right of action was suspended (Simon v. Lloyd, 2 C. M. & R. [*826] 187). It is *not a multifarious replication to say that the deft. did not pay, &c., in satisfaction, &c.; nor did the plt. accept or receive it in satisfaction (Webb v. Weatherly, 1 Bing. N. C. 502); but *de injuriâ* is a bad replication (see Jones v. Senior, 4 M. & W. 123, and "REPLICATION DE INJURIA") Where the plea stated that a certain agreement to be made between the plt. of the one part, and the deft. and others (the plt.'s creditors) of the other part, was to be void unless the creditors, whose names and descriptions were on the other side of the paper on which the agreement was to be drawn up, should concur in subscribing the same, and the replication impeaching the validity of the agreement did not state in its inducement that the persons mentioned as having omitted to subscribe the agreement were creditors, though it stated that their names and descriptions were on the other side of the said paper the replication was held bad (Matthews v. Taylor, 3 Sco. N. R. 42; 5 Jur. 321).

Evidence of Composition.

When the composition is *by deed*, the deed should be produced, and proved

by the subscribing witness, and no verbal declarations of the parties can be received in evidence to give it a meaning *different* from that which appears on the face of it, or to avoid its effect, though the party signed the instrument on the faith of such representations (Lewis v. Jones, 4 B. & C. 513). As to when such deed will be an escrow, see other points of evidence, *ante*, p. 824 (*vide post*, "BONDS," "EVIDENCE"). Plt. may show that it is void as to him, as where it contains a proviso that it shall be so if all and every of the creditors should refuse to execute or consent to the deed; but plt. must prove that it was tendered to some one of the creditors to execute, as his absolute refusal, in the event of his mere non-execution of it, will be insufficient (Holmes v. Love, 3 B. & C. 242); but, unless the deed contain a positive stipulation that it shall be void, he cannot avail himself of the fact of the other creditors not having signed it, though he himself signed under a verbal representation of the party, that it would be void unless signed by all the creditors. He may also show, that he is discharged by reason of fraudulent representations made to him, when he was induced to sign (*ante*, p. 822).

Although the plt. has not executed any deed, the deft. may prove that plt. *agreed* to take a composition, secured by some collateral security, as the notes of a third person, and that such acceptance was actually *received* by the plt.; for, although a debtor gives the security of a third person for payment of part of a *stipulated dividend*, he is not discharged upon payment of that part only, if the residue of it continues unpaid (Walker v. Seaborne, 1 Taunt. 526, *supra*); or, in some cases, the deft. has fully *completed* his part, according to the terms of the accord, *by actually tendering* such notes to the plt. (Bradley v. Gregory, 2 Camp. 384; Cranley v. Hillary, 2 M. & S. 120).

A deft. may prove, that, on the faith of plt.'s undertaking to receive a composition from him, he executed a deed of assignment of all his property to a trustee, for the benefit of his creditors, and that plt. refused to sign the deed of composition (Butler v. Rhodes, 1 Esp. 236, *supra*). But, deft. should prove that the deed was tendered to plt., and that he *refused* to execute it (Ib.; Holmes v. Love, 3 B. & C. 242). Plt. may, however, avoid the effect of such undertaking, by showing that he did it from deft.'s mis-representations (Cooling v. Moyes, 6 T. R. 263, p. 822).

Deft. may also prove, that plt. is one of several creditors who promised to sign a composition-deed, and that, upon the faith of *his signing it, others were induced to accept a composition (Boothbey v. Lowden, [*827] 3 Camp. 175; Wood v. Roberts, 2 Stark. 217; Brown v. Cornish, 1 Ld. Raym. 217, p. 820).

A plea of composition with creditors stated, that defts. were indebted to plts., and to divers other persons whose names were to defts. unknown, and that defts. agreed with plts. and their other creditors, and the plts. and the said other creditors mutually agreed with defts. and with each other to accept a composition: held, that the plea was not proved by evidence of some only of the other creditors besides the plts. having agreed to accept a composition. *Quære*, whether the plea would be good if proved (Brown v. Dakeyne, 11 Jur., 39, Q. B.).

While the delivery or the acceptance in satisfaction is denied by the replication, they cannot be presumed from mere length of time, the deft. must prove them (Siboni v. Kirkman, 1 M. & W. 418); as also, that the plt. accepted the bill, &c., in satisfaction of the cause of action (see Bedford v. Deakin, 2 B. & A. 210; and where it was pleaded that a bill was accepted by the deft. for 60*l.* in satisfaction upon which issue was joined, and it was proved that the acceptance was in blank, and was to have been drawn for 60*l.*, but was in fact only drawn for 46*l.*: held, that the issue was not proved (Baker v. Jubber, 1 Man. & G. 212). In order to prove the agreement

stated in the plea, the deft. put in a letter from one of the plts., containing the terms of the agreement for the composition: held, that evidence of a previous conversation, when the plt. made inquiries as to what the other creditors were likely to do was admissible to show the motive which induced him to write the letter, and the intention with which the agreement was entered into (*Reay v. Richardson*, 2 C. M. & R. 422; 5 Tyrw. 931). To an action by the executors of an indorsee against the acceptors of a bill of exchange, the defts. pleaded that it was an accommodation acceptance for the drawer with the knowledge of the indorsee; that the drawer became insolvent, and the indorsee, the defts., and two other creditors agreed among themselves, as his friends, to release their several back debts and liabilities, and averred that the defts. and the two other creditors did release and discharge their several debts, &c., and then went on to state that the indorsee in consideration of the premises, and that certain other creditors would release, abandon, and never enforce payment of their debts, agreed with the defts. that he would never ask for, sue for, demand, or enforce payment of the said bill of exchange. There was an averment also that the other creditors had released their debts. The plt. replied that the indorsee did not agree *modo et forma*, &c., and the evidence was that the indorsee at first promised to sign the account, if some more signatures were obtained to it; but after they were obtained, he refused to sign it, but said on one occasion that he knew that the bill was an accommodation bill, and he should not call on the deft. to pay it; and on another, that the bill should not come against any of the parties, but that he himself would come in as the rest of the creditors. The agreement signed by the creditors contained these words: "We, the undersigned, do hereby agree to accept of a release from the said E. A. (the drawer) of the equity of redemption, &c., and we agree upon the execution of such deed to execute releases," &c.; held, that the allegations in the plea were not sustained by the evidence (*Deacon v. Stodhart*, 9 C. & P. 635).

In an action on a note against a surety, the deft. pleaded that it was made by three persons as sureties, and a fourth as principal; that the principal had compounded with her creditors; and that the plt. and other creditors mutually agreed with the principal and with *each other, to accept [*828] the composition in satisfaction of all debts due to them from the principal, and, of all demands in respect of such debts: held, that it was an essential part of the deft.'s proof in support of that plea, that all the creditors were parties to the agreement for giving up collateral securities; and that the evidence being that one of the creditors took his money and went away before it had been finally settled whether the plt. would give up the note upon which the action was brought, the plea was not proved (*Vincent v. Dove*, 8 Law T. 411, Q. B.).

A. being a creditor of B., had executed a composition-deed, in which it was stipulated that the deft. should be paid by 6s. in the pound by promissory notes. After executing this deed, A. obtained a payment from B. in full: held, that B. could not recover back the difference between the full amount and the 6s. in the pound, without proving the composition notes had been paid, or giving some evidence that would be equivalent to such proof (*Ward v. Bird*, 5 C. & P. 229).

Where at a meeting of the creditors of A. it is agreed that a composition shall be accepted, and that promissory notes for the amount "shall be given within 14 days, the creditors assenting thereto within that time," and A. is sued for a debt due to one of the parties of the agreement, unless A. can show delivery or tender of the notes, he is liable for the whole debt (*Oughton v. Trotter*, 2 Nev. & M. 71).

The plt. being in insolvent circumstances, and indebted to several persons,

in sums partly secured by outstanding bills, entered into a deed of composition, by which composition bills were agreed to be given to the respective creditors by the plt. to the amount of 5s. in the pound, and guaranteed by one T. M. The creditors severally covenanted not to sue while those composition bills were running, and to release the plt. if the same were paid at maturity. They also covenanted severally to indemnify the plt. against and in respect of such bills as were outstanding in their hands as his creditors at the execution of the deed. H. P. and his partner, J. M., were at the time of the execution of the composition deed creditors of the plt., and holding acceptances of the plt. for part of their debt. These bills were afterwards negotiated, and the plt. was sued upon them, and compelled to pay the amount with costs. He thereupon sued H. P. on the covenant, for not indemnifying and holding him harmless. The deft. pleaded, that before the execution of the deed it had been agreed between the plt. and himself and his partner, that, in addition to the composition of 5s. in the pound, the plt. should pay in full a portion of the debt to them, and should pay the composition of 5s. in the pound in cash instead of by a bill, and that this agreement was unknown to the other creditors, and that he, the deft., in part performance of the agreement, had executed the deed to induce the other creditors to believe that he and his partner had received the same composition as the rest: held, that the transaction was fraudulent, and that the plt. could not sue the deft. upon the covenant to indemnify (*Higgins v. Pitts*, 18 Law J., Ex. 488).

The declaration alleged that the deft. did, on, &c., to wit, as such creditor, jointly with J. M., subscribe his, the deft.'s name, and affix his seal to the indenture. The plea stated, that, in part pursuance of the agreement stated therein, "he, the deft., for himself and his partner, made and executed the indenture as in the declaration mentioned:" held, that it sufficiently appeared that the deft. had himself executed the deed (*Ib.*).

The plea did not state in terms that the agreement was a fraud upon the other creditors: held, that the facts sufficiently shewed that the deed was fraudulent, and could not be enforced by any of the parties to the fraud (*Ib.*).

Assumpsit by payee against maker of a promissory note. Plea, that the note was made by deft. and G., and that plt. afterwards, by deed-poll, released G., whereby deft. was released. Replication, *non est factum*. The deed, by which the creditors of G. agreed to accept a composition, contained a clause that it should not extend to invalidate notes upon which other parties might be jointly liable with G., or prejudice the claim of any creditor against a surety of G.: held, first, that the replication put in issue the construction of the deed as alleged in the plea; secondly, that the deed did not release deft. (*North v. Wakefield*, 13 Jur. 731; 19 Law J. 214, Q. B.).

A plea of composition must state that the payments were made at a precise time agreed on, or at least a tender made of them (*Evans v. Powis*, 1 Exch. 601). *Seem*, that a plea that a new mutual agreement between plt., deft., and other creditors, binding on each at the time when it was made, was given as a substitution for, or in full satisfaction of, the debt due from the deft. to the plt., would be good; and in that case it would have been for the jury to decide whether the plt. agreed to accept the agreement itself, not the performance of it, as a satisfaction for his debt (*Ib.*).

CONFIDENTIAL COMMUNICATIONS.

Post, "WITNESSES."

CONSTABLE.

See "OFFICER."

CONTRACT.

See "ASSUMPSIT."

Alteration of Contract.] A material alteration of a sold note by the buyer, without the privity of the seller, avoids the contract (*Mollett v. Wackerbarth*, 17 L. J. 47, C. P.; 5 C. B. 181).

An alteration in a material part of a written contract, without the consent of both parties, is a material alteration, which avoids the contract, although it may not have altered the duty of the party sought to be charged (*Ib.*).

A plea stated, that a material alteration had been made in the contract declared on, and proceeded to specify the alterations under a *videlicet*; and at the trial, a different alteration, which was also material, was proved, and no objection was taken on the ground of variance: held, that the plt. could not take advantage of the variance in shewing cause against a rule nisi for leave to enter a verdict for the debts (*Ib.*).

Semble, that it was not necessary, under such a plea, to prove the specific alteration alleged; and that, at all events, the judge could have amended the plea at the trial (*Ib.*).

C. and Co. and H. and Co., were merchants at Calcutta. H. and Co. sold to C. and Co. a large quantity of Indigo, through the medium of a broker, who drew up a sold note, addressed to H. and Co., and submitted it to H. for his approval, when H., having objected to a particular word remaining, the broker took the sold note to C. and informed him of H.'s objection. C. struck his pen through the word objected to by H., placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to H. and Co. The broker delivered a bought note to C. and Co. on the following day, which differed in certain material parts from the sold note. In an action brought by H. and Co. against C. and Co., for non-performance of the contract contained in the sold note, the Supreme Court at Calcutta was of opinion that the sold note alone formed the contract, and found for the plt.; upon appeal, held, by the Judicial Committee, that the transaction was one of bought and sold notes, and that the circumstances attending C.'s alteration of the sold note and affixing his initials, were not sufficient to make that note alone a binding contract, and that there being a material variation in the terms of the bought from the sold note, they together did not constitute a binding contract (*Cowie v. Remfray*, 5 E. F. Moo. 232; 10 Jur. 789).

CONVICTION.

*Its Effect, and when admissible in Evidence.
How proved.*

Its Effect, and when admissible in Evidence.] A conviction in a court of criminal jurisdiction is evidence of the same fact coming collaterally into controversy in a court of civil jurisdiction (B. N. P. 245; Gilb. Ev. 30). Therefore a conviction for bigamy is admissible on an ejectment where the validity of the second marriage is disputed (Ib.). But, if the conviction has been procured on the evidence of the party who seeks to avail himself of it in a civil action, it is not admissible (Fawcett v. Howlis, 7 B. & C. 394; *Strickland v. Ward, 7 T. R. 633, n.; Smith v. Rummons, 1 Camp. 9; Hathaway v. Barrow, ib. 151); and it seems doubtful [*829] whether it can be received in evidence, when it has not been procured on the sole evidence of the party, or even where it has been procured entirely on the evidence of others, if at the party's own instance (Hillyard v. Grantham, cited 2 Ves. 246; Gibson v. Maccarty, Rep. t. Hardw. 311; Burdon v. Browning, 1 Taunt. 520; Brook v. Carpenter, 3 Bing. 300; 1 Ph. Ev. 320). But the better opinion seems to be that it is admissible without reference to the witnesses, or upon whose testimony it was obtained (see Blackmore v. Glamorgan Canal Company, 2 C. M. & R. 139; Brook v. Carpenter, 3 Bing. 300, and cases, *ante*, p. 828). Nor will it be received to contradict the witnesses in a collateral proceeding, by showing that they had before given a different account before the committing magistrate (Rex v. Howe, 1 Camp. 461). It is of course evidence where the fact of conviction is material; as where the object is to prove the incompetency of a witness, and where the conviction operates *in rem* it is admissible in a suit *inter alios*, although obtained on the evidence of the party who offers it (Davis v. Nest, 6 C. & P. 167).

When a magistrate has jurisdiction, a conviction by him is conclusive evidence of the facts stated in that conviction, if no defects appear upon the face it (per Dallas, C. J., Brittain v. Kinnaird, 1 B. & P. 440). So, in trespass against magistrates for taking and detaining a vessel, a conviction by them under the Bum-Boat Act is conclusive evidence that the vessel in question is a boat within the meaning of the act, and properly condemned (Ib. 432; Wickes v. Clutterbuck, 2 Bing. 483). And so, a conviction will justify the magistrates under the general issue in an action of trespass, not only in respect of such facts as may be necessary to give them jurisdiction, but also upon the merits of conviction (Gray v. Cookson, 16 East, 13). A conviction cannot be controverted in evidence; the justice having a competent jurisdiction of the matter, his judgment is conclusive till reversed or quashed (per Yates, J., Strickland v. Ward, 7 T. R. 634, n.). And, in trespass against two magistrates for giving plt.'s landlord possession of a farm, as a deserted farm, they produced in evidence a record of their proceedings under the act 11 Geo. II. c. 19, s. 16, which set forth all such circumstances as were necessary to give them jurisdiction, and by which it appeared that they had pursued the directions of the statute: it was held, it was conclusive as an answer to the action (Basten v. Carew, 3 B. & C. 649). In this case, Abbott, C. J., observed, "That where justices of the peace have an authority given to them by an act of parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the

act to do to originate their jurisdiction, a conviction, drawn up in due form, and remaining in force, is a protection in any action brought against them for the act so done." See *post*, "JUSTICES OF THE PEACE").

An information under 7 & 8 Geo. IV. c. 29, s. 39, for stealing a growing ash-tree, the property of M., was preferred by R. to D., a justice of the peace, who summoned the offender. At the time and place fixed in the summons he appeared, and was convicted by another magistrate, the deft., D., the summoning magistrate being present, but not taking any part. The conviction ordered the plt. "to forfeit and pay, over and above the value of the tree stolen, the sum of 5s., and for the value of the tree stolen, 1s., and also to pay the sum of 1*l.* 4*s.* 6*d.* for costs, to be paid on or before the 19th of March next, and in default of payment of the said sums to be imprisoned in the house of correction" at, &c., "and there kept to [*830] *hard labour for one month, unless the said sums shall be sooner paid." It then ordered the 5*s.* to be paid to the overseer, the 1*s.* to M., the party grieved, and the 1*l.* 4*s.* 6*d.* to be immediately paid to R., the complainant. An action of trespass and false imprisonment having been brought against the deft.: held, that the conviction was good, notwithstanding it had not proceeded on the information of the party aggrieved, or been made by the magistrate who received the original information, and issued the summons on which the deft. appeared; nor was it invalidated by its mode of adjudicating the costs (*Tarry v. Newman*, 15 M. & W. 645).

Justices are empowered by the 27th sec. of 9 Geo. IV. c. 31, to convict of an assault upon complaint, and the offender, upon conviction thereof before them, is to pay such sum, not exceeding 5*l.*, as shall appear to them to be meet, which sum is to be paid to some other officer of the poor of the parish, &c., in which the offence shall have been committed, to be by such overseer or officer paid over to the general use of the rate of the county in which such parish, &c. shall be situate. A conviction, under this section, ordered the party convicted to pay the fine to the treasurer of the county: held, that the conviction was bad, and the magistrate liable to an action of trespass at the suit of the party imprisoned under it (*Chaddock v. Wilbraham*, 17 Law J. 176, C. P.; 12 Jur. 136).

A conviction for contempt by commissioners of a court of requests is conclusive for them in trespass, and deft. cannot controvert the fact of contempt, although unnecessarily alleged in the plea (*Aldridge v. Haines*, 2 B. & Ad. 395). He may, nevertheless, show that the commissioners had no jurisdiction (*Andrews v. Morris*, 1 Q. B. 3).

How proved.] The conviction should be proved to be under the hand and seal of the magistrate; and it will be sufficient evidence that the judgment it recites was given (*Fuller v. Fotch*, Holt, Rept. 287; Carth. 346). If a valid subsisting conviction be proved at the trial, which appears by the date to warrant the act done under it, the collateral proceeding, or, where the conviction is not directly impeached, evidence as to the time when it was actually drawn up will not be received (*Massey v. Johnson*, 12 East, 82; *Gray v. Cookson*, 16 East, 20, 21). A witness who produced an examined copy of a record of conviction at the assizes stated, that he examined it with the original record in the custody of the clerk of assize, but that he thought the original record was written on paper, but was not sure. The son of the clerk of assize proved that all the records in his father's custody were written on parchment, but he had no recollection of this particular record: held, that the examined copy was receivable in evidence (*Reg. v. Pembridge*, 1 Car. & M. 157).

COPY.

Post, "SECONDARY EVIDENCE."

*COPYHOLD.

[*831]

Proof of Party being a Copyholder, p. 831.*Proof in Ejectment for, post*, "EJECTMENT."*Proof of Surrender and Admittance*, p. 831.*Proof of Custom of*, p. 832.*Proof by Court-Rolls*, p. 832.

Proof of Party being a Copyholder.] This may be done by proof of his admittance and identity (Doe v. Hillier, 3 T. R. 162; and see *infra*). As to ejectment by, see *post*, "EJECTMENT."

Presentments are not evidence of matters not within the jurisdiction of the homage, as a presentment by the freeholders of the right of common enjoyed by the owner of a certain farm (Richards v. Bassett, 10 B. & C. 657).

Proof of Surrender and Admittance to.] The rolls of the customary court, or examined copies of such rolls, of the surrender and admittance properly stamped, will be evidence of such surrender and admittance (Doe v. Hall, 16 East, 208; Birch v. Brenton, 3 M. & R. 297; 8 B. & C. 765; see Doe v. Farrand, Car. & K. 386). They are the public documents by which the inheritance of every tenant is preserved (1 Ph. Ev. 397, 398); or registered entries of the surrender, which need not be produced stamped, according to 48 Geo. III. c. 149 (Doe v. Hall, 16 East, 208). Where a surrender of copyhold lands is made out of court by a deed of surrender the copy of court roll is still evidence of surrender, although the 48 Geo. III. c. 149, requires that in such cases the deed of surrender, or a memorandum thereof, shall be stamped, and not the copy of the court roll, as in all other cases (Doe d. Hawthorn v. Mee, 1 Nev. & M. 424; 4 B. & Ad. 617). A surrender and presentment may be proved by the draft of the entry on the court rolls of the surrender and presentment, and the parol testimony of the foreman of the homage who made the presentment, though it appears that the entry was never made on the rolls (Doe dem. Priestly v. Callaway, 6 B. & C. 484; 9 D. & R. 518). After long enjoyment under admittance to a copyhold, *semble* that a previous surrender not entered on the rolls may be presumed (Wilson v. Allen, 1 J. & W. 611). The court rolls containing a presentment of an admittance upon a surrender out of court are primary evidence of the surrender as between surrenderor and surrenderee, without producing the original surrender or inquiring into the sufficiency of the stamp upon it (Doe d. Garrod v. Otley, 12 Ad. & E. 481; 4 P. & D. 275; Doe d. Hawthorn v. Mee, 1 Nev. & M. 424). Where the stamped copies are given in evidence, they must be proved to have been given out by the steward, or at least that upon their being shown to him he admitted that they had been delivered out by him (Doe v. Freeman, C. & K. 386; 12 M. & W. 844). Some evidence of the identity of the party admitted should be adduced (Doe v. Smith, 1 Camp. 197). If the original roll be put in, it may be shown to be incorrect by producing the minute of the steward, or by other evidence (Doe d. Priestly v. Callaway, *supra*; 1 Scriv. 253). Copies of

surrenders and admissions of an alleged copyhold are some evidence of the premises being copyhold, without other proof of the existence or extent of the manor (*Standen v. Christmas*, 9 Law T. 169, Q. B.).

[*832] *Where a surrender was made in 1774, and there was no record of it on the court rolls, the books of a manor containing a record of the admissions which recited the surrender were admitted as evidence of it (*R. v. Thruscross*, 1 Ad. & E. 126). A presentment in a manor book will not be rejected because mutilated, there being no ground for supposing it to have been done by fraud (*Evans v. Rees*, 10 Ad. & E. 151).

Proof of Custom of.] The custom must be proved to have existed since the time of legal memory (4 Leon. 242; *post*, "CUSTOM"). The court rolls, or examined copies from them, duly stamped, are the most usual evidences of the custom; the same may, however, be proved by the steward or some ancient person, who has long known the manor and its customs. In an action by a copyholder against the freeholder of a manor, certain parchment writings, preserved among the muniments of a manor, dated in 1698, and 1717, purporting to be signed by certain copyholders of the manor, stating an unlimited right of common in the copyholders, were held to be evidence of the reputation of the manor at the time, as to a presumptive right of common set up by the deft. (*Chapman v. Cowlan*, 13 East, 10). An entry on the court rolls, stating the mode of descent of lands in the manor, is evidence of such mode, though no instance of any person having taken according to it be proved (*Roe v. Parker*, 5 T. R. 26; *Doe d. Askew v. Askew*, 10 East, 520; see *Doe d. Brown v. Brown*, 11 East, 441). Ancient writings, not properly court rolls, nor signed by any of the tenants, but found among the rolls, and delivered down from steward to steward, purporting to have been made *assensu omnium tenentium*, have been admitted as evidence, to prove the course of descent within a manor (*Denn v. Spray*, 1 T. R. 466). Entries of fines assessed in the books of a deceased steward are not evidence of a custom to take such fines, unless there be evidence of payment (*Ely (Dean of) v. Coldecott*, 7 Bing. 433). Entry of an admission reciting a previous surrender to the use of a will is evidence of the surrender (it being lost) in proof of a settlement by estate (*R. v. Thruscross*, 1 Ad. & E. 126). A heriot may be due by custom on the death of a tenant of free lands of a manor held in fee-simple. In order to prove such a custom, evidence of presentments and payments of heriots in respect of other lands in the same manner was admitted (*Damerell v. Protheroe*, 16 Law J. 170, Q. B.; 11 Jur. 331; 9 Law T. 100).

Proof by Court Rolls.] We have already seen in what instances they are proof of a party being a copyholder, of a surrender and admittance or custom; it may be here further added, that court rolls, whether of the court baron or customary court, are evidence between the lord of the manor and his tenants or copyholders (B. N. P. 247; 1 Ph. Ev. 397; *Attorney-General v. Hotham*, 1 Turn. & Russ. 217); and entries made by a steward in his book, respecting admissions, receipts of fines, &c., connected with the manor, are also evidence. Evidence of amerciaments on court rolls are not in general evidence of title, without proof of payment (*Rowe v. Brenton*, 3 M. & R. 302). The court rolls are usually produced and proved by the stewards, but examined stamped copies will do (*Doe v. Hall*, 16 East, 208; *Doe d. Hawthorn v. Mee*, *supra*). Copies of court roll, authenticated by the steward of the manor, are admissible as evidence, though they are not the copies delivered to the tenants of the estate (*Breeze v. Hawker*, 14 Sim. 350). If it be necessary to prove any entry in the *steward's book*, it must

be regularly produced, *and identified as the book kept by the steward of the manor, and his handwriting to the several entries must be proved; but, when the book was thirty years of age it was held sufficient to make it evidence to prove that it came out of the proper custody, without proving the steward's handwriting subscribed to the entry (*Wynne v. Trehwitt*, 4 B. & A. 376; *Ely (Dean and Chapter) v. Stewart*, 2 Atk. 45; *Roe v. Brenton*, 3 M. & R. 296; see *Fortes*. 43). A presentment of a jury at a manor court setting forth the bounds of the manor, is admissible evidence of the bounds, though mutilated in a part, such part not being apparently connected with the subject of boundary (*Evans v. Rees*, 10 Ad. & E. 151). It may be as well observed, that, on the application of a tenant, the Court of Queen's Bench will compel the steward to give the tenant leave to inspect the court roll (*Rex v. Shelley*, 3 T. R. 141).

COPYRIGHT.(a)

FORM OF REMEDY FOR INJURY TO, p. 833.

FORM OF PLEADINGS, p. 839.

Declaration, p. 839.

Several Counts, p. 839.

Pleas, p. 839.

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EVIDENCE FOR PLAINTIFF, p. 841.

EVIDENCE FOR DEFENDANT, p. 843.

Notice of Objections, p. 844.

Form of Remedy for Injury to.

By 5 & 6 Vict. c. 45, "it is enacted, that if any person shall print or cause to be printed, either for sale or exportation, any book in which there shall be a subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book, so having been unlawfully printed, from parts beyond the sea, or knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright."

The 5 & 6 Vict. repeals the 54 Geo. III. c. 156, except so far as the continuance of the same may be necessary for carrying on or giving effect to any proceedings at law or in equity pending at the time of its passing, or for enforcing any cause of action or suit, or any right of contract then existing.

By sect. 3 it is enacted, that the copyright in any book which shall after the passing of that act be published in the lifetime of its author, shall endure for the natural term of such author, and for the further time of seven years commencing at the time of his death, and shall be the property of such author and his assigns: provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of

(a) See 1 U. S. Dig. p. 581; 2 Id. p. 132; 3 Id. p. 104.

such book, the copyright shall in that case endure for such period of forty-two years, and that the copyright in any book which shall be published after the death *of its author shall endure for the term of forty-two [*834] years, from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns.

By sect. 4 it is enacted, that the copyright which at the time of passing that act shall subsist in any book theretofore published (except as therein-after mentioned) shall be extended and endure for the full term provided by the act, in cases of books thereafter published, and shall be the property of the person who at the time of the passing of the act shall be the proprietor of such copyright: provided always, that in all cases in which such copyright shall belong, in whole or in part, to a publisher or other person, who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by that act, but shall endure for the term which shall subsist thereon at the time of passing of the act and no longer; unless the author of such book if he shall be living, or his personal representative if he shall be dead, and the proprietor of such copyright shall before the expiration of such term consent and agree to accept the benefits of this act in respect of such book, and shall cause a minute of such entry in the form in that behalf given in the schedule thereto annexed, to be entered in the book of registry thereafter directed to be kept, in which case such copyright shall endure for the full term by the act provided in cases of books to be published after the passing of the act, and shall be the property of such person or persons as in such minute shall be expressed.

By sect. 5 it is enacted, that it shall be lawful for the Judicial Committee of the Privy Council, on complaint made to them that the proprietor of the copyright in any book, after the death of its author, has refused to republish or allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a license to such complainant to publish such book, in such manner and subject to such conditions as they may think fit, and that it shall be lawful for such complainant to publish such book, according to such license.

By 5 & 6 Vict. c. 100, s. 8, a summary remedy is given for the recovery of penalties inflicted on persons pirating designs for ornamental articles of manufacture.

By sect. 9 it is enacted, that, notwithstanding the remedies thereby given for the recovery of any such penalty as aforesaid, it shall be lawful for the proprietor in respect of whose right such penalty shall have been incurred (if he shall elect to do so) to bring such action as he may be entitled to, for the recovery of any damages which he shall have sustained, either by the application of any such design or of a fraudulent imitation thereof, for the purpose of sale, to any articles of manufacture or substances, or by the publication, sale, or exposure to sale as aforesaid, by any person of any article or substance to which such design, or any fraudulent imitation thereof, shall have been so applied; such person knowing that the proprietor of such design had not given his consent to such application.

A special action on the case was maintainable against a person for infringement of a copyright, under the 8 Anne (Miller v. Taylor, 4 Burr. 2380; Ewer v. Jones, Salk. 415; Donaldson v. Becket, 4 Burr. 2409; Beckford v. Hood, 7 T. R. 620). The property of an author in an unpublished work exists independently of the statute (Southey v. Sherwood, 2 Mer. 435; Teneson v. Collins, 1 Bla. R. 301). Copyright may be either in respect of matter or arrangement, but no property can be acquired in any

article copied from a prior work (*Barfield v. Nicholson*, 2 Sim. & St. 1). A work consisting partly of compilations *and selections from former works, and partly of original compositions, may be the [*835] subject of copyright (*Lewis v. Fullarton*, 2 Beav. 6; 3 Jur. 669; see *Cary v. Fadin*, 5 Ves. jun. 24; *Tonson v. Walker*, 3 Swanst. 672). There may be a copyright in a translation, whether produced by personal application and expense or by gift (*Wyatt v. Barnard*, 3 Ves. & B. 67). The question whether one author has made a piratical use of another's work does not necessarily depend upon the quantity of that work which he has quoted or introduced in his own book (*Bramwell v. Halcomb*, 3 Myl. & Cr. 738). *Quære*, whether it is not piracy to print at full length cases contained in the law reports, although with the additions of notes, however voluminous (*Saunders v. Smith*, 3 Myl. & Cr. 711; 2 Jur. 576).

There is no copyright in a general subject, as in the case of maps and road-books (*Wilkins v. Aikin*, 17 Ves. jun. 427). As to East India Calendar, see *Mathewson v. Stockdale*, 12 Ves. jun. 270; *Longman v. Winchester*, 16 Ves. jun. 269.

An action will lie if parts of a book of chronology be servilely imitated though other parts of the book be different (*Trusler v. Murray*, 1 East, 363, n.). But not for publishing sea-charts on an improved and more useful principle with material corrections, though many of the lines are copied from old charts (*Sagre v. Moore*, 1 East, 361, n.).

There is no copyright in specifications of patents (*Wyatt v. Barnard*, 3 Ves. & B. 77; but see *Newton v. Cowie*, 4 Bing. 234; 12 Moo. 457).

A copyright remains in the writer in private letters after transmission (*Perceval (Lord) v. Phipps*, 2 Ves. & B. 19; see *Gee v. Pritchard*, 2 Swanst. 402; *Thompson v. Stanhope*, Amb. 737).

The author or publisher of a work of a libellous or immoral tendency can have no legal property in it (*Stockdale v. Onwhyn*, 5 B. & C. 173; 7 D. & R. 625); or of a work tending to impugn the doctrine of scriptures (*Lawrence v. Smith, Jacob*, 471).

Quære, whether the author had any copyright in a part of a volume published separately, and which, not being required to be entered at Stationers' Hall, had not been entered there (*British Museum v. Payne*, 4 Bing. 459; 2 Y. & J. 166; 1 M. & P. 415).

An author, whose work was pirated before the expiration of twenty-eight years (under 54 Geo. III.) from its first publication, might maintain an action on the case for damages, although the work was not entered at Stationers' Hall, and although it was first published without the name of the author affixed (*Beckford v. Hood*, 7 T. R. 620).

An author, whose works had been published more than twenty-eight years before the passing of the Copyright Act (54 Geo. III.), is not entitled to the copyright for life (*Burke v. Clarke*, 1 B. & A. 396). An author did not lose, under the late Copyright Act, his copyright by selling his work in manuscript before it was printed (*White v. Gooch*, 2 B. & A. 298).

The universities of Oxford and Cambridge, and colleges of Eton, Westminster, and Winchester have a perpetuity in all works belonging to them (*Donaldson v. Becket*, in error, 2 Bro. P. C. 129).

The English assignee of the copyright of a foreign musical composer was within the protection of the late statutes relating to copyright (*D'Almaine v. Boosey*, 1 Y. & C. 289). *Semble*, a foreigner who resides and publishes in England is within the like protection (*Ib.*).

To publish, in the form of quadrilles and waltzes, the airs of an opera of which there exists an exclusive copyright, is an act of piracy (*D'Almaine v. Boosey*, 1 Y. & C. 289).

*A fair abridgment is no infringement of a copyright (*Anon. Loft. 775*; *Bell v. Walker, 1 Bro. C. C. 451*). An abstract published in an annual register or magazine is not piracy, especially if the author himself have published extracts in a periodical paper (*Dodsley v. Kinnersley, Amb. 403*).

A person who writes words to an old air, and procures an accompaniment, and publishes them together, is entitled to a copyright in the whole, and may describe his title accordingly in a declaration (*Leader v. Purday, 16 Law J. 97, C. P. 12 Jur. 109*).

The defts. published a book containing an original essay on modern English poetry, biographical sketches of forty-three modern poets, and selections from their poems, amongst which were six short poems and parts of larger ones, the copyright of which belonged to the plt. The selections constituted altogether the bulk of deft.'s work, but were alleged to have been introduced into it for the purpose of illustrating the essay. The court restrained the publication of deft.'s work (*Campbell v. Scott, 11 Sim. 31*; *6 Jur. 186*).

The plt. contracted with the author of a work to purchase from him, and to sell at a fixed price, a tenth edition of 2500 copies: held, that the plt. had obtained a right in the copyright of the work until he should have sold off the tenth edition; that during such time the plt. had bound himself to sell the work at the fixed price, and the author would be bound not to interfere in the sale (*Sweet v. Cater, 5 Jur. 68*). Held, after examination by the court of the two books, that there had been such an abstraction of matter from the plt.'s work as exceeded the limits of fair quotation, and that though the pirated passages might be contained in the prior editions in which the author had the entire copyright, yet that being also incorporated in the tenth edition, the plt. on the contract was entitled to the edition (*Sweet v. Cater, ib.*).

In an action on the case for pirating an engraving under 17 Geo. III. c. 57, which gives a right of action against any one who shall copy any print "in the whole or in part, by varying, adding to, or diminishing from the main design," the judge directed the jury to consider whether the deft.'s engraving was substantially a copy of the plt.'s: held, that this direction was correct (*Moore v. Clarke, 9 M. & W. 622*; *6 Jur. 648*). *Quere*, whether the copying an engraving without the consent of the proprietor is rendered an illegal act by 17 Geo. III. c. 57; so as to entitle the owner to nominal damages where no actual damage has been sustained (*Moore v. Clarke, ib.*).

The right and property of an author or composer of any works, whether of literature, art, or science, in such works unpublished and kept for his private use or pleasure, entitles the owner to withhold the same altogether, or so far as he may please, from the knowledge of others, and the court will interfere to prevent the invasion of his right, by the publication of a catalogue containing a description of such work (*Prince Albert v. Strange, 1 Macn. & Gord. 25*; *13 Jur. 109*).

An action lies at common law (*Beckford v. Hood, 7 T. R. 627*; *1 Camp. 97, n. (a)*). An action lies for printing the new corrections and additions to an old work (*Cary v. Longman, 1 East, 359*). Under 8 Anne, an action was maintainable for pirating a single sheet of music (*Clementi v. Goulding, 11 East, 244*; *Back v. Longman, Cowp. 623*; see *Moore v. Clarke, 9 M. & W. 692*; *5 & 6 Vict. c. 45, s. 20*); or a print, under 8 Geo. II. c. 13 (*Rothworth v. Wilkes, 1 Camp. 94*). Besides this action for damages, there are various penalties created by the statutes of 8 Anne, c. 19, 41 Geo. III. c.

107, and 54 Geo. III. c. 156, *for which a party could proceed by [*837] action. The assignee of a copyright may sue for an injury after he has become the proprietor (*1 Ch. Pl. 76*; see *Pattison v. Robinson, 5 M. & S. 105*; *5 & 6 Vict. c. 45, s. 3*). Case is a concurrent remedy

with debt for the recovery of penalties for the infringement of copyright of designs for ornamental articles of furniture (5 & 6 Vict. c. 100, s. 8).

As to the copyright in encyclopedias, periodicals, and works published in a series, reviews or magazines, see 5 & 6 Vict. c. 45, s. 18; and as to copyright in musical compositions, *ib.* s. 20.

International Copyright.] See 1 & 2 Vict. c. 59, s. 1; 7 & 8 Vict. c. 12. Before the statute the court could not protect a foreigner's copyright (*De Londre v. Shaw*, 2 Sim, 237). Prints engraved and struck off abroad, but published here, are not protected from piracy (*Page v. Townsend*, 5 Sim. 305).

A foreign author, residing and composing his work abroad, sending it to this country, and first publishing it here, does not acquire any copyright in England. And a British subject, who purchases of such foreign author such right as the latter had in his own country, does not stand in a better situation in this country than the foreign author. Assuming, however, a foreign author and his assigns to be by law entitled to copyright in this country, where he means to publish contemporaneously in England and abroad; neither he nor his assigns are entitled to copyright by reason of the publication having taken place abroad at an earlier hour on the same day than a corresponding publication took place in this country (*Boosey v. Purday*, 18 Law J. 378, Ex.); and if he first publish his work abroad, neither he nor his assigns have any copyright here (*Chappel v. Purday*, 14 M. & W. 303; 14 Law J. 258, Ex.; see *Bentley v. Foster*, 10 Sim. 329).

A foreign author resident abroad assigned the copyright of his work to H., a foreigner, also resident abroad, who, before publication, by letter assigned it to the plt., an Englishman domiciled there,—an assignment by letter being a valid assignment by the law of the place where it was made. Afterwards the work was published here and abroad, contemporaneously on the same day: held, that copyright in the work was acquired here, and that the assignment by letter was effectual to enable the plt. as assignee to sue for an infringement of the copyright (*Cocks v. Purday*, 11 Law T. 241, C. P.).

For piracy of lectures, see 5 & 6 Will. IV. c. 65; 6 & 7 Vict. c. 65; of designs for manufactures, &c., 5 & 6 Vict. c. 100; 6 & 7 Vict. c. 65 (*Mil-lengen v. Picken*, 1 C. B. 799); dramatic performances, 3 & 4 Will. IV. c. 15 (see *Murray v. Elliston*, 5 B. & A. 657; *Cumberland v. Planché*, 1 Ad. & E. 580; *Planché v. Braham*, 4 Bing. N. C. 17). A pantomime is a "dramatic entertainment" within the 3 & 4 Will. IV. c. 15. It need not be shown that the deft. knew the work to belong to plt. when he illegally represented it: the offence is sufficiently described, if alleged in the language of the act of parliament (*Lee v. Simpson*, 4 D. & L. 666, C. P.). Prints and engravings, 8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57. (see *Newton v. Cowie*, 4 Bing. 234; *Wyatt v. Barnard*, 3 Ves. & B. 77; *Brookes v. Cock*, 3 Ad. & E. 138; *Thompson v. Symonds*, 5 T. R. 41; *Berenger v. Whelbe*, 2 Stark. 548; *Martin v. Wright*, 6 Sim. 297; *West v. Francis*, 5 B. & Ad. 737; *Murray v. Heath*, 1 B. & Ad. 804). Linens, calicoes, &c., 27 Geo. III. c. 38; 29 Geo. III. c. 19; 34 Geo. III. c. 23; 2 & 3 Vict. c. 13; 2 & 3 Vict. c. 17.

By 10 & 11 Vict. c. 95, the Queen is empowered to suspend the prohibition against pirated books (under 5 & 6 Vict. c. 45) being introduced *into the colonies, where the colonial legislature shall secure [*838], to the author "reasonable protection."

Quære, whether a mechanical contrivance within the stem of a parasol, for raising or lowering it with one hand, is "a design for the shape or con-

figuration of an article of manufacture," within the 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65.

Trade-marks.] In cases of an attempt by one trader to obtain an unfair advantage to himself from the name and reputation of another, the general resemblance of forms, words, symbols, and accompaniments must be such as to mislead the public; and a distinct individuality must, at the same time, be preserved, so as to procure for the person himself the benefit of that deception. A name may be used, and yet no injury may be done; and, on the contrary, without the use of the name, an injury may be done; and wherever the article prepared by one person is sold by him, under such circumstances as to induce ordinary persons to believe the article to be the manufacture of some other person, who has obtained a high character for the excellence of his manufacture, that person brings himself within the rule as to trade-marks, &c. Accordingly, where W. headed his labels with a distinct name, given to an article of his own manufacture, and described its properties, and then introduced the name of F. with great praises, as the first maker of the article, together with certain testimonials of its excellence given to F. by the leading medical men of the day, and ended with stating that the article (calling it by the name adopted by himself) was sold in bottles at certain prices; it was held, that W. had violated the rule as to such cases, though F.'s article was sold in bottles stamped, and without any label, but accompanied by a printed paper; and W.'s was sold in bottles unstamped, and in a wrapper, and containing certain weights (*Franks v. Weaver*, 8 Law T. 510, Ch.).

In an action on the case, brought by the plts. against the defts., for manufacturing and selling certain penknives, with the mark of the plts. thereon, with the intention of denoting the same to be and selling the same as the penknives of the plts., &c., and issue joined on the plea of not guilty, and on a plea denying that the penknives were marked by the defts. in order to denote them as manufactured by the plts., the judge directed the jury to satisfy themselves in the first place that the defts. did mark the penknives, so as to resemble the mark made on knives manufactured by the plts., and, if so, then to inquire whether the defts. sold such, as of the plt.'s manufacture. The jury having found for the plts.: held, on motion for a new trial, that the direction of the judge was right (*Rogers v. Nowill*, 11 Jur. 1039, C. P.).

An allegation of damage, that "by means of the premises, the plts. were deprived of great gains and profits," sufficient after verdict (*Rogers v. Nowill*, 11 Jur. 1039, C. P.).

Trade-marks abroad.] A British subject may maintain an action in the American courts against an American for pirating his trademarks (*Taylor v. Carpenter*, 5 Q. B. 109).

Form of Pleadings.

There is nothing peculiar to distinguish the pleadings in this from any other action in case (see "CASE"). The averment of deft.'s wrongful intent is immaterial (1 Camp. 98). It is usual to negative plt.'s *written* consent to the piracy (7 T. R. 320. See a form 2 Ch. Pl. 572, and notes).

*The declaration stated that the plts., manufacturers of cutlery, [*839] were accustomed to mark their knives with certain marks denoting their manufacture, and that the defts., intending to injure the plts., did fraudulently impose similar marks on knives made by the defts. to in-

duce the public to believe that the knives made by the defts. were manufactured by the plts., &c.: held, that it was properly left to the jury to consider, whether there was such a resemblance between the defts.' marks and those used by the plts., as was calculated to deceive the public; and whether the defts. used the marks with an intention to deceive.

No person has a right to sell his own goods as and for goods manufactured by another person (*Rodgers v. Nowill*, 17 Law J. 52, C. P.).

Several Counts.] In an action for the infringement of a copyright, the plt. will not be allowed a count on the statute 5 & 6 Vict. c. 45, in conjunction with a count for the infringement of the same copyright at common law.

Under a count on the above statute for infringing a copyright, setting forth the requisitions of the statute, and concluding *contrà formam statuti*, the plt. may set up his common-law right, if he fail to bring himself within the operation of the statute (*Boozey v. Tolkien*, 17 Law J. 137, C. P., 3 C. B. 476; 5 D. & L. 549).

See a declaration for not paying for a copyright, *Da Pinna v. Polhill*, 8 C. & P. 78; 5 & 6 Vict. c. 45.

See the form of declaration in debt for penalties on 10 Geo. II. c. 28, s. 2; for acting unlicensed plays, *Parsons*, q. t. 5 C. & P. 33; *Levy v. Yates*, 8 Ad. & E. 129; for penalties for infringing dramatic literary property, *Planché v. Braham*, 8 C. & P. 68; 3 & 3 Will. IV. c. 15; *Cumberland v. Planché*, 1 Ad. & E. 580. See a form of declaration for selling, &c., pirated copies of a work, *Wright v. Tallis*, 1 C. B. 893; for pirating the form of a bust, *Gahagan v. Cooper*, 3 Camp. 112; 38 Geo. III. c. 71; 54 Geo. III. c. 56; 5 & 6 Vict. c. 100; 6 & 7 Vict. c. 65. For pirating a print contrary to 8 Geo. II. c. 13, s. 1; see 7 Geo. III. c. 38; 17 Geo. III. c. 57; *West v. Francis*, 5 B. & A. 737; *Brooks v. Cock*, 3 Ad. & E. 138; *Moore v. Clarke*, 9 M. & W. 622; see *Page v. Townsend*, 5 Sim. 305; *Martin v. Wright*, 6 Sim. 297; see 5 & 6 Vict. c. 65; 6 & 7 Vict. c. 65.

Plea.] The plea is usually the general issue, as in other actions on the case (see "CASE," and *post*, p. 843, as to what is put in issue thereby). Twelve months is the time limited for bringing the action.

In cases for infringement of copyright of a book, entitled "Evening Devotions, &c., from the German of C. J. Sturm," the defts. pleaded that Sturm had written religious works in the German language, which had been translated into English, and were much valued; that the plt. employed one H. to write the book mentioned in the declaration, and with intent to defraud and deceive the public, and to make them believe that the book was a translation of an original book written by Sturm, fraudulently published it as and for a translation of an original work written in German by Sturm; and that he published with the book a false and fraudulent preface, the object of which was to induce the public to believe that the work was really a translation of a work written by Sturm: held, on general demurrer, that the matters stated in the plea were sufficient to negative the existence of a valid copyright in the plt. and consequently to preclude him from maintaining any action for piracy (*Wright v. Tallis*, 1 C. B. 893; 9 Jur. 946; 14 Law J. 283, C. P.).

*By articles of agreement between A. and B., after reciting that A. had invented a parasol upon a new principle, it was agreed that [*840] B. should be permitted to manufacture it, and that if B. should, pending the agreement, manufacture parasols without making the stipulated

payments, or do anything whatever to prejudice A.'s right and title to the invention, he should pay A. 100*l.* as liquidated damages. In case for a breach of this agreement, the declaration alleged that A. was the proprietor of a new and original design for an article of manufacture, having reference to a purpose of utility, so far as the design was and is for the shape or configuration of such article, that is to say, of a new or original design for the shape or configuration of a parasol, for the purpose of opening and closing the same with one hand, and which design had not before or at the time of registration been published; that such design was duly registered according to the 6 & 7 Vict. c. 65; and that B. published a circular stating A.'s design to be an infringement of a patent previously granted to C. B. pleaded that A. was not, before or at the time of the registration, the inventor or proprietor of a new or original design for the shape or configuration of a parasol not published before or at the time of the said registration *modo et formâ*: held, that this plea did not raise the question whether or not the alleged invention of A. was the proper subject of a certificate of registration under the statutes 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65 (*Millengen v. Picken*, 1 C. B. 799).

In an action for the value of a copyright bargained and sold, a defence that it was not assigned in writing pursuant to 5 & 6 Vict. c. 45, s. 13, does not require to be specially pleaded (*Johnson v. Dodgson*, 2 M. & W. 657; see *Baltimore v. Hayes*, 6 M. & W. 456; *Leaf v. Tuten*, 10 M. & W. 397; *Da Pinna v. Polhill*, 8 C. & P. 78; but see *Barnett v. Glossop*, 1 Bing. N. C. 633; and see *Hining v. Trenay*, per Lord Denman, C. J., 8 Ad. & E. 935).

To a declaration for breach of a contract in not delivering an engraved plate to be published; plea, that there was no note of the agreement in writing in pursuance of the statutes 8 Geo. II. c. 13, and 17 Geo. III. c. 57, held bad, on special demurrer, for not containing an averment of all the facts necessary to bring the plate under the protection of these statutes (*Colnaghi v. Ward*, 6 Jur. 969, Q. B.).

See a plea to a declaration for pirating a print, that the date of the first publication was not engraven thereon, *Brooks v. Cock*, 3 Ad. & E. 138.

Def't. may, along with a plea denying the copyright, plead in denial that the plt. was the proprietor when the book was printed; secondly, that there was any subsisting copyright in the book; thirdly, that the book was not printed in the British dominions (*Chappel v. Purday*, 12 M. & W. 303; 13 Law J., N. S., Exch. 7). Upon an action by several plts. for piracy of a copyright, it appeared that def't. had published the work in question pursuant to the conditions of a cognovit given by him to one of the plts. and one P., in an action for not performing an agreement to write the work in question: held, a sufficient defence (*Sweet v. Archbold*, 10 Bing. 133; 3 Moo. & S. 299).

Precedents.

See the various forms in 2 Ch. Pl. 572; 8 Wentw. 420; 7 T. R. 518, 620. See precedent on 54 Geo. III. c. 156, 2 B. & C. 681.

**Evidence for Plaintiff.*

By 5 & 6 Vict. c. 45, s. 11, it is provided, that a book of registry for the proprietorship of copyrights, and the assignment thereof, shall be kept at Stationers' Hall, and a certified copy of the entries in such book, under the hand of the officer of the company, and impressed with their stamp, shall be *prima facie* proof of the proprietorship, or assignment of copyright, or license, as therein expressed, but subject to be rebutted by other evidence.

Sect. 13 provides for the form of the entry of proprietorship, and enacts, that "it shall be lawful for every such registered proprietor to assign his interest or any portion of his interest therein, by making entry in the said book of entry of such assignment, and of the name and place of abode of the assignor thereof, in the form given in the schedule, and such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subjected to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed."

A sheet of music is comprised in the term "book" within the 2nd sect. of 5 & 6 Vict. c. 45 (Ch. Pl. by Pearson, 531, n. (i)).

The assignment of copyright was required by the Copyright Act to be in writing, in order to entitle the assignor to maintain an action on the case for pirating it (Power v. Walker, 3 M. & S. 7; 4 Camp. 8; see Moore v. Walker, 4 Camp. 9, n.; Latour v. Bland, 2 Stark. 382).

An assignment of the copyright of a song, under stat. 8 Anne, c. 18, s. 1, in order to entitle the assignor to maintain an action for a piracy, was required to be by an instrument in writing, attested by two witnesses (Davidson v. Bohn, 18 Law J. 14, C. P.).

B. wrote words to an old air, and got his friend H. to compose an accompaniment, and B. agreed, in writing, with L. to execute a proper assignment of the whole work to him, or any persons he might name; B. accordingly executed an assignment to L. and C., the plts. The deft. published a copy of the whole work. An action having been brought for the infringement of the copyright, the deft. gave notice of objections to the plts.' title under the 5 & 6 Vict. c. 45, s. 16 (*post*, 844), in which he stated that the plts. were not the owners of the copyright, but did not state who were: held, that B. had the copyright in the whole work; that deft. was not entitled under this notice to object that no assignment of the accompaniment from H. to the plts. had been proved, even although the objection arose on the plts.' case, and that the agreement to sign was executory, and did not operate as an assignment so as to render the subsequent deed of assignment inoperative (Leader v. Purday, 18 Law J. 97, C. P.; 12 Jur. 109).

And, where an author published his work, and afterwards sold the right, but no agreement or consent in writing was entered into; in 1814 the assignee published the work, and, in 1818, B. infringed the copyright, and, in 1822, the author, by a proper assignment in writing, assigned to the assignee the exclusive right: it was held that the assignee did not, by the parol assent of the author in 1814, acquire the exclusive right of publishing the work, and that the author could not afterwards, in 1822, by making a valid assignment to the assignee, enable him to maintain an action against B. for selling a copy of the same work after such assignment was executed (Clementi v. Walker, 2 B. & C. 861; 4 D. & R. 598). A count for pirating generally will not be supported by evidence that there are in the original work errors and mistakes, with which the pirated *edition corres- [*842] ponds verbatim (Carey v. Kearsley, 4 Esp. 168). But it would support a count for transcribing particular matter without the plt.'s consent

(Ib.). It is lawful to incorporate parts of the works of a contemporary writer in a new work, provided it be not a pretext for stealing the original copyright (Ib.; see *Rosworth v. Wilkes*, 1 Camp. 94). The assignee of a print may maintain an action for pirating it, and his right will be established by producing one of the prints taken from the original engraving, the production of the plate itself not being deemed requisite; the date must also appear on the print (*Thompson v. Symonds*, 5 T. R. 41). In an action by the author of the work, it is necessary to establish his right by production of his own work, as well as the publication of the deft., in order to show, by comparing the two, the fact of piracy; and it will not be necessary for plt. to prove the entry of his work at Stationers' Hall (*Beckford v. Hood*, 7 T. R. 620); such entry only being necessary to be proved where the party proceeds for the penalty under 8 Anne (Ib. 627; *Tonson v. Collins*, 1 H. Bl. 330; see now 5 & 6 Vict. c. 45, p. 841). Nor is it incumbent upon the plt. to prove that his name was attached to the title-page of the work. So, where it appeared that the two editions of the work were published without the author's name prefixed to them, and the title-page of the third edition bore his name, and, after its publication, deft. printed it; held, that these facts were sufficient to entitle plt. to recover (*Beckford v. Hood*, 7 T. R. 620). And, though the work be not printed, but only in manuscript, yet will the plt. be entitled to recover damages for the infringement of it (*White v. Gerock*, 2 B. & A. 298; 1 Ch. Rep. 24). In an action for pirating a musical composition called A., the right of the author to maintain the action is well supported by showing him to be the author of a musical composition of that name, comprised in and occupying only one page of a work with a different title, which contained several other musical compositions (Ib.). The copyright in musical compositions is more extensively protected than the copyright in dramatic pieces (*Russell v. Smith*, 15 Sim. 181). The plt., who was a composer of music and a public singer, composed certain songs and published them with words, the copyright in which had been assigned to him. The plt. then performed the songs in public. An injunction was granted to restrain the deft., who was also a singer, from publicly performing, singing, or reciting the words or music of these compositions (*Russell v. Smith*, 15 Law J. 340, Ch.).

In action by the assignee of a copyright, upon an agreement for permission to publish, in which the declaration averred that the plt. was ready and willing, pursuant to the agreement, to deposit with a third person the deed of assignment, it was proved that the plt. offered to deposit the assignment, upon receiving an undertaking from that third person that he would not part with it until a certain event: held, a fatal variance, *Semble*, that letters offered in evidence to prove the terms of a contract ought to be stamped, though they purport to refer to an agreement previously made, to terms previously accepted. *Quære*, whether the license to publish a book, granted by the assignee of the copyright, is a sufficient consideration for a promise to pay money, unless the assignment of the copyright be registered, and the license be in writing (*Wood v. Cockerell*, 7 Law T. 469, Q. B.).

Upon motion for an injunction to restrain the sale of a periodical containing articles copied from the plts.' *Gazette*, it was held that the plts. had not made out such a title to the copyright in the articles as was required by the statute 5 & 6 Vict. c. 45, since it appeared that although the [*843] editor was paid for supplying the *articles and other contributions, upon the terms that all copyright in the *Gazette*, and in all literary matters supplied thereto, should belong to the plts., yet it was not stated that the contributors had been actually paid for their contributions. Injunction refused, with liberty to the plts. to bring an action. *Semble*, the

copyright in such articles is not vested in the publishers, under 5 & 6 Vict. c. 45, s. 18. *Quære*, whether, in order to vest the copyright, the publishers must have employed such persons beforehand (*Brown v. Cook*, 16 Law J. 141, Ch.; 11 Jur. 77).

In an action for penalties, on proof of distinct acts of sale, plt. may recover several penalties incurred on the same day (*Brooke v. Milliken*, 3 T. R. 509). Proof of having been seen correcting the manuscript of a work afterwards pirated is not sufficient evidence of being the author (*Stockdale v. Onwhyn*, 5 B. & C. 173; 7 D. & R. 625; 2 C. & P. 163). Evidence of the plt.'s having made additions and alterations in a work in which originally he had no interest, is sufficient evidence of his copyright to enable him to maintain an action (*Cary v. Longman*, 3 Esp. 273; 1 East, 358). In *Sayer v. Dicey*, it was held that the proprietor of a mezzotinto or other print, to entitle himself to the benefit of 8 Geo. II. c. 13, must engrave both his name and the day of the first publishing thereof on the plate, and print the same on the print (3 Wils. 63); but see *Roworth v. Wilkes*, 1 Camp. 98, where Lord Ellenborough observes, "Although the plt.'s name be not engraved upon the prints, if there has been a piracy, I think him entitled to recover." Proof that deft. had acted a piece on the stage, of which plt. had bought the copyright, is not evidence of a publication within the meaning of the 8 Anne, c. 19 (*Colman v. Wathen*, 3 T. R. 245). In maps more is necessary than that the maps appear the same (*Nichols v. Loder*, 2 Coop. 217).

Defences.] Not guilty, denies only the mere fact of the infringement of the copyright, but not that the book was not the subject of copyright property (*Milligen v. Picken*, 1 C. B. 799), either on the ground of its immoral or irreligious character, or, in the case of copyright in designs, that it was not the subject of a certificate of registration under the stat. (Ib.).

Evidence for Defendant.

By 5 & 6 Vict. c. 45, s. 24, no action can be maintained for the infringement of the copyright in any book which shall be first published after the passing of this act, unless the entry directed by sect. 11, *ante*, p. 841, to be made at Stationers' Hall, has been first made (see *Colburn v. Sims*, 2 Hare, 543). Sect. 16 of 5 & 6 Vict. c. 45, requires the deft. to give notice of the objections to the plt.'s title on which he means to rely.

Notice of Objections.] The 5 & 6 Vict. c. 45, s. 16, enacts, "that if the nature of the defence to an action for the infringement of copyright be, that the plt. was not the author or first publisher of the book in which he, by such action, claims copyright, or is not the proprietor of the copyright therein, or that some other person than the plt. was the author or first publisher of such book, or is the proprietor of the copyright therein, then the deft. shall, in the notice of objections to be delivered by him with his pleas, specify the name of the person who he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time *when, and the place where, such book was first published." *Semlle*, that this section [*844] is sufficiently complied with, by alleging a definite publication of the disputed work at some particular place, by some definite party, either

before, or simultaneously with, the publication by the plt., or with a publication in another place.

In an action for the infringement of copyright, two of the objections delivered by the deft. with his pleas, as required by 5 & 6 Vict. c. 45, s. 16, were, that the books in question were not first printed or published in the British dominions; and that there was no *valid* assignment of the copyright in the said books to the plt. from the original proprietors or their representatives: *Seemle*, that the first of these objections ought to be struck out, as too general; and that the word "valid" should be expunged from the second (*Boosey v. Purday*, 10 Jur. 1038, Ex.; 1 N. P. C. 383).

In an action on the case for an infringement of the copyright of a certain book, the deft. pleaded several pleas; denying that the plt. was the proprietor of the copyright; that there was any copyright subsisting; that the books were first published in England, and that the copies complained of were unlawfully printed: held, on application by the plt. to have the notice of objections delivered with the deft.'s pleas, under the 5 & 6 Vict. c. 45, s. 16, amended, that the alleged first publication having taken place abroad, and so far back as the year 1831, it was sufficient for the deft. to state the year of the first publication, and that it was not necessary that he should specify the day or month. But he was bound to state the name of the party whom he alleged to be the proprietor or first publisher, the title of the book, the place where, and the time when, the first publication took place: held also, that he was not entitled to object that "some person, whose name is to the deft. unknown, and not the plt., was the proprietor of the said copyright;" nor "that the plt. was not himself the author;" nor "that the work was not first printed or published in the British dominions;" nor "that the plt. never acquired any title, by assignment or otherwise," to the copyright; nor that there was no "valid assignment;" nor "that there was no copyright in a work first published out of the British dominions, under such circumstances as the books in question were published;" but that he might object that A. B. if any one, and not the plt., was the proprietor, and that at the time of committing the alleged grievances, "no copyright" in the work "was subsisting" (*Boosey v. Davidson*, 4 D. & L. 147, Q. B.).

In answer to plt.'s proofs, deft. may show that the work was of an immoral tendency; and it will be no answer to the objection that the deft. is also a wrong-doer in publishing it, and therefore cannot set up its immorality (*Stockdale v. Onwhyn*, 5 B. & C. 173; 7 D. & R. 625; 2 C. & P. 163). And, in an action against him by an assignee, he may show the assignment to be invalid, as not being in writing (*Power v. Walker*, 3 M. & S. 7; 4 Camp. 8); or, in an action against him by the author, he may give in evidence a declaration by him that he had parted with his copyright, when the law will presume a valid assignment (*Moore v. Walker*, 4 Camp. 9, n.). But evidence that the plt. acquiesced in the publication by the deft. six years previous, will not be proof of an assignment (*Latour v. Bland*, 2 Stark. 382); nor will proof of a receipt given by the plt. for money received by him as the price of his copyright (*ib.*). It will be no defence for the deft. that plt. had improperly obtained the copy in the first instance (*Cary v. Kearsley*, 4 Esp. 168).

No action for the piracy of a print can be sustained unless the date of the first publication was engraved on the plate, according to 8 Geo. II. c. 13, s.

1 (*Brooks v. Cock*, 3 Ad. & E. 138; *Colnaghi v. Ward*, *6 Jur. [*845] 969; 12 Law J. 1, Q. B.). The plt., H. G. B., had become entitled to the entire copyright of "Illustrations of the Life of L. de M." The deft., D. B. commenced a certain publication, called "The European Library," the first volume whereof was entitled, "A Life of L. de

M." several passages of which were admitted by the deft. to have been copied from the "Illustrations:" held, that the deft. having materially lessened the price of the original work by knowingly taking a material valuable part of it, this was sufficient to constitute a piracy from the "Illustrations," notwithstanding the passages copied were stated to be quotations, and were not so many nor extensive as to make the work so pirated a substitution for the original one (*Bohn v. Bogue*, 2 R. Prop. & Conv. Cases, 187).

An *alien amy*, author of a work first published in England, has a copyright in it, whether composed in this country or abroad (*Cocks v. Purday*, 12 Jur. 677; 17 Law J. 273, C. P.).

The proprietor of an encyclopædia, who employs a person to write an article for publication in that work, cannot, without the writer's consent, publish the article in a separate form or otherwise than in the encyclopædia, unless the article was written on the terms that the copyright therein should belong to the proprietor of the encyclopædia for all purposes (*Hereford (Bishop of) v. Griffin*, 16 Sim. 190; 12 Jur. 255; 17 Law J. 210, Ch.).

The publication of a book of designs by the owner of the copyright, under the 5 & 6 Vict. c. 100, does not give any right to the purchaser of such book to apply the designs to articles for the purpose of sale without the permission of the proprietor (*Branchardière v. Elvery*, 18 Law J. 381, Exch.).

The copies of newly registered designs published in a book for sale need not have any registration mark attached to them (lb.).

CORPORATION.(a)

Form of Remedy, p. 845.

Actions against, p. 845.

Actions by, p. 847.

Evidence, p. 851.

Form of Remedy.

Actions against.] Replevin does not lie against a corporation aggregate, as they cannot distrain in their own persons, but by their bailiff (*Bac. Ab. Corporations*, E. 2; *Brownl.* 175). An indictment will lie against a corporation aggregate for a misfeasance (*Reg. v. The Great North of England Railway Company*, 10 Jur. 755, Q. B.; 7 Law T. 468). But case lies, as for not repairing a sea-bank (*Lyme Regis v. Henley*, 3 B. & Ad. 77; 5 Bing. 91; 3 Moo. & P. 278); or cleansing a creek (*Lynn v. Turner*, *Cowp.* 86); or for a false return (*Argent v. Dean and Chapter of St. Paul's*, 16 East, 8; per *Twisden, J.*, *Dr. Witherington's case*, 1 Keb. 68, pl. 39).

In *Yarborough v. England (Bank of)*, Lord Ellenborough observed, "The instances of actions against corporations for false returns to writs of mandamus directed to them must be numerous" (16 East, 9). So, trespass lies for an act done by their agent within the scope of his authority (*Maund v. Monmouth-*

(a) See 1 U. S. Dig. Tit. "Corporation," p. 582; 1 Supp. U. S. Dig. p. 421; 1 Ann. Dig. p. 133; 2 Id. p. 74; 3 Id. p. 105.

shire Canal Company, 4 M. & G. 452; 2 Dowl. N. S. 113; 1 Car. & M. 606). So, they may be defts. in an action of *quare impedit*, and the hindrance is an act of tort (Butler v. Hereford (Bishop of) and University of Cambridge, Barnes, 350); or of ejectment (see Wood v. Tate, 2 Sco. N. R. 247). So, trover lies for the act of their agent, and it does not seem necessary that the act, if it be within the scope of his employment, should be authorized under seal (Yarborough v. England (Bank of), 16 East, 6); and, if it should be necessary, such authority will be presumed after verdict (Ib.); or on general demurrer (Tilson v. Warwick Gas-light Company, 4 B. & C. 962); and so, though it should appear before verdict that the appointment is not under seal, yet they are liable if the act be an ordinary service, such as a distress under a statute for debt due to them (Smith v. Birmingham Gas Company, 1 Ad. & E. 526; 3 Nev. & M. 771). A canal company, incorporated by act of parliament, may appoint an agent for the purpose of creating or determining a tenancy-at-will, without an instrument under seal (Doe d. Birmingham Canal Company v. Bowl, 10 Law T. 184, Q. B.; see *infra*). In Duncan v. Surrey Canal Company (3 Stark. 50), it was ruled that they would be liable for a *conversion by their agent, acting [*846] under the direction of a committee appointed for managing the affairs of the company. So, debt lies for the price of weights and measures supplied to a corporation by order of the mayor, and examined at a meeting of the corporate body (De Grave v. Monmouth (Mayor of), 4 C. & P. 111, per Tenterden, C. J.); or for a pecuniary benefit granted by a by-law to each of the twelve senior burgesses for the time being of a town (Hopkins v. Swansea (Mayor of), 4 M. & W. 621, affirmed in error, 8 M. & W. 901). Whether assumpsit lies by or against a corporation aggregate, and under what circumstances, is a question which has been much discussed of late years. At one time, "the court clearly agreed, that unless the (local) act which authorized the making of promissory notes, *eo nomine*, by a corporation, *ex vi termini* impliedly empowered the corporation to make a promise," assumpsit would not lie (Stark v. Highgate Archway Company, 5 Taunt. 792). Subsequently it was decided that assumpsit lay on a bill of exchange against a corporation whose power to draw and accept was recognised by statute (Murray v. East India Company, 5 B. & A. 204; Broughton v. Manchester Waterworks, 3 B. & A. 1); and so in the case of Promissory notes (3 & 4 Anne, c. 9). But, except where the contracts appear sanctioned by legislative enactments (6 Vin. Abr. 317, pl. 49); or, "are of daily necessity to the corporation, or too insignificant to be worth the trouble of affixing the common seal;" or of such immediate urgency, that "it would be impossible to wait for the formality of" affixing it, or they are already executed, or the corporation has a head, they must, in order to be valid, be under the corporation seal (per Best, C. J., in East London Waterworks Company v. Bailey, 4 Bing. 283; see 7 Jur. 653, 654; 8 Jur. 909). But this doctrine seems to be only applicable to trading and not to municipal corporations, which are only empowered to do small acts, as retaining a servant, &c., unless under their seal (see Ludlow (Mayor of) v. Charlton, 6 M. & W. 820; Arnold v. Poole (Mayor of), *infra*), even though the contract be executed (Ib.). An agreement with a water company to supply a certain number of iron pipes at stated periods, pursuant to certain proposals issued by the plts. and accepted by the defts. (East London Waterworks Company v. Bailey, 4 Bing. 283); the retainer of an attorney by a municipal corporation (Arnold v. Poole (Mayor of), 4 M. & G. 860; 7 Jur. 653; D. N. S. 396); an agreement by them to give an increase of salary as a compensation for the loss of an office (Reg. v. Mayor of Stamford, 8 Jur. 909); or to pay money for making improvements within the borough (Lud-

low (Mayor of) v. Charlton, 6 M. & W. 815; 4 Jur. 637), although the contract be executed (Ib.; and see Arnold v. Poole (Mayor of), *supra*), do not come within any of the above exceptions, and therefore must be under the common seal.

Assumpsit lies against a gas-light company for gas metres sold and delivered to them (Beverly v. Lincoln Gas-light Company, 6 Ad. & E. 829; 3 Nev. & P. 283); or by such a company for gas supplied (London Gas-light Company v. Nicholls, 2 C. & P. 365); or for refusing to accept gas according to contract (Church v. Imperial Gas-light Company, 6 Ad. & E. 846; 3 Nev. & P. 35), these being contracts of such daily and frequent occurrence as may be made by parol (Ib.), though it was doubted whether such companies could contract otherwise than under seal (Dunstan v. Imperial Gas Company, 3 B. & Ad. 125). From the necessity of the case, because the plt. would be otherwise without remedy, and in analogy to the principle which renders corporations capable of being sued in trover, it has been lately held that *indebitatus assumpsit* lies for money wrongfully received by them (Hall v. Swansea (Mayor of), 5 Q. B. 526; 1 D. & M. 475; 8 Jur. 213, Q. B.). It would seem that if a corporation [*847] sue upon an executory contract before execution, they could not object, on a cross action by the deft. that the contract was not under seal (see Fishmongers' Company v. Robertson, 8 M. & G. 131). *Quere.* whether municipal corporations can contract new debts (see 5 & 6 Will. IV. c. 76; Reg. v. Lichfield, 4 Q. B. 905; Attorney-General v. Lichfield, 13 Sim. 549).

If persons who do not form a corporation, as churchwardens and overseers, and therefore cannot bind their successors, covenant for themselves and their successors, churchwardens and overseers, with a proviso that nothing, &c., shall be construed to extend to a personal covenant, or to affect them in their private capacity, yet they will be personally liable (Furnival v. Coombes, 6 Sco. N. R. 522; 7 Jur. 399).

The guardians of a union, who are, by stats. 5 & 6 Will. IV. c. 69, s. 7, and 5 & 6 Vict. c. 27, s. 16, a corporate body, by direction of the Poor-law Commissioners, under 6 & 7 Will. IV. c. 96, s. 3, entered into an agreement, under seal, with plt. for making a survey and map of one of the parishes comprised in the union. A reduced plan being also required, a verbal order for it was given to the plt. In *assumpsit* for the price of the reduced plan, held, that this was not a contract incident to the purposes for which the guardians were incorporated, and therefore not within the exceptions to the general rule, requiring contracts by a corporation to be made under seal. Admitted, that plt. was not entitled to compensation for attendance as a witness at sessions, on appeal against a rate made upon his valuation (Paine v. The Guardians of the Strand Union, 10 Jur. 308; 15 L. J. 89, M. C.).

If work be done for a corporation, for purposes connected with the corporation, under a verbal order, and accepted and adopted by them, they cannot, in an action to recover the price, object that no order was given under seal (Sanders v. The Guardians of St. Neot's Union, 8 Q. B. 810; 15 Law J. 225, Q. B.; 1 New Mag. Ca. 531).

Actions by.] Though, unless under some one of the exceptions noticed, *ante*, p. 846, a corporation aggregate cannot sue or be sued on an express parol promise; yet it may sue on a promise implied by law, as where the consideration has been already executed (per Best, C. J., 4 Bing. 77); or, in other words, where the parties to the contract "*have received* the benefit of the consideration moving from the corporation" (per Tindal, C. J., 5 M. &

G. 192); as the doctrine as to "the mutuality of contracts applies only in those cases where the want of it would have the effect of depriving either party of a valid consideration for his promise" (per Tindal, C. J., in *Arnold v. Pool* (Mayor of), 7 Jur. 653; *ante*, p. 846; *Ludlow* (Mayor of) v. *Charlton*, *ante*, p. 846). A corporation may have debt for the use and occupation of land (*Rochester* (Dean and Chapter of) v. *Pierce*, 1 Camp. 466; 5 B. & A. 204); or *assumpsit* (*Stafford* (Mayor of) v. *Till*, 4 Bing. 75); or for the use and occupation of tolls (*London* (Mayor of) v. *Hunt*, 3 Lev. 37; *Cardmarthen* (Mayor of) v. *Lewis*, 6 C. & P. 608); or for a penalty forfeited under a by-law (*Barber Surgeons of London* v. *Pelson*, 2 Lev. 252); or for the breach of a contract respecting the passing of a bill through parliament, they having done all that was agreed to be done by them, and the defts. having received the whole benefit of the consideration for which he bargained (*Fishmongers' Company* v. *Robertson*, 5 M. & G. 131; 6 Sco. N. R. [*848] 56); but *semble*, that till they *performed the stipulations on their part, there was a want of mutuality from their not being compellable to perform the contract, and the defts. might treat it as a *nudum pactum*, and retract (*Ib.*; see effect of their putting it in suit, *Ib.*). A trading corporation may have *assumpsit*, as for gas supplied (*London Gas-light Company* v. *Nichols*, 2 C. & P. 365); or for refusing to accept gas according to contract (*Church* v. *Imperial Gas-light Company*, 6 Ad. & E. 846; 3 Nev. & P. 35; see *ante*, p. 847). A foreign corporation may sue here in *assumpsit*, debt, or otherwise, in their corporate name (*St. Charles* (National Bank of) v. *De Bernales*, R. & M. 190; 1 C. & P. 569; *Dutch West India Company* v. *Moyses*, 1 Stra. 612; 2 Ld. Raym. 1535).

Form of Pleadings.

A corporation must in all legal proceedings be described by their corporate name (*R. v. Patrick*, 1 Leach, 253). A mistake in the corporate name must be pleaded in abatement (*Stafford* (Mayor of) v. *Bolton*, 1 B. & P. 40). A corporation may obtain a name by reputation, and sue, and be sued in it (*Queen's College*, Oxford, 11 Co. 19, 20, 21; Hob. 122, 124; *Dutch West India Company* v. *Moyses*, 1 Stra. 612; 2 Ld. Raym. 1532). A corporation by prescription may have more than one corporate name (*Shrewsbury* v. *Hart*, 1 C. & P. 113, per *Hullock*); and where such a corporation sued in their modern name, on a covenant for quiet enjoyment, averring that it was made with them under a certain other name, by which they had been then known, the indenture was held evidence against the defts. who claimed under the grantor that the corporation was known by that name at the time upon an issue taken on that fact (*Carlisle* v. *Blamire*, 8 East, 487). Where a corporation declare in the name by which they are incorporated by a public act of parliament, the court are bound even after verdict to notice that they are a corporation (*Church* v. *Imperial Gas-light Company*, 3 Nev. & P. 35). It is not a variance to describe a corporation as "The Mayor, &c., of the borough town of M.," when the name in the charter is "The Mayor, &c., of M.," if it appear from the charter that it is a borough town (*Doe* d. *Malden* v. *Miller*, 1 B. & A. 699), or to describe the plts. as "The National Bank of St. Charles," the name in the charter being "The Bank of St. Charles," if it is in fact a national one (*St. Charles* v. *De Bernales*, R. & M. 190; 1 C. & P. 569, per *Abbott*, C. J.; see a material mistake in the corporate name, *R. v. Croke*, Cowp. 29, and immaterial ones, *Croyland Hospital* v. *Farley*, 6 Taunt. 467; 2 Marsh. 174; *Attorney-General* v. *Rye*, 7 Taunt. 546; 1 Moo. 267). The style of each municipal corporate body is now "The Mayor, Alderman, and Burgesses," 5 & 6 Will. IV. c. 76, s. 6). This act does not create new corporations (*Ludlow* v. *Tyler*, 7 C. & P. 537). The

present corporations are but a continuance of the old ones (Attorney-General v. Kerr, 2 Beav. 420; and see Ludlow v. Charlton, 9 C. & P. 242). A revived corporation remains the same, as to debts and rights, as the old one, and so may maintain an action on a bond given to the old corporation (Colchester v. Seaber, 3 Burr. 1782; see Colchester (Mayor) v. Brooke, 10 Jur. 610, Q. B.; Com. Dig. Biens, C.; Bac. Abr. Corp. E. 4); and its right will be the same, even though its revived name be different (Haddock's case, T. Raym. 439). Where it appears from the different clauses of several local acts of parliament, that the conservators of a river navigation, if not created a corporation by express words are so at least by implication, they may sue in their corporate name (Tone *Conservators v. Ash, 10 B. & P. 349; Bridgewater Canal Company v. Blewett, ib. 393). As to [*849] describing incorporated companies, see 1 Leach, 513; R. v. Harrison, 8 T. R. 508; and *post*, p. 850.

Where churchwardens and overseers sue in respect of rights held by them in their *quasi* corporate character, created by the 59 Geo. III. c. 12, s. 17, they must describe themselves by their christian and surnames, and allege that they are suing as churchwardens and overseers, and cannot waive that character and sue in their personal capacity (Ward v. Clarke, 1 D. & L. 1027).

Where a corporation make a by-law that fines shall be recoverable by their head or any other particular person, he only can sue (Feltmakers (Company of) v. Davis, 1 B. & P. 98). The Chamberlain of London sues for the corporation (The Chamberlain of London's case, 5 Co. 63; and see Nollings v. Hungerford, cited 1 Wils. 235).

Where a corporation brings an action for any due, it is sufficient to state, in a *declaration*, though it would be otherwise in a plea, that it is an ancient borough, and that the burgesses thereof, and for divers years, have been a body politic, in the name of the mayor, &c., without setting out the name of incorporation, or any title to the duty; for, the declaration being founded upon their possession, there is no necessity to state a title to the thing (1 Saund. 340, n.); Owen, 109). In an action of any kind brought by a corporation, English or foreign, it is unnecessary to show how they were incorporated (Norris v. Staps, Hob. 211; Dutch West India Company v. Moyses, 2 Ld. Raym. 1535; 1 Stra. 612; Bac. Abr. Corp. E, 2). But in a plea justifying a trespass committed in the assertion of a franchise or privilege of a corporation, it is necessary to show not only the existence of the corporation, but the manner in which it claims to be so (Bac. Abr. *supra*; Pitts v. Gauce, 1 Ld. Raym. 558). If they do not, in declaring on a contract, allege it to be under seal, it will be presumed, on general demurrer, not to be so (Fishmongers' Company v. Robertson, 5 M. & G. 131).

In case against a corporation for not cleansing a creek into which the sea flowed and reflowed, it was held enough to say "as from time immemorial they had been used," without alleging that they were bound, &c., by tenure, or otherwise, for it might have been the very condition of that incorporation (Lynn v. Turner, Cowp. 86).

A plea by a corporation aggregate, which is incapable of a personal appearance, must purport to be by attorney, appointed under the common seal (Bro. Abr. Corp. 28; Co. Lit. 2, B, 2; Com. Dig. Franchise, F. 19).

A corporation will not be let in to defend an ejectment without entering into the common consent rule to confess themselves in possession (Doe d Par v. Roe, 1 Q. B., 700; 1 Gal. & Dav. 220; 6 Jur. 101). When they sue, the demise must be stated to be by deed, but it need not be proved, as the consent rule admits it (Furley v. Wood, 1 Esp. 198). When they are tenants, the demandant must proceed against them and serve the notice of ejectment

on their officers : or he may proceed against an under-tenant of theirs who is in actual occupation, but he must not proceed against their officers : as, where a corporation had held lands from the Earl of Carlisle, and the rent had been always paid by the bailiffs or head officers, and he, wishing to eject the corporation, served a notice of ejectment on the bailiffs *pro tem.*, and proceeded against them, it was held that he could not maintain it by proof of payment of rent by their annual predecessors in office, for the bailiffs not being a corporation of themselves, and therefore, having no succession, could not be affected by *the acts of their predecessors, there being no privity in law [*850] between them (*Doe d. Carlisle v. Woodman*, 8 East, 228).

It has been determined that the mayor of a corporation, who on the sale of certain lands by auction, of which the corporation were the vendors, signed a contract on behalf of himself and the corporation with the purchaser, for the due performance of the conditions of sale, could not, in his individual capacity, maintain an action against such purchaser for a breach of his contract (*Bowen v. Morris*, 2 Taunt. 374, 387). The members of a corporation are not liable individually for acts done in their corporate capacities, without at least proof of malice (*Harman v. Tappenden*, 1 East, 555).

By-laws—Charter.] See these heads *ante*, pp. 83, 778.

Evidence.

The evidence generally applicable to each form of action, will be found under the the different heads throughout this volume. The following points may be noticed here :—

In actions against Corporations.] In trespass for the act of their agent, it is not necessary to show his appointment under the common seal (*Maund v. Monmouthshire Canal Company*, 2 Dowl. N. S. 113 ; 6 Jur. 932). So, also in trover ; and general evidence of his having acted as their agent, and done similar acts on other occasions will be sufficient (*Smith v. Birmingham Gas-light Company*, 3 Nev. & M. 771 ; 1 Ad. & E. 526). The jury may infer his agency from the adoption of his act by the corporation (*Ib.*). After verdict it will be presumed if necessary that he was appointed under seal (*Yarborough v. England (Bank of)*, 16 East. 6).

In Actions by Corporations.] Before the new pleading rules the plts. were bound, on the general issue being pleaded, to prove that they were a corporation (*Norris v. Staps*, Hob. 211 ; *Dutch West India Company v. Moyses*, 2 Ld. Raym. 1535 ; 1 Stra. 612) ; and if a trifling variance appeared between the name in the declaration and the name proved, the question of identity was left to the jury : as, where a Spanish company declared as “The National Bank of St. Charles,” and the king of Spain gave them the name of “The Bank of St. Charles,” but made them a national bank, and the deft. had addressed them as “The National Bank of St. Charles ;” Abbott, C. J., left it to the jury to say whether “this *was* the same bank that was incorporated by the King of Spain,” and they answered the question in the affirmative (*St. Charles (National Bank of) v. De Bernales*, 1 C. & P. 569 ; R. & M. 190). Very slight evidence of incorporation was sufficient : as, where The Company of Carpenters, Brickmakers, Bricklayers, Plasterers, &c., of Shrewsbury *v. Hayward*, brought an action against one for a breach of one of its customs, and there was no evidence of a common seal, nor of any corporate parol act done by it, nor of any admission into the corporate body, but merely of admissions into the company of carpenters, the company of brick-

layers, &c., of fines paid for working in those trades without being free of the Carpenters' Company, the Bricklayers' Company, &c., and the testimony of one witness (twenty-four years of age) who said that he had been employed to call meetings of the company and that they were called by the above aggregate name, and the jury found that there was such a company, the court refused to disturb the verdict (Doug. 371). The fact *that a town is mentioned in schedule A., of the Municipal Reform Act as a "Borough," and the borougholders and freemen in connection with it, as the [*851] "corporate body," is *prima facie*, but not conclusive evidence of the existence of a municipal corporation there before the statute (R. v. Greene, 1 Nev. & P. 631; 6 Ad. & E. 548; see also as to variance, *ante*).

In ejectment, payment of rent to the bailiffs or head officers of the corporation, by a person holding under a void lease as tenant to the corporation, is sufficient to prove a tenancy from year to year (Wood v. Tate, 2 N. R. 247); and parol notice to quit by the steward is said to be enough without showing an authority under seal (Doe v. Pierce, 2 Camp. 96; and see Smith v. Birmingham Gas Company, 1 Ad. & E. 531; see Doe d. Birmingham Canal v. Bowl, *ante*, p. 846).

Proof by Corporation Books.] As between the members of a corporation, the production of their books is sufficient to establish the plt.'s right to maintain an action (London (Mayor of) v. Lynn (Mayor of), 1 H. Bl. 214); but this will not be admissible as evidence against a stranger (Ib.; Marriage v. Lawrence, 3 B. & A. 142; see *ante*, "Books"); except, perhaps, where it may be received by consent of the parties (Hull v. Homer, Cowp. 102); and, on a question of public right, the books of a corporation are always admissible (Gibbon's case, How. St. Tr. 810, 854). If corporation books have been publicly kept as such, and the entries made by the proper officer, or by a third person acting for him, in case of absence or sickness, they may be given in evidence (R. v. Mothersell, 1 Stra. 92); but a book kept by the prosecutor's clerk, who was not an officer of the corporation, containing minutes of corporate proceedings, but which had not been kept as a public book of the corporation, was rejected in evidence (Ib.). Where the books are ancient; it must be shown that they come from the proper custody, as from a chest which has always been in the custody of the clerk of the corporation (Shrewsbury (Mercers of) v. Hart, 1 C. & P. 114); and it is insufficient if they are produced from a chest found in the house of a former clerk, after his death (Ib.). Where, in order to prove a person freeman of Evesham, a copy, upon a two-shilling stamp, was produced, of a loose paper upon a file, which the witness said was also on a two-shilling stamp, and it appeared that there was a book in which the acts of the corporation were kept, and where there was an entry more at large of the freeman's admission, and which was made when the freeman was originally admitted, but this was not on a stamp in the book, it was held by Noel, J., that the loose paper, being the only effectual act, as having that which the law requires, *viz.*, the proper stamp, must be looked upon as the proper and original act of the corporation, and that a copy of it was good evidence (R. v. Head, Pea. 92, n.). Corporation books may be proved by examined copies (Brocas v. London (Mayor, &c., of), 1 Stra. 308); but a copy of a letter fifty years old and found in one of the corporation chests, as not being a corporate act, is not evidence, but the original ought to be produced (R. v. Gwyn, ib. 401).

Deed and Seal—Effect and Proof of.] The execution of a deed by a corporation is proved by showing that the seal on it is the seal of the corporation. It is not necessary to call a witness who saw it affixed; any wit-

ness will do who is acquainted with it (*Moises v. Thornton*, 8 T. R. 307); and even if a witness were to attest the affixing of it, it is doubtful whether he should be called (*Doe d. England (Bank of) v. Chambers*, 4 [*852] Ad. & E. 410). For this reason, *as the seal of corporations, being of a permanent character, may be proved at any distance of time from the date of the instrument, by a person acquainted with it, it would seem to be necessary to prove that the seal to a corporation deed more than thirty years old is the proper one, and that it does not, like other deeds in the same circumstances, prove itself (*R. v. Bathwick*, 2 B. & Ad. 639 (this point is a *quære*)). The seal of the corporation of London has been held to prove itself (*Doe v. Mason*, 10 Esp. 53). The seal of the Apothecaries' Company (*Chadwick v. Bunning*, R. & M. 306), and *semble* of the Bank of England (*Doe v. Chambers*, *supra*), must be proved.

If the seal is affixed by a stranger, the indenture is not the deed of the corporation (*Anon.* 12 Mod. 423). So it is invalid if the seal be affixed without proper authority (*R. v. Haughley*, 4 B. & Ad. 650). Affixing the common seal is tantamount to delivery (*Com. Dig. Fait, A, 3*), and passes an estate without a formal delivery, if done with that intent; but *secus* if the order for affixing it be accompanied with a direction to their clerk to retain the deed till certain accounts are adjusted, and he parts with it before they are adjusted (*Derby Canal Company v. Wilmot*, 9 East, 360). On *non est factum* pleaded by a corporation, they may show, after the plt. has proved the affixing of the seal by the proper officer, that several of the requisitions of the act of parliament under which they are constituted, necessary to give validity to the execution, have not been complied with (*Hill v. Manchester Waterworks Company*, 2 Nev. & M. 373; 5 B. & Ad. 866); but they will be held to give strict proof of the non-compliance, as the court will not presume against the due execution (*Clarke v. Imperial Gas Company*, 1 Nev. & M. 206; 4 B. & Ad. 315; see *Fairtitle v. Gilbert*, 2 T. R. 169; *Doe v. Horne*, 3 Q. B. 757).

Where the corporate name was "the bailiffs and burgesses," and a lease purporting to be executed by the bailiffs and some of the aldermen with the assent of the burgesses, was sealed with their individual seals instead of the corporate one, the lease was held void, but payment of rent to the bailiffs by the lessee, as tenant to the corporation, was held sufficient to show a tenancy from year to year (*Wood v. Tate*, 2 N. R. 247).

Competency of Witnesses.] Formerly, a member of a corporation was incompetent, on the ground of interest, as a witness in questions relating to the corporation (*Stevenson v. Nevins*, 2 Ld. Raym. 1350; *Burton v. Hinch*, 5 T. R. 174), unless the interest was inconsiderable (*R. v. London (Mayor of)*, 2 Lev. 231; *R. v. Carpenter*, 2 Show. 47; 1 Vent. 351; *Weller v. Governor of Foundling Hospital*, Pea. 153). But this was questioned by *Buller, J.*, B. N. P. 290. The witness's competency might be restored by his resignation (even by parol), if it had been accepted and acted on (2 Salk. 432), or by disfranchisement (1 P. Wms. 595; 11 Mod. 225). A release would not do (*Godmanchester v. Phillips*, 4 Ad. & E. 550; *Rigby v. Walthen*, 5 Dowl. P. C. 527). But all objections of this kind are removed by Lord Denman's Act, 6 & 7 Vict. c. 85, which see *post*, "WITNESS".

An act of parliament incorporating a railway company gave power to the directors "to appoint and displace any of the officers of the company, and to enter into contracts and other matters necessary for the transaction of its affairs:" held, that the appointment of an attorney to the company need not be under their corporate seal (*Reg. v. Cumberland (Justices)*, 12 Jur. 1025; 17 Law J. 102, Q. B.).

Deft. had occupied land from 1824 to 1831, upon demand of possession by the secretary of a canal company incorporated by act of Parliament, deft. said that the preceding secretary had told him to take possession of the land : held, first, that a valid authority to the secretary to create the tenancy in 1824, and to determine it in 1831, might be inferred, though there was no direct evidence of authority under seal (*Doe d. Birmingham Canal Company v. Bold*, 12 Jur. 350, Q. B.).

An attorney authorized to appear for a party to a suit, has, incidentally, authority to refer it, without any fresh authority to that effect ; and the attorney having appeared for a corporation in an action, to the knowledge of the directors, the corporation was bound by his acts as their attorney, though he was not authorized to appear by any authority under seal (*Favell v. Eastern Counties Railway Company*, 17 Law J. 297, Exch.).

A joint stock company completely registered under 7 & 8 Vict. c. 110, is only a corporation for some purposes, and therefore may, in certain cases, be bound by contracts not under seal (*Ridley v. Plymouth Grinding Company ; Knightsbridge Flour Mill Company v. Plymouth Grinding Company*, 12 Jur. 542 ; 2 Exch. 711).

*COVENANT.(a)

[*853]

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(a) See 1 U. S. Dig. Tit. "Covenant," p. 674 ; 1 Supp. U. S. Dig. p. 474 ; 1 Ann. Dig. p. 133 ; 2 Id. p. 85 ; 3 Id. p. 118.

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Evidence for Defendant, p. 874.

Nature of Remedy, and when it lies.

An action of covenant is of a technical nature (5 B. & C. 602), and enables parties to recover damages for the breach of covenants or engagements under seal, whether in deeds-poll or in indentures (B. N. P. 156; Salk. 197), as in indentures of apprenticeship (1 B. & C. 460); or deeds of conveyance (ib.); of separate maintenance (2 B. & C. 547; 4 D. & R. 11); of good title (1 B. & C. 13; 3 D. & R. 195; 2 Saund. 175, 178, 181); of charter-parties of affreightment (6 Moo. 415; 3 East, 233; 1 N. R. 104); on policies of assurance under *seal, against fire, &c. 6 T. R. [*854] 710; 2 Marsh. 601, n. (a); 6 Moo. 199; see "INSURANCE"; on articles of agreement under seal (5 B. & C. 41; 7 B. & R. 800). But in practice it occurs more frequently on leases (see *post*, "LEASE," "LANDLORD AND TENANT").

No action lies on a covenant by C. to pay a sum of money to A. B. and himself, C., or the survivor or survivors of them, on their joint account (*Fawlkner v. Lowe*, 4 Exch. 598).

Where a sum of money is secured by deed, and a balance is struck for the purpose of ascertaining how much is due thereon, and the obligor admits the correctness of the account and promises to pay it, debt on simple contract or an account stated will not lie, but the action must be brought on the specialty (*Middleditch v. Ellis*, 2 Exch. 623).

On implied Covenants.] It lies as well on covenants implied from the terms of the deed, as on those which are express: thus, it will lie by the lessee against the lessor, upon the word *demise* in the lease; as that word imports a covenant in law on the part of the lessor, that he has good title, and that the lessee shall quietly enjoy during the term (*Spencer's case*, 5 Rep 17): and, therefore, if the lessee be ousted during the term, an action of covenant will lie (per *Littledale, J.*, 5 B. & C. 609; 8 D. & R. 368); or if he be only put to the expense of procuring a better title for the term, the lessor not having had power to demise for the whole term (*Frazer v. Skey*, 2 Chit. Rep. 646).

If a party demise *reddendo* rent, that word implies a covenant to pay rent (Com. Dig. Cov. A, 4; 1 Roll. Abr. 419, 625; *Persons v. Jones*, 2 Roll. R. 399). Though the word demise implies a covenant for title and quiet enjoyment, yet both branches of such implied covenants are restrained by an express covenant for quiet enjoyment (*Line v. Stephenson*, 5 Bing. N. C. 183; 4 ib. 678; 7 Sc. 69; 6 ib. 447); and so, though the word grant implies a like covenant (*Coleman v. Sherwin*, Carth. 98; *Baber v. Harris*,

9 Ad. & E. 532), yet an absolute covenant for title can be implied from words of grant where there is an express qualified covenant on the face of the deed (*Stannard v. Forbes*, 6 Ad. & E. 572; 1 Nev. & P. 633; *post*, p. 855). By the 7 & 8 Vict. 76, s. 6, the words "grant" or "exchange" shall not henceforth create any warranty or right of re-entry or covenant by implication.

A distinction has been recently taken between what ought properly to be designated covenants in law, implied covenants, and express covenants. And a covenant in law has been defined to be, properly speaking, an agreement which the law infers from the use of certain words of grant having a known legal operative force, as the word *dedi* in a feoffment, or *remisi* in a lease. Whereas an implied covenant, in its proper legal sense, is a covenant not formally stated in a deed, but which is collected by constructive inference from the terms used in it, and in its proper sense should not be distinguished in its effects or legal consequence from an express covenant. Where a tenant for life with a leasing power made a lease for ninety-nine years, if three persons named therein should so long live, and covenanted for himself, his heirs and assigns, to warrant and defend the demised premises to the lessee, and the lessee was afterwards evicted by the remainderman, on the ground that the lease was not made with a due observance of the leasing power, it was held that this was an express covenant for title, and that, therefore, the executors of the lessor were liable in covenant to the lessee; and so, in the case of another lease, made under the same circumstances to another person, the executors of the assignee of the lessee were liable (*Williams v. Burrell*, 1 C. B. 402; 9 Jur. 282). Had it been only a covenant in law it would have extended to the continuance of the interest which passed by law under the demise, *i. e.* during the lessors life only (*Ib.*).

A covenant to supply the lessor and his tenants with lime at a stipulated price, at all times and seasons of burning lime, is an implied covenant to burn lime at all such seasons (*Shrewsbury (Earl) v. Gould*, 2 B. & A. 487). So a covenant to plough and sow the demised premises, except the rabbit warren and sheep walk, is an implied covenant not to plough these (*St. Alban's * (Duke of) v. Ellis*, 16 East, 352); and where a lease of an undivided third part of certain mines contained a recital of an agree- [*855] ment made by the lessee, with the lessor and the owners of the other two-thirds, for pulling down an old smelting-mill and building another of larger dimensions, and also a covenant to keep such new mill in repair, and so leave it at the end of the term, but did not contain any covenant to build it, it was held that this was an implied covenant to build (*Sampson v. Easterby*, 4 M. & R. 422; 9 B. & C. 505; 6 Bing. 644; 4 Moo. & P. 601; 1 Crompt. & J. 105). So a covenant by a grantee of lands under letters-patent, that he would use his best endeavours to procure a renewal of them, extends to the payment of a reasonable fine for such renewal (*Simpson v. Clayton*, 4 Bing. N. C. 758; 6 Sco. 469; 2 Jur. 892).

A stipulation in a charter-party that forty days should be allowed for unloading and loading again, implies a covenant on the part of the freighter that the vessel should not be detained longer in unloading and loading again (*Randal v. Lynch*, 12 East, 179). A covenant by a lessee to repair, "provided always and it is agreed that the lessor shall find timber," amounts to a covenant by the latter to find timber (*B. N. P.* 156). If there be an express covenant in the deed upon the same subject as that which might otherwise be implied, the expressed covenant restrains the implication upon the principle *expressum facit silere tacitum* (*Merrill v. Frame*, 4 Taunt. 329, *ante*, p. 854). So, where F., who was possessed of a term for years, provided C. should so long live, knowing that C. was dead assigned it, and covenanted

that, notwithstanding any act done by him, the lease was in full force and undetermined, and that he had full power to assign, &c., it was held that the covenant, as to the lease being in full force, &c., was restrained to acts done by himself, and that he was not liable on this covenant for an eviction by the party entitled on C.'s death (*Stannard v. Forbes*, 1 Nev. & P. 633; 6 Ad. & E. 572). So a distress for land tax due from the lessor before the demise has been held not to be a breach of the usual covenant for quiet enjoyment, as the claim is not through, but against the lessor (*Stanley v. Hayes*, 2 Gal. & Dav. 411).

Where the plt. leased coal-mines to the defts., they covenanting to pay so much per ton for all coals, to the extent of 13,000 tons a year, which they should work, and a fixed sum as annual rent, whether they worked them or not, it was held that this did not imply a covenant on the lessor's part that there was such a quantity of coals there as would supply that number of tons annually to the end of the lease (*Bute (Marquis of) v. Thompson*, 13 M. & W. 487; 14 Law J., N. S. 95). A covenant by the plt. that A. should serve the deft. for five years as an assistant, and a covenant by the deft. that he, during the said term of five years, would pay A. certain sums weekly; the services so to be performed do not imply a covenant on the part of the deft. to retain A. in his service during the five years (*Dunn v. Sayles*, 5 Q. B. 685; 1 D. & M. 579). So, a covenant by a plt. with the deft. to manufacture cement for him, the deft., and to instruct him in the art of manufacturing it, and in consideration thereof, a covenant by the deft. to pay the plt. certain weekly sums for the following three years, and at the end of that time to take him into partnership, do not imply a covenant by the deft. to retain the plt. in his service for the three years, or any part of that time (*Aspdin v. Austin*, 5 Q. B. 671; 1 D. & M. 515).

A recital in an indenture between A. and B. that B. owes A. so much, implies a covenant to pay that sum, if an intention to enter into such an engagement appear on the face of the deed (*Courtney v. Taylor*, *6 [*856] M. & G. 851; 7 Sco. N. R. 749): but not, if the admission appears to have been made with another object (*Ib.*). There are a few cases in which the action of covenant lies, though the deft. do not seal (these, however, are exceptions): thus, on letters-patent, though no counterpart be sealed by the lessee, who is to be charged (*Cro. Jac.* 399); also, if a lease be to A. and B. by indenture, and A. seal a counterpart, and B. agrees to the lease but does not seal, yet B. may be sued for covenant broken (*Co. Lit.* 231 a; 5 B. & C. 599, 602; 8 D. & R. 368). When damages are unliquidated, their amount depending on the award of the jury, debt is not applicable, as it only lies for the recovery of money *in numero*, or capable of being reduced to certainty by averment (2 M. & S. 316; 2 T. R. 105; B. N. P. 167). Covenant is the proper remedy where an entire sum is stipulated by deed to be paid by instalments, the whole not being due, nor being secured by a penalty (2 Saund. 303, n. (c)). Covenant is *usually* a concurrent remedy with debt. Covenant is the proper remedy in cases of money-demands arising from an express or implied covenant in a deed (13 East, 63, 71; 12 East, 182); or where the demand is for rent, or any other liquidated sum (1 Saund. 241, n. 5). Although, where there is a deed, the party is seldom allowed to waive his higher remedy and resort to assumpsit, yet there are some exceptions to the rule: thus, if husband and wife separate by deed, and the former covenant with A., her sister, to pay to his wife, or such person as she should appoint, a certain weekly allowance during their separation, and he fails to pay such allowance, A. may support assumpsit for necessities supplied (*Nurse v. Craig*, 2 N. R. 148); so, where partners had covenanted under seal to account yearly, and had dissolved partnership and

struck a balance, assumpsit was held maintainable on a promise to pay such balance (2 T. R. 479; Selw. N. P. 455). So, where a mortgage deed contains no covenant for repayment, so that no action can be brought on the deed, debt for money lent may be brought in the ordinary form (Yates v. Aston, 4 Q. B. 182; 3 Gal. & Dav. 351). It would also seem, that in some cases, where the non-performance of a covenant constitutes a breach of duty, case would be a concurrent remedy with covenant (2 Bla. 1111; 5 B. & C. 607; 8 D. & R. 368). See "CASE."

A covenant not to carry on a trade in London or within 600 miles is divisible, and the deft. is liable for a breach by carrying it on in London (Green v. Price, 14 Law J., N. S., Ex. 105).

Declaration in covenant on an indenture, which after reciting that deft. had for four years been plt.'s salaried clerk, and a request to accept him as articulated clerk, without payment of any premium, which plt. consented to do, on deft. entering into the covenants thereafter contained, and that deft. had bound himself clerk to plt. for five years, to the intent that he might become entitled to make application to be admitted attorney and solicitor, deft. covenanted that he would not, during the said term of five years, nor at any time after the expiration of such term, either directly or indirectly, interfere or intermeddle with, or be concerned, as attorney, agent, or otherwise, for any person who had already been, or should hereafter become or be, the client or correspondent in business of or with plt. or any partner he might admit to a share with him, or any person to whom he might sell or assign the whole or any part of his business or profession; and that deft. would not act as partner, clerk, or assistant with or to any person who should interfere or intermeddle as aforesaid; and in case deft. should commit any breach of his said covenants, he should forfeit 100*l.* for every such breach: held, that the covenant was divisible, and that *an action was maintain- [*857] able against the deft., for being concerned as attorney for persons who were clients of the plt. at the date of the deed (Nichols v. Stretton, 11 Jur. 1008, Q. B.).

E. F. borrowed 1600*l.* and covenanted to repay the same to A. B., C. D., and E. F. jointly: held, that the covenant was void, and could not be enforced, as it amounted to a person covenanting to pay money to himself (Faulkner v. Lowe, 11 Law T. 245, Ex.).

Parties to Suit—Who should be Plaintiffs.] It is a general principle, that no other than one who is party to the deed can have a right to sue upon it, as the right of suit is constituted by the deed (6 M. & S. 77; Barford v. Stuckey, 8 Moo. 88; 1 Bing. 225; and see 3 B. & B. 335; 5 D. & R. 118, 234; 5 Moo. 23); however, he may be included in the covenant by implication or express averment. As, where a landlord authorized an attorney to execute a lease for him, and the attorney executed it in his own name, the landlord could maintain covenant against the tenant, though the covenants were expressly stated to have been made by him to and with the landlord (Berkley v. Hardy, 8 D. & R. 102; 5 B. & C. 355). So, where the lease was not signed by the landlord or his agent, though it was made with his consent and approval, and the tenant held under it, the landlord's devisee could not recover (Cardwell v. Lucas, 2 M. & W. 111; 2 Gale, 203). So, where rent is reserved by lease to a person who is not a party to the lease, and the lessees covenant with him and the lessors to pay him, &c. (Southampton (Lord) v. Brown, 6 B. & C. 718). So, where two persons for a valuable consideration, as amongst themselves, covenant to do an act for the benefit of a stranger, he cannot bring covenant against either, though each of them may against the other (Colyear v. Mulgrave (Countess of), 2 Keen,

81; see also *Ex parte Richardson*, 14 Ves. jun. 187, and *Brewer v. Hill*, 2 Anst. 413). So, where one of two partners signs a composition-deed in the name of the firm, and sets his seal thereto, he must sue alone, for the other partners, not being parties to the deed, cannot join in covenant (*Metcalf v. Rycroft*, 6 M. & S. 76). Therefore, in order to ascertain the rights or liabilities of partners as plts. or defts., it is necessary to refer to the deed itself. Joint covenants in a lease to two persons, partners, held not joint and several (*Clark v. Bickers*, 9 Jur. 678; 1 R. P. & Con. C. 489; see "PARTNERS").

A. being possessed of a term of 5000 years, created on the 4th of August, 1815, assigned to B., by indenture of the 5th of August, 1818, subject to redemption on payment by A. to B. 1200%. and interest. On the 17th of August, 1820, B. (by indenture, to which A. was a party, and executed by him), at the request of A., demised to C. for 4000 years, "*reddendum* to B., his executors, &c., during the continuance of the mortgage, and after payment and satisfaction thereof to A., his executors, &c., the yearly rent of 18*l.* 18*s.*;" and C. covenanted "to and with A., his executors, &c., and also to and with B., his executors, &c., to pay the said yearly rent of 18*l.* 18*s.* on the several days and times, and in the manner in which the same was made payable." To an action of covenant by the assignee of B. against the assignee of C., for non-payment of this rent, the deft. pleaded that before the rent became due, and during the continuance of the mortgage, B. was paid and satisfied all the principal and interest due on the mortgage, out of moneys arising by the sale of the demised premises, and afterwards, by indenture executed by him, acknowledged himself to be so paid and satisfied, and released and discharged A. from all claims in respect thereof: held, on demurrer to the plea, thirdly, that the covenant was capable of [*858] being *read as several by reason of its being for the payment of the rent at one period to A., and at another to B., and that the action was therefore rightly brought by B. only; lastly, that the continuance of the mortgage was sufficiently shown on general demurrer (*Harrold v. Whitaker*, 15 Law J. 346, Q. B.; 10 Jur. 1004).

In general, *all joint covenantees who may sue, must join*; and, even if persons who are parties to a deed, but did not sign or seal it, be omitted, it is fatal, no averment of their refusal to execute the deed being made (*Petrie v. Bury*, 3 B. & C. 353; 5 D. & R. 152); "for, if a covenant be made with three persons, and although two of them did not seal the deed, yet it is not, in law, converted into a covenant with one" (per *Holroyd, J.*, *ib.* 356; 1 Saund. 291 *g*). So, trustees who assent to a trust, and executors who may sue, must join (*ib.* 355); and where, in covenant against the executors of A., the plt. declared that A. covenanted with him and two others, that his executors, &c., should pay to them an annuity for the use of B., and averred that the other two never sealed the deed, it was held fatal on demurrer, by reason of their not joining (*ib.*; 1 B. & P. 67; *Stra.* 1146; 1 Saund. 291 *g*); and two covenantees must join, though one has no beneficial interest (1 Saund. 154 *a*); and, where one of several covenantees survives, he alone must sue, though the representatives of the other covenantees may be the parties beneficially interested. Thus, where the declaration stated that F. and W. had demised lands, &c., of which F. was seised in fee to the deft. for a term of years, he covenanting with them, their heirs, executors, &c., to erect, &c., and that F. had died, and that plt. was his heir, and the breaches assigned had occurred since F.'s death: it was held, that the action brought by the plt. without W., who had survived F., could not be sustained (*Foley v. Addenbrooke*, 4 Q. B. 197; 3 Gal. & Dav. 64). So, where the

declaration stated that by indenture of lease, E. and A., who were seised in fee of a fourth part of the demised premises in trust for E. F. and M. F., W. who was seised of another fourth, T. who was seised of half, and G. and I. who had an equitable interest in that half, jointly demised, according to their several interests, certain mines to the deft., he yielding and paying certain rents to them respectively, and their respective heirs and assigns, according to their several interests, and he covenanted with them and each and every of them, their and each of their heirs, executors, &c., to repair, &c., and to work the mines properly, it was held, that for breaches committed after T.'s death, on the portion of the premises of which he had been seised, not his heir, but A., the sole surviving covenantee, should sue (*Bradburne v. Botfield*, 14 Law J., N. S. Ex. 330; *nom.* *Bradbury v. Botfield*, 14 M. & W. 559). One of two or more joint covenantees, therefore, cannot sue alone: and the omission to join the other parties, or, where one of the parties is dead, the omission to state his death, will be ground of nonsuit at the trial, demurrer on praying over, or in arrest of judgment (1 B. & P. 73). But, though the covenant be joint in its terms, yet, if the interests of the covenantees be several, each may sue separately (*Withers v. Birchman*, 5 D. & R. 106; 3 B. & C. 254); for the right of action follows the legal interest in all cases (1 Saund. 155 c), and therefore, where a deed is *inter partes*, the party who has the legal interest must always sue, although the beneficial interest may be in another (2 B. & B. 333; 2 M. & S. 308, 322); and for the same reason, where the legal interest is several, each covenantee may sue separately, though the words of the covenant are joint only, as it is held that the covenant must follow the interest of the covenantees * (per *Gibbs, C. J.*, *James v. Emery*, 8 Taunt. 248; *S. C.* 2 Moo. 195; [*859] 5 Pri. 529). So, where part-owners of a ship agreed, "each and every of them with the others, and each and every of them," that the ship should be under the exclusive direction of one of them, as husband, and that, on her return, an account was to be taken, and the net profits to be divided rateably, it was held, that, as each of the covenantees was entitled to have an account, he might sue the ship's husband without joining the other part owners (*Owston v. Ogle*, 13 East, 538; *Willes*, 154; 1 Saund. 151, n. 1). So, where a party covenanted by deed with each of certain parties (proposed shareholders in a mine), his executors, administrators, and assigns, that he would produce a good title, &c., and do certain works, &c., it was held, that the covenants were several, and that each of the covenantees had a several interest, and could sue alone for a breach (*Mills v. Ladbroke*, 7 M. & G. 218; 7 Sco. N. R. 1005; 13 Law J., N. S., C. P. 122; 8 Jur. 247). But where the interest is joint, though the covenant is several, as "with them and each of them," yet all must join (*Slingsby's case*, 5 Rep. 19). The rule has been recently explained to be that where the whole covenant taken together applies to all the covenantees, and not to either of them, although separately named in some of its words, by reason of the joint interest in the subject-matter of the action appearing on the face of the covenant, all must join (*Hopkinson v. Lee*, 9 Jur. 616; 6 Q. B. 964), and therefore, where A., with the sanction of B., lent some of B.'s money, which he held as trustee for her, to C. D., on the security of the deposit of certain Bank annuities, &c., and an undertaking by L. and the deft. to pay the difference between the interest on the sum lent and the dividends on the Bank annuities, and L. and the deft. covenanted with A., his executors, &c., and also as a separate covenant with and to B., her executors, &c., to pay A., (the plt.) the interest, &c., it was held, that A. could not sue alone for arrears of interest (1b.).

In covenant by the assignee of a rent-charge against one of the grantors,

the declaration stated that J. C. and J. S., H. S. and R. S., and each of them, granted to E. R. an annuity of 16*l.* 10*s.*, charged on certain lands. The deed, being set out on oyer, contained a grant by H. S., with her husband's consent, and by J. C. and J. S. jointly and severally according to their several estates and interests; held, on demurrer, that the declaration was bad, the grant being pleaded as a grant by four persons, two of whom were strangers to it (*Vincent v. Scully*, 10 *Ir. Law R.* 28).

Where the covenant is several, the covenantees cannot sue jointly (*Servante v. James*, 10 *B. & C.* 410; 4 *M. & R.* 299); as the part-owners of a ship for freight, &c., covenanted for with each separately (*Ib.*); but where the words used are ambiguous, they will be construed to constitute a joint or several covenant, according to the interest (*Sorsbie v. Park*, 12 *M. & W.* 146); and if the covenant is joint in terms, and the covenantees have not separate interests, all must join (*Ib.*).

Joint and Several.] The rule as to joint and several covenants is one merely of construction; and parties may, by apt words, covenant severally, although there be a joint interest. If the words were capable of two constructions, then the legal construction will depend upon the nature of the interest (*Keightley v. Watson*, 18 *Law J.* 339, *Exch.*).

A. covenanted with B., and, as a separate covenant, with C.: held, that B. could sue alone, although the deed shewed that the consideration moved partly from C., and that C. would, under some circumstances, be interested in the amount recovered (*Ib.*).

A joint and several covenant by A. and other persons, that "they, or some or one of them," will pay a certain sum, may be declared upon as a covenant by A. to pay; and debt will lie on such a covenant (*Caldwell v. Breke*, 2 *Exch.* 318).

Where a deed is pleaded according to its supposed legal effect, a plea or replication of *non est factum* (the deed not being set out on oyer) not only puts in issue the fact of its execution, but the construction of it, as alleged in the previous pleading (*North v. Wakefield*, 18 *Law J.* 214, *Q. B.*).

B., being owner for a term of sixty-one years, granted to S. an annuity for lives; and for securing it, assigned the term, wanting one day, to R. By indenture reciting the above facts, R., at the request of S. and B., did demise, &c., and B. did grant, demise, lease, ratify, and confirm to O. the land for thirty-one years (ending some years before the term first mentioned) at a rent payable to S. while the land should remain subject to the annuity, and afterwards to B.; and O., for herself, her heirs, &c., covenanted to and with S. & R., and their respective executors, and also to and with B., his executors, &c., that she, O., her executors, administrators, and assigns would pay the rent to R., while the premises should remain subject to the annuity, and afterwards to B., and that she, her executors, &c., would perform certain repairs, and would surrender at the end of the thirty-one years to B., in good repair, and B. (alone) covenanted for quiet enjoyment; there was also a covenant by O., with R. and B., to repair after certain notice: held, that, after the death of S., B. and R. might join in an action against the assignee of O. for breach of the first-mentioned covenant to repair; the covenant being with S., B. and R. jointly, and running with the land (*Wakefield v. Brown*, 9 *Q. B.* 209).

A covenant, whereby "A., B., and C., and any two of them jointly, and each of them severally," covenant with D. that A., B., and C., "or some or one of them," shall pay D. a sum of money, is properly declared upon in an action of covenant against A. alone as a covenant that A. would pay that sum to D. (*Addison v. Gibson*, 10 *Q. B.* 106).

A., by indenture, covenanted with B. and C., their executors, &c., to pay a sum of money, to be held by them on certain trusts. C. did not assent to or execute the deed, and subsequently, by an indenture to which neither A. nor B. was a party, disclaimed all the trusts of the first indenture: held, by the Exchequer Chamber, that B. could not alone sue A. upon the covenant during the lifetime of C. (*Wetherell v. Langston*, 1 Exch. 634; 17 Law J. 338, Exch. Cham.).

How a Corporation should sue.) If A. B., and C., as master and governors of a hospital, make a lease covenanting for themselves and their successors, and affix the common seal of the hospital, they cannot sue in their own names upon it, though they are named individually in the lease, but the declaration must be in the corporate name (*Cooch v. Goodman*, 2 Gal. & Dav. 159; 2 Q. B. 580; 6 Jur. 779; see "CORPORATION").

Agent liable.] If an agent covenant under seal for the act of another, *he renders himself personally liable, as it has been held (5 East, 148), "that one who covenanted for himself, his heirs, executors, [*860] &c., for the act of another, was personally bound by his covenant, although he described himself in the deed as covenanting for and on the part and behalf of such other person" (cited by Abbott, C. J., *Burrell v. Jones*, 3 B. & A. 50); in which case it was also decided, that the defts., who covenanted in the words, "We, as solicitors to the assigns, &c., undertake to pay," were liable personally (see, also, 1 B. & C. 160; R. & M. 229; see "AGENT;" "PRINCIPAL AND AGENT").

And where the plt. covenanted with A., B., C., D., &c., churchwardens and overseers of the parish of B., to do certain work, and they for themselves and their successors covenanted that they, their successors, and assigns, would pay him, and there was a proviso that nothing contained in the deed should be construed to extend to a personal covenant, or affect them, or any of them, in their private capacity, the proviso was held void as repugnant to the covenant, and they were declared personally liable (*Furnival v. Coombes*, 6 Sco. N. R. 522; 12 Law J., N. S., C. P. 265; 7 Jur. 399).

When the Heir or Devisee or Executor must sue.] As to where the executor, or heir, or devisee, should sue on a covenant, the rule is, "that real covenants run with the land, and either go to the assignee of the land, or descend to the heir, and must be taken advantage of by him alone; but personal covenants must be sued on by the executor" (per Le Blanc, 1 M. & S. 364). On all covenants which run with the land, therefore, the heir or devisee must sue: covenant lies by a devisee of lands in fee upon a covenant made by deft. to the testator, to whom deft. conveyed the lands in fee, that he, deft., had a good title to convey, as such covenant runs with the land, and, though broken in the lifetime of testator, is a continuing breach in the time of the devisee (*Kingdon v. Nottle*, 4 M. & S. 53); and the executor could not, in such case, recover, the testator having sustained no damage in his lifetime (1 M. & S. 355). And, where the lessee covenanted with the lessor, his executors, &c., to repair, it was held, the heir (though not named) might have covenant against the lessee for not repairing (2 Lev. 92; *Skin.* 305); and, where the damage was in the lifetime of the ancestor, and continues, the heir may sue and recover what it will cost to put the premises in repair at the time of action brought (*Salk.* 141; *Lidgbird v. Judd*, 7 D. & R. 517). Care must be taken to show how he is heir-at-law, a

general averment that the demised premises descended to him as cousin and heir-at-law not being sufficient. But the executor must sue where the ultimate damage was sustained in the time of the ancestor, and, consequently, the covenant running with the land did not descend to the heir (2 Lev. 26; S. C. 1 Vent. 75; see also 5 Taunt. 418; 4 M. & S. 188; F. N. B. 145). He may sue, though not named upon a covenant in reference to a chattel (Doe d. Rogers v. Rogers, 2 Nev. & M. 550). Where a tenant from year to year leased for twenty-one years, his executors may sue for a breach committed after his death (Mackay v. Mackreth, 2 Chit. Rep. 461; 4 Doug. 213).

With respect to an assignee, the 32 Hen. VIII. c. 34, gives the assignee (or grantee) of a reversion the same remedies against the lessee or his assignee, or their personal representatives, upon covenants running with the land, as the lessor or his heir, or their ancestor, had at common law. The statute also contains a clause, giving the lessees the same remedy against the grantees of the reversion which they might have had against their grantors (3 T. R. 401); and was passed *to remedy the doctrine of the [*861] common law, that no person but the parties or privies to a covenant could take advantage thereof; and it has been held, that, under this statute, for the breach of any covenant running with the land, the assignee—and a devisee is an assignee within the statute (Isherwood v. Alknow, 3 M. & S. 382) of the reversion, and of all (1 Saund. 237; Co. Lit. 384 a) or part of the demised premises (Twynham v. Pickard, 2 B. & A. 105)—may have covenant against the lessee (Ib.) or his assignee (3 Mod. 337, 338; 1 Show. 199; Carth. 182; 1 Salk. 80, 81; Walker v. Reeves, 2 Doug. 461, n.); but not against his under-lessee, for with him there is not privity of estate or of contract (Holford v. Hatch, Doug. 182); and so also, *vice versâ*, may the assignee (even though by the deed of assignment rent should be reserved to the assignor; Palmer v. Edwards, Doug. 186, n.) of the term (Cro. Eliz. 374, 436; Moo. 419; Spencer's case, 5 Rep. 17; Campbell v. Lewis, 3 B. & A. 392), or of part of the term (Simpson v. Clayton, 4 Bing. N. C. 758; 6 Sco. 469; 1 Arn. 299), have covenant against the lessor or his assignee (Ib.); and, therefore, for continuing damage, or other injury, causing a breach after the assignee becomes legally entitled to the reversion, the assignee must sue (1 Saund. 234, n. 4, 241, n.; 2 Moo. 164, 171; 3 M. & S. 386; 16 East, 99; 1 T. R. 378; 5 T. R. 4; 5 Rep. 16; 2 H. Bl. 319; Selw. N. P. 490 to 494, and cases there cited). But to enable the assignee of the reversion to recover, the lessor must have had at the time of making the lease, the legal estate, and not merely an equitable interest (Whitton v. Peacock, 1 Hodges, 376). But for covenants not running with the land, or which are merely collateral or personal, the assignee of the reversion cannot sue (Thursby v. Plant, 1 Saund. 237; Webb v. Russell, 3 T. R. 393), or be sued in covenant (Grey v. Cuthbertson, 2 Chit. Rep. 482; Flight v. Glossop, 2 Sco. 220; 2 Bing. N. C. 125; 1 Hodges, 263).

A., by indenture, demised to B. certain land, and B. covenanted for himself, his heirs, executors, administrators, and assigns, to build certain houses upon such land within two years. B. underlet to C., and covenanted for himself, and his heirs, executors, and administrators, to observe and perform, or effectually to indemnify C. against the covenantees in the first indenture. B. afterwards assigned his reversion to D. A. having entered, and ejected R. by reason of the non-performance of the first-mentioned covenant: held, on writ of error, that B.'s covenant with C. did not run with the land, and that D. was not liable to C. (Doughty v. Bowman, 17 Law J. 111, Q. B.; 12 Jur. 182).

B., having a term of sixty-one years in land, granted an annuity to W.; and, for securing payment, assigned the term, wanting one day, to R. R. then, at the request of W. and of B., demised, and B. demised and confirmed the premises to S., for thirty-one years, paying rent to W. while the land remained subject to the annuity, and afterwards to B. S. covenated with W. and R., and their respective executors, &c., and also with B., to pay the rent, while the land was subject to the annuity, to R., and afterwards to B., and also to repair the premises. The premises came by assignment to G., who failed to repair. W. being dead; held, that an action for breach of the covenant to repair was properly brought against G. by R. and B. jointly (*Wakefield v. Brown*, 15 Law J. 373, Q. B.; 10 Jur. 853).

Rule as to what passes to.] The "rule is, that, if the covenant respect the thing demised, and be co-extensive with the estate of the person to whom it is made, and be made with him and his assigns, it passes to his assignee" (per Bayley, J., *Vernon v. Smith*, 5 B. & A. 1); and a [*862] covenant to insure against fire premises situated within the weekly bills of mortality, mentioned in 14 Geo. III. c. 78, passes, and is a covenant running with the land, that statute enabling the landlord to have the sum insured laid out in rebuilding the premises (*Ib.*) The remainderman may sue on a covenant in a lease made by a tenant for life under a leasing power (3 M. & S. 382).

Bankruptcy.] In cases of bankruptcy, an assignment of the legal interest of the bankrupt taking place by operation of law, all the assignees must sue, as in other cases (1 Ch. Pl. 15; see "BANKRUPT," *INSOLVENT*").

Who should be made Defendants.] Covenant cannot be maintained, except against a person who, by himself or some other person acting on his behalf, has executed a deed under seal, or has agreed by deed to do a certain thing, except under some very peculiar circumstances (per Abbott, C. J., *ante*, p. 860). The same principle applies as in the case of *plts.* (*Ib.*), and therefore covenant does not lie against the chairman of a board of directors of a joint-stock company, not incorporated by act of parliament upon a deed under the seal, of a former chairman, though sealed by him for and on behalf of the company (*Hall v. Bainbridge*, 1 Sco. N. R. 151; 1 M. & G. 42).

When Plaintiff may sue one of several Covenantees.] Where the covenant is joint and several, the *plt.* may sue one of the covenantees only, though their interest in the subject-matter of the covenant be joint; and the words, "for themselves and each of them," have been held to make a joint and separate covenant (1 Salk. 393; 5 T. R. 522; 7 T. R. 352; 1 Saund. 154, n. 1); but, if three be bound jointly and severally, the *plt.* cannot sue two of them only, but must sue them all, or each of them separately (3 T. R. 782; 1 Saund. 291 f); and if two suffer judgment by default, and the third defend, and succeed on some counts, the *plt.* cannot hold his judgment on those counts against the other two (*Morgan v. Edwards*, 6 Taunt. 398; 2 Marsh. 201).

Non-joinder Cause of Abatement.] However, the omission to join a covenantor, or one of several covenantors, even when the covenant is joint, is only a cause of abatement, and not of nonsuit (*Ib.*; 2 Taunt. 254: see "ABATEMENT"); and it is not error, though it appear on the record that there are others who ought to be joined as *defis.* (5 Rep. 119; 1 Stra. 503; 1 Saund. 154 a).

W. B., having effected a policy of assurance on his own life, in which there was a proviso avoiding the same in case the assured should "die by his own hands," assigned the policy to trustees under a deed of settlement, and covenanted with the trustees to pay the premiums, and to "do and perform all such acts, matters, and things as should be requisite for continuing and keeping on foot the said policy." W. B. afterwards was drowned, and by a verdict of a jury it was found that he voluntarily threw himself into the water with the intention of destroying life, but at the time of the committing of the act he was not capable of judging between right and wrong; and, in an action brought against the insurance office, this court was of opinion that the policy was thereby avoided: held, that the trustees were not entitled at law, under the covenant, to recover the money assured from the executor of W. B. (*Dormay v. Borradaile*, 11 Jur. 231, C. P.).

Heir and Devisee liable on Covenants running with the Land.]

[*863] For *breaches of covenant running with the land, the *heir* is liable (*Willes*, 585; *Selw. N. P.* 494), and so is a devisee: if there be several heirs, as in the case of parceners, &c., they should all be joined, or the defendant may plead it in abatement (*Com. Dig. Abat. E*, 9); and a devisee must be sued jointly with the heir (2 *Saund.* 7, n. 4); but the executor cannot be joined with the heir (*Com. Dig. E*, 10; *Vin. Abr. Actions, C. d.* pl. 8; see "EXECUTOR").

Executors liable.] Covenant lies against *executors* in every case, although they be not named, unless it be such a covenant as is to be performed by the person of the testator (3 *Wills.* 29; *Cro. Eliz.* 553).

Where a tenant for life with a leasing power, made a lease and covenanted for quiet enjoyment, and the lessee was evicted by the remainderman, in consequence of the leasing power not having been properly pursued, the executors of the lessor are liable in covenant to the lessee, and even to the executors of his assignee (*Williams v. Burrell*, 1 C. B. 402; 9 Jur. 282; see "EXECUTOR").

Assignees liable.] Assignees, though not named, are liable for the breach, after assignment, of covenants running with the land (*St. Saviour's, Southwark v. Smith*, 3 Burr. 1271). They are, however, chargeable only in respect of the thing demised; as, on covenants to repair (5 Rep. 24 a; *Twynham v. Pickard*, 1 B. & A. 105); to reside constantly on the demised premises (*Tatem v. Chaplin*, 2 H. Bl. 133); to leave part of the land demised every year for pasture (*Cro. Jac.* 125); to insure premises against fire, under 14 Geo. III. c. 78 (*Vernon v. Smith*, 5 B. & A. 1; 2 Ch. Rep. 608); to supply them with water at a certain stipulated price (*Jourdain v. Wilson*, 4 B. & A. 266); to erect a smelting mill on a waste adjoining a coal-mine, but not demised with it (*Sampson v. Easterby*, 4 M. & R. 422; 9 B. & C. 505; 6 Bing. 644; 4 Moo. & P. 601; 1 Cr. & J. 105); to grind at the lessor's mill all the corn grown upon the premises (*Vyvyan v. Arthur*, 2 D. & R. 670; 1 B. & C. 410); to use his (the lessor's best endeavours to procure a renewal of the letters-patent under which he himself held the premises demised to lessee (*Sampson v. Clayton*, 4 Bing. N. C. 758; 6 Sco. 469). So a covenant, in a demise of land, for the purpose of forming a railway, that the lessees, their executors and assigns, should carry on the railway all the coals raised from the Hatfield colliery, and from any other mine in the township of Stanley, which they might afterwards work, paying 2*d.* for every ton so carried, runs with the land, and binds the assignees (*Hemmingway v. Fernandez*, 12 Law J., N. S. 130; 7 Jur. 888, V.-C. E.). So, a covenant by a lessee of tithes, not to let any of the farmers in the parish have

any part of the tithes, runs with the tithes and binds the assignee (*Bally v. Wells*, 3 Wils. 25).

The assignee of lessee is liable for a breach after the assignment, although he has never occupied or become possessed of in fact (3 Saund. 304, n. 12; *Walker v. Reeves*, 2 Doug. 764); and even though the lease is assigned merely by way of mortgage security (*Williams v. Bosanquet*, 1 B. & B. 238; 3 Moo. 500; *Burton v. Barclay*, 7 Bing. 745; 5 Moo. & P. 785); or for securing an annuity (*Grellon v. Diggles*, 4 Taunt. 766).

But an assignee may always get rid of his liability by assigning over, which he may do to a mere pauper, although such person neither takes possession nor receives the lease (*Taylor v. Shum*, 1 B. & P. 21; B. N. P. 159; *Chancellor v. Poole*, 2 Doug. 764; *Paule v. Nurse*, 8 B. & C. 486; *Odell v. Wake*, 3 Camp. 394; *Hartshorne v. Watson*, 5 Bing. N. C. 477).

**But, if the covenant be merely collateral or personal*, it is otherwise; for, "in order to bind the assignee, the covenant must [*864] either affect the land itself during the term, such as those which regard the mode of occupation, or it must be such as, *per se*, and not merely from collateral circumstances, affects the value of the land at the end of the term" (per *Bailey*, 10 East, 130); nor is the assignee bound where the covenant relates to personal goods (*Spencer's case*, 5 Rep. 17; Wilm. 345). A covenant not to assign (*Doe d. Cheese v. Smith*, 5 Taunt. 795; 1 Marsh. 359; *Paul v. Nurse*, 8 B. & C. 486), or not to hire persons settled in other parishes, without a parish certificate (*Congleton (Mayor of) v. Pattison*, 10 East, 130), or to indemnify the overseers against all costs and charges by reason of employing persons who might become chargeable to the parish (*Welsh v. Fussell*, 3 Moo. & P. 455; 6 Bing. 163), or to pay to the lessor the amount of fruit trees, &c., to be planted by the lessee (*Grey v. Cuthbertson*, 2 Chit. Rep. 482; 4 Doug. 351; 1 Selw. N. P. 498), or to allow the free use of two boxes in a theatre, no particular boxes being mentioned, till a certain event (*Flight v. Glossop*, 2 Sc. 220; 2 Bing. N. C. 125), does not bind an assignee. It is doubtful whether a covenant by a lessee of a public house, that he and his assigns would buy all their beer of the plt. binds the assignee (*Hartley v. Pehall*, Pea. 131, per *Kenyon*). So, as to a covenant in a conveyance in fee, with the lessees of waterworks not to dispose of water from a well to the injury of their works (*Collins v. Plumb*, 16 Ves. jun. 454).

Where J. B. conveyed in fee to the defts., to the use that he, his heirs and assignees, might take a certain rent to be issuing out of the premises, and they covenanted to pay it, and also to build one or more messuages on the premises for better securing the rent, it was held that the plts., to whom J. B. demised the rent for 1000 years, could not have covenant for it, or for not building, &c. (*Milnes v. Branch*, 5 M. & S. 411).

Bankruptcy, its Effects.] Bankruptcy does not discharge, *ipso facto*, the bankrupt from his liability to pay rent as lessee (1 Saund. 241, n. 5; as the estate does not, by operation of law, vest in the assignees (*Copeland v. Stevens*, 1 B. & A. 593, 303); and until they have done some act to manifest their acceptance of it, it remains in the bankrupt (*Ib.*). If they will not accept it, and he wishes to be discharged of it, he will be discharged on complying with the provisions of the Bankrupt Act (see *ante*, "BANKRUPTCY"). If the assignees take possession of the estate, they will be liable to the performance of covenants (7 East, 335; 3 Camp. 340; Holt, 290; Pea. 238; 8 Taunt. 325; 2 Chit. Rep. 600; 2 H. Bl. 320; Arch. B. L. 193, 429). They may, however, discharge themselves, as in other cases,

by assigning their interest over to a pauper (1 B. & P. 21; *ante*, "BANKRUPTCY").

Husband liable on Wife's Covenants.] When there is a breach of covenant during coverture, upon a lease made by the *wife* whilst acting as a *feme sole*, she may be joined with the husband, or he may be sued alone (Com. Dig. Baron and Feme, Y; 6 Mod. 230; Lake v. Smith, 1 N. R. 174): but the husband is not liable on a covenant made by the wife during the coverture, unless by his authority (6 T. R. 176; *post*, "HUSBAND AND WIFE").

[*865]

**Form of Pleadings.*

Declaration.—Venue.] The venue is transitory in all cases where the action is founded on privity of contract, as between the original parties (5 Co. Rep. 7 a; Cro. Car. 142); even though the land, the subject of the contract (Hodgson v. East India Company, 8 T. R. 648) or demise, lies not within the realm (Way v. Tally, 2 Salk. 651; Carth. 182; 6 Mod. 194); and also as between the assignee of the reversion and the lessee, or *vice versa*, as the 32 Hen. VIII. c. 34, transfers the privity of contract to the assignee (1 Saund. 237, 244 b; 1 Lev. 259). But the venue is local where the action is founded on privity of estate, as between the assignee of the term and the lessor (Carth. 182, 183; Jon. 43; 1 Wils. 165; Berwick (Mayor of) v. Shanks, 3 Bing. 459), or his executor (Hob. 37), or assignee (5 Rep. 17 a); or between his assignee and the lessee (Barker v. Damer, 1 Salk. 80); or between the lessor and the executor of the lessee for rent accrued due in the executor's time, as the executor is in such case charged as assignee (1 Sid. 266; 2 Lev. 80; Lat. 262, 271). For rent accrued in the testator's lifetime, the venue is local (Ib). If the action is local, and it appears on the evidence that the premises are not within the county, this is not a ground of nonsuit or objection at nisi prius, unless the plea raises the point of venue, or the effect is to produce a variance (Boyes v. Hewetson, 2 Bing. N. C. 575).

Statement of the Date.] The deed may be described as made on a day subsequent to that on which, on the face of it, it is stated to have been made (Hall v. Cazenove, 4 East, 477; 1 Smith, 272); and it must be stated to have been under seal (2 Ld. Raym. 1536; Com. Dig. Pleader, 2, V, 2), or be named as a "deed," "indenture," or "writing obligatory," or be described by some other name which imports that it was under seal (Moore v. Jones, 2 Stra. 815).

Profert.] A profert of the deed should be made or some excuse for not making it should be stated (Read v. Brookman, 3 T. R. 151; see "DEBT," "PROFERT").

Parties.] The deed must be described as executed, either by the parties who actually executed it (Magleston v. Palmerston (Lord), 2 C. & P. 474; Moo. & M. 6; per Abbott, C. J.), or by those who in law are considered as executing it, as a lease granted by husband and wife may be described as granted by husband alone, though the lands were hers before marriage (Arnold v. Revoult, 4 Moo. 66; 1 B. & B. 433; see also Wood v. Day, 7 Taunt. 646; 1 Moo. 389).

Inducement.] An inducement is not in general, necessary in this action, unless by or against a person claiming or being sued in a derivative charac-

ter, as at the suit of the heir-at-law, or of the assignee of the lessor (1 Ch. Pl. 376); and in such case he must show how he is entitled to the character which he assumes, as where a plt. sues as heir-at-law to the lessor, he must show how he is such, a general averment that the lands descended to him as cousin and heir-at-law not being sufficient (*Lidgbird v. Judd*, 7 D. & R. 517). But an allegation by the assignee of the reversion that the lessor was seised (without stating of what estate), and being so seised devised to the plt. in fee, is sufficient after verdict (*Harris v. Beavan*, 4 Bing. 646; 1 Moo. & M. 633).

Consideration.] Nor is a consideration necessary to be stated, *unless a conveyance operating under the Statute of Uses be [*866] pleaded (*Bolton v. Carlisle* (Bishop of), 2 H. Bl. 259); and an averment, that the deft., "for the considerations in the indenture mentioned," is sufficient (3 Bing. 322); and if the deed contain only one consideration, it is not a variance (*Gully v. Exeter* (Bishop of), 12 Moo. 591; 4 Bing. 290); and if the deft. do not crave oyer, but plead that the covenants are in restraint of trade and illegal, the court will presume that the deed disclosed a sufficient legal consideration (*Homer v. Ashford*, 11 Moo. 91; 3 Bing. 322). But if the plt. state any part of the consideration, he should state the whole (*Swallow v. Beaumont*, 2 B. & Ad. 765; 1 Chit. Rep. 518).

Setting out the Deed.] The deed declared on may be set out in its very terms, which, in a case admitting of doubtful construction, is safest (1 Marsh. 216; 4 M. & S. 13); or according to its legal operation and effect (1 Marsh. 316; 2 Saund. 96 b, n. 2; *Wilson v. Bramhall*, 1 Y. & J. 2).

A declaration, setting out the *fac-simile* of the deed, will be received so as to make it sense, however incorrect and illiteral the deed may be (1 Ch. Pl. 316). It will suffice in a declaration, after verdict, to state, that by the deed "it was witnessed" that the deft. covenanted (*Baynon v. Batley*, 8 Bing. 256; 1 Moo. & S. 339); in a plea it should be more positive (1 Saund. 274, n.; 1 Ld. Raym. 1539). Where it is stated, that by a certain deed "it was witnessed," &c., there can be no variance, if the very words of the deed are set out (per *Holroyd, J.*; *Ross v. Parker*, 1 B. & C. 362). Care should be taken not to insert any unnecessary matter in setting forth the deed, or otherwise, for fear of a variance, or censure from the court. Any exception or condition, or matter qualifying the covenant, should be stated, as an omission would be fatal on *non est factum* (11 East, 633, 641; see instances, &c., *post*, "LEASE"). There is some distinction between a proviso and an exception: a proviso is properly the statement of something extrinsic of the subject-matter of a covenant, which shall go in discharge of that covenant by way of defeasance; an exception is taking out of the covenant some part of the subject-matter of it. A plt. need, therefore, never state a proviso (1 Saund. 234; *Grogan v. Magan*, 1 Al. & Nap. 366 (Irish); *Gordon v. Gordon*, 1 Stark. 294); unless it be referred to in the covenant, in which case it will be taken to form part of it (*Shaw v. Poynter*, 2 Ad. & E. 312; *Vavasour v. Ormrod*, 6 B. & C. 430). Where, in an indenture between A. and B., B. acknowledges that he owes so much money to A., such acknowledgment may be declared upon as a covenant to pay that sum, if an intention to enter into an engagement to pay appear upon the face of the deed: *secus*, where the acknowledgment appears to have been made solely for a collateral purpose (*Courtney v. Taylor*, 6 Man. & G. 851). For instances of variances in stating deeds, see *post*, "LEASE," &c.

The performance of every condition precedent, or an excuse for it, must be averred, as in other actions (*ante*, p. 201). The mode of averring per-

formance by a plt. of a condition precedent, and the deft.'s notice thereof, and his breach of covenant, will be found *ante*, p. 209. In an action upon a covenant by the deft., that he would pay over to the plt. the first fruits or proceeds which should be first realized, "and be at the disposition of the deft." under a sequestration, "forthwith upon the receipt thereof," the declaration alleged that divers moneys, being first fruits and proceeds, were realized, and were at the disposition of the deft., and that he had not paid them over to the plt.: held sufficient, on special demurrer, *and that it was [*867] not necessary to aver actual receipt of the money by the deft. (Smith v. Nisbett, 2 C. B. 286; 15 Law J., C. P.).

In covenant, the declaration alleged that the defts., the Great Western Railway Company, demised to the plt. certain refreshment-rooms at Swindon, for ninety-nine years, at the annual rent of 1*d.*; that the plt. covenanted, *inter alia*, to keep the premises in repair, and not to carry on there any other business than that of the refreshment-rooms; and that the defts. covenanted with the plt., that, in case the Swindon station should be disused as the regular and general place of stoppage for refreshment of passengers, they would purchase the buildings of the plt. on the terms therein mentioned; that it was by the said indenture declared to be the intention of the defts., and the understanding of the plt., that, in consequence of the outlay to be incurred by the plt. in erecting the refreshment-rooms, the defts. should give every facility to the plt. for enabling them to obtain an adequate return by the profits of the rooms; and that all trains carrying passengers, not goods trains or to be sent express for special purposes, which shall pass the Swindon station, should, save in cases of emergency, or unusual delay arising from accident, stop there for refreshment of passengers for a reasonable period of about ten minutes; and that the defts. covenanted with the plt. not to do any act which should have an effect contrary to the above intention. The breach alleged was, that the defts., whilst the Swindon station was used as the regular and general place of stoppage for the refreshment of passengers, did divers acts which had an effect and were contrary to the intention of the defts. in the said indenture; that is to say, they caused divers trains, containing passengers, not being trains sent express, &c., to pass the Swindon station without stopping there for refreshment of the passengers for a reasonable period of ten minutes; and the defts. caused several trains to stop, and they did stop, at Swindon for a short and unreasonable time, to wit, for one minute and no more, the said period of time not being sufficient to enable the said passengers to obtain refreshment. The defts. set out the deed on oyer, which corresponded with the statement of it in the declaration, except that the terms of the covenant declared on were, that the defts. engaged not to do any act which should have an effect contrary to the above intention: held, on demurrer, that this amounted to a covenant on the part of the company not to do any act to prevent the trains from stopping at Swindon, so long as it was used as the regular refreshment station; and, secondly, that a good breach of that covenant was alleged in the declaration (Rigby v. The Great Western Railway Company, 14 M. & W. 811; 15 Law J. 60, Ex.).

It is usual, after stating the breaches of covenant, to conclude by alleging, "and so the said plt. in fact saith, that the said deft., although often requested so to do, hath not kept his said covenant, but hath broken the same," &c.; but this is mere form, and is superfluous repetition (1 Saund. 235).

Damages.] Damages, being the principal object of this action (13 East, 343), should be laid sufficiently large to cover the real demand and interest up to the time of final judgment (see Watkins v. Morgan, 6 C. & P. 661), and the judge will not amend the declaration by inserting larger amount of

damages (Ib.). The jury are not restricted to giving nominal damages, though no actual damage naturally arising from the breach is proved (*Hey v. Wyche*, 6 Jur. 559; 2 Gal. & Dav. 569; 12 Law J., N. S. 83). Where the plt. as surety joined the deft. in a promissory note, and the deft. by deed covenanted *to pay him the amount on a day certain, [*868] the amount of the note, though still unpaid, was held to be the measure of the damages (*Loosemore v. Radford*, 9 M. & W. 657; 1 Dowl. N. S. 881). Where a deft. by a marriage settlement conveyed estates on certain trusts, and covenanted with the trustees to pay off incumbrances on the estates to the extent of 19,000*l.* within a year, it was held that on his failing to do so the trustees were entitled to recover the whole 19,000*l.*, though no special damage was laid or proved, and an inquisition on which nominal damages had been given was set aside and a new writ of inquiry awarded, (*Lethbridge v. Mytton*, 2 B. & Ad. 773). So, where A. having covenanted with B. to pay C. a debt owing from B., and to indemnify B. in respect of it, did not pay C., and C. sued B. and obtained judgment against him, it was held that B. might recover the amount of the debt from A., before he, B., had paid C. (*Carr v. Roberts*, 2 Nev. & M. 42; 5 B. & Ad. 78).

The deft. by deed assigned to the plt. his business as a surgeon, &c., carried on by the deft. in Park Street, Camden Town; and the deft. covenanted, directly or indirectly, not to carry on his practice or profession of surgeon, &c., either by residing or visiting any patient within three miles from the then place of business of the deft.; and that, in case of any breach of this covenant, the deft. should pay to the plt. 500*l.*, as liquidated damages, and not as a penalty. After the execution of this deed, the deft. attended several ladies within the three miles, and on one occasion received a sum of 14*l.* 14*s.* for his services; but he attended these persons in consequence of a request by plt. that the deft. should for a time continue to visit the patients, to keep the connection together; and the jury found the deft., in these instances, exercised his profession for the purposes of assisting the plt.: held, first, that for a breach of this covenant the measure of damages was the full sum of 500*l.*; but, and secondly, that the above facts did not constitute a breach of the covenant (*Rawlinson v. Clarke*, 14 M. & W. 187; 14 Law J. 364, Ex.).

The Great Western Railway Company granted to the plts. debenture bonds in the following form:—"By virtue of an act passed, &c., we, the Great Western Railway Company, in consideration of 1000*l.* to us paid by S. P. and W. G., the said undertaking, and all future calls, and all the estate, right, title, and interest of the said company in and to the same, to hold unto the said S. P. and W. G., until the said sum of 1000*l.*, together with all interest for the same after the rate of 5*l.* *per cent.*, payable as hereinbefore mentioned, shall be fully paid and satisfied, and it is hereby stipulated that the said principal sum of 1000*l.* shall be repayable and repaid on the 15th of January, 1844, and that in the mean time the said company shall, in respect of interest as aforesaid on the said principal sum, pay to the bearer of the *coupons*, or the interest-warrants, the several sums mentioned in such warrants respectively, at the times specified therein." In January, 1844, the previous interest having been duly paid, the last of the *coupons* or interest-warrants was presented, and the interest paid to the plts.; but the company did not then pay the principal, or give notice to the plts. that they were ready to pay it: held, that the plts. were entitled in an action of covenant to recover interest from the 15th of January, 1844, to the time of the payment of the principal (*Price v. The Great Western Railway Company*, 16 M. & W. 244; 16 Law J. 87, Ex.; see *post*, "INTEREST").

Costs of a former Action.] In an action on a covenant to repair *by a lessee against his sub-lessee, it was held that the plt. could not recover as special damage the costs of defending an action brought against him by his lessor for the same dilapidations, as they were not necessarily occasioned by the deft.'s breach of the covenant to repair, though they were in fact occasioned by his denying the receipt of notice to repair and the necessity of repairs (Walker v. Hatton, 10 M. & W. 249; 2 Dowl. N. S. 263); the proper question for the jury in such a case is, whether in respect to the former suit the plt. pursued the course which a prudent and reasonable man would do in his own case, and if they think he did he may recover the costs (Tindall v. Bell, 11 M. & W. 228).

Plea.] Even before the new rules there was no general issue in an action of covenant, and the deft. should plead specially every matter which it would be necessary to plead in debt on a bond for other specialty (*post*, "DEBT;" Com. Dig. Pleader, 2, V, 4, &c.). He should plead specially performance of the covenant (Com. Dig. Pleader, 2, V, 13; B. N. P. 165; 1 B. & P. 640); or excuse of performance (1 Saund. 204, n. 2; 2 Saund. 176; 2 East, 576; 8 T. R. 366; 1 Saund. 235); or license (Ratcliff v. Pemberton, 1 Esp. 35); or discharge (Com. Dig. Pleader, 2, V, 8): as, by his bankruptcy, &c. (4 T. R. 156; 1 Saund. 241, n. (b)); or by accord and satisfaction after breach (1 Taunt. 428; see 8 Taunt. 37; 1 Moo. 460; *ib.* 358); arbitrament, &c. (9 Co. 79; Com. Dig. Pleader, 2, V, 8). He might, however, under the plea of *non est factum*, show that the deed was delivered as an escrow (Stoytes v. Pearson, 4 Esp. 255, per Ellenborough); or that it was avoided, as by erasure since execution (5 Rep. 119); but alteration by a stranger, without the privity of the obligee, in a point not material, will not avoid it (11 Rep. 27; B. N. P. 171; see "ALTERATION," "ASSUMPSIT"); or was void from the beginning, on the ground of lunacy (Faulder v. Silk, 3 Camp. 126); or coverture (Lambert v. Atkins, 2 Camp. 272; Davenport v. Nelson, 4 Camp. 26); but these must be now pleaded, as, by the new pleading rules, *non est factum* operates "as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void as well as those which make it voidable" (R. G. H. T. 4 Will. IV. r. 2). The deft. cannot therefore give in evidence under it a fraudulent misrepresentation of the legal effect of the deed, by which he was induced to sign it (Edwards v. Brown, 3 Y. & J. 423; 3 C. & M. 307; 1 Tyrw. 182); but he may still, on the trial, avail himself of a variance in the statement of the deed, either in respect of a misstatement, or of the omission of a covenant qualifying the contract (9 East, 188; 11 East, 639; 4 Camp. 20); and this, although he has agreed to admit on the trial the due execution of the deed (Goldie v. Shuttleworth, 1 Camp. 70). And, if there be any omission or variance, the deft. may crave oyer, and set out the deed, and demur (Com. Dig. Pleader, 2, V, 3, 4; 11 East, 639; 1 Ch. Pl. 449); but he cannot in such case avail himself of a variance in an immaterial point (Ross v. Parker, 1 B. & C. 358; 2 D. & R. 662), as describing a covenant to assign stock as a covenant to assign a certain sum of money (*Ib.*); or a covenant to pay at a certain time and place as a covenant to pay at a certain time, without mentioning the place (Paine v. Emery, 4 Dowl. P. C. 191; 1 Gale, 266; 2 C. M. & R. 304; 3 Tyrw. 1097); and if, after craving oyer, he sets out the deed and pleads *non est factum*, the deed so set out becomes part of the declaration, and he cannot then [*870] do more than dispute *the execution (Snell v. Snell, 7 D. & R. 294; 4 B. & C. 741); and if, on the other hand, he omit to set it out, "the plt., on making up the issue or demurrer book, may, if he think

fit, insert it for him" (1 R. G. H. T. 2 Will. IV. s. 44; see the course to be pursued where a deft. pleads a deed, and the plt. craves oyer, *Smith v. Jennings*, 9 Dowl. P. C. 155; 4 Jur. 1060). A parol accord and satisfaction, made before breach, cannot be pleaded in bar to an action of covenant (1 Taunt. 428); nor can a parol agreement for a substituted contract be pleaded (1 East, 630; 3 T. R. 596, n.). A. being possessed of a term of 5000 years created on the 4th of August, 1815, assigned to B. by indenture of the 5th of August, 1818, subject to redemption on payment by A. to B. of 1200*l.* and interest. On the 17th of August, 1820, B. (by indenture, to which A. was a party, and executed by him), at the request of A., demised to C. for 4000 years "*reddendum* to A., his executors, &c., during the continuance of the mortgage, and after payment and satisfaction thereof, to A., his executors, &c., the yearly rent of 18*l.* 18*s.*;" and C. covenanted "to and with A., his executors, &c., and also to and with B., his executors, &c., to pay the said yearly rent of 18*l.* 18*s.* on the several days and times and in the manner in which the same was made payable." To an action of covenant by the assignee of B. against the assignee of C., for non-payment of this rent, the deft. pleaded that before the rent became due, and during the continuance of the mortgage, B. was paid and satisfied all the principal and interest due on the mortgage, out of the moneys arising by the sale of the demised premises, and afterwards, by indenture executed by him, acknowledged himself to be so paid and satisfied, and released and discharged A. from all claims in respect thereof: held, on demurrer to the plea, first, that it sufficiently showed that the mortgage no longer continued; but, secondly, that it was bad for duplicity, in averring both the payment of the mortgage-money and the execution of the release (*Harrold v. Whitaker*, 15 Law J. 346, Q. B.; 10 Jur. 1004).

A tender may be pleaded in covenant for the payment of money (*Johnson v. Clay*, 7 Taunt. 486; S. C., 1 Moo. 200; 1 Raym. 566; see "*ILLEGALITY*," *post*).

A. covenanted with B., a single woman, by whom he had two children, to pay her for her life, subject to the proviso thereafter contained, an annuity of 40*l.*, which proviso was, that if she should at any time thereafter happen to marry with any person, then the annuity should be reduced to 20*l.*: held, that the proviso was void, as being in restraint of marriage (*Grace v. Webb*, 15 Sim. 384).

In an action of covenant the plt. declared upon a deed assigning half the plt.'s interest in a patent, wherein the deft. covenanted to pay a sum of money by instalments. The deed also contained a covenant by the plt. that the patent assigned was a valid patent: held, that the covenants were independent, and that the invalidity of the patent was no answer to an action on the covenant for payment of the money. By the recitals in the deed of assignment it appeared that the plt. had previously granted to the deft. a license by deed to use the patent, upon payment to the plt. of a certain royalty: held, that inasmuch as the deft. was at all events bound to pay that royalty, whether the patent was valid or not; and by the deed of assignment he became entitled to half the royalty, pleas setting up the invalidity of the patent did not show a total failure of consideration (*Cutler v. Bower*, 11 Law T. 173, Q. B.).

The declaration, after stating that plt. and deft. had agreed to enter into partnership as surgeons and apothecaries until 1st of *January, 1846, the deft. agreeing to pay the plt. 800*l.* and to be entitled to [*871] all the profits of the business, &c., proceeded to state that it was agreed that plt. should, after the 1st of January, introduce deft. as his successor in the business, and use his best endeavours to establish him in it; and

deft., in consideration thereof, covenanted to pay to the plt. the further sum of 50*l.* on the 25th of March, 1846, in addition to and beyond the said sum of 800*l.*, &c. Breach, nonpayment of the sum of 50*l.* Plea, that after the 1st of January, and before the said 25th of March, plt. refused and neglected to introduce the deft. as plt.'s successor to, &c., and would not use his best endeavours to establish the deft. in his business: verification: held, that the plea was bad, as the introduction of the deft. by the plt. to his patients was not a condition precedent to the payment of the 50*l.* (*Judson v. Bowden*, 1 Exch. 162; 17 Law J. 172, Ex.).

A plea of *non infregit conventionem* is bad on demurrer to a declaration assigning the breach in the negative, "and so the deft. did not keep his covenant," as two negatives cannot make an issue (*Pitt v. Russell*, 3 Lev. 19; *Boone v. Eyre*, 2 Bla. R. 1312; 1 H. Bl. 273, n; *Hodgson v. East India Company*, 8 T. R. 278; 1 Sid. 289; Com. Dig. Pleader, 2, V, 5); and even though the declaration, after assigning as a breach that the deft. did not repair, concluded by averring that "so the deft. hath broken his covenant" (*Taylor v. Needham*, 2 Taunt. 278); but it would be aided after verdict (Com. Dig. *supra*; 1 Sid. 289) for the plt. (*Walsingham v. Combe*, 1 Lev. 183). *Rien in arrear* is also a bad plea in this action (*Hare v. Savile*, 1 Brownl. 19). A plea of performance otherwise than in the terms of the covenant is bad, even on general demurrer (*Scudamore v. Stratton*, 1 B. & P. 455). Issue cannot be taken on a general averment of performance (*Sayre v. Minns*, Cowp. 578). A plea in abatement by assignee of lessee that the estate, &c., vested in him jointly with another is bad, for not setting out the title specially (*Heap v. Livingston*, 1 Dowl. & L. 334; 11 M. & W. 896). A plea by assignee of lessee to covenant by the lessor that the *indenture* was not signed by the lessor or any agent authorized in writing is bad in form and substance (*Aveline v. Whigson*, 4 M. & G. 801; see a plea of the bankruptcy of the plt., *Trott v. Smith*, 12 M. & W. 688; 13 Law J., N. S., Ex. 178).

Statute of Limitations.] By the 3 & 4 Will. IV. c. 42, s. 3, covenant may be brought within ten years after the close of that session of parliament, or twenty years after cause of action (see "STATUTE OF LIMITATIONS").

Statute of Limitations.] In an action of covenant on an indenture, a plea under 3 & 4 Will. IV. c. 42, s. 3, pleaded in bar of the further maintenance of the action, that the cause of action accrued more than twenty years before the pluries summons with which the deft. was served, and that that writ could not, according to 2 Will. IV. c. 39, s. 10, be connected with any anterior process, and must, therefore, be considered as the commencement of the suit: held bad on special demurrer, first, as being only an argumentative allegation that the cause of action occurred more than twenty years before the commencement of the suit (*Higgs v. Mortimer*, 12 Jur. 249, Exch.). Held, secondly, that it ought not to have been pleaded in bar of the further maintenance of the action (*Ib.*).

In debt upon a covenant to a plea of the Statute of Limitations (3 & 4 Will. IV. c. 42), a replication, under sect. 5, that deft., by writing signed by him, had acknowledged the debt, need not set out the writing (*Kempe v. Gibbon*, 12 Jur. 697; 17 Law J. 298, Q. B.).

Replication.] In covenant, as the declaration states the breach, and the plea usually denies it, and concludes to the country, a special replication

seldom occurs (3 Ch. Pl. 464). A replication *de injuriâ* is now allowable in covenant and debt as well as in assumpsit (*Purchell v. Salter*, 9 Dowl. 517; 1 Q. B. 197; 1 Gal. & Dav. 682; 5 Jur. 502).

If the plea be one of performance generally, the replication should aver some particular instance of misfeasance or nonfeasance, &c., as issue cannot be taken on a general averment of performance (*Sayre v. Minns*, Cowp. 578).

For instances of departure, see *Green v. James*, 6 M. & W. 656.

**Precedents.*

[*872]

Præcipe for original in covenant.

London to wit (*venue in action*). Command C. D. late of London merchant that justly and without delay he keep with A. B. the covenant made by him the said C. D. with the said A. B. according to the form and effect of a certain indenture (or "deed-poll," or "articles of agreement," &c., *according to the fact*) made between them (*according to fact*) as it is said and unless &c. (*As to the præcipe &c. in general, post, "PRÆCIPE."* It does not disclose the cause of action which afterwards appears in the declaration).

Commencement and conclusion of declaration.

In the Q. B. (C. P., or Ex. of P.). On the day of A. D. 1850. London to wit. A. B. by E. F. his attorney (or "in his own proper person") complains of C. D. who has been summoned to answer the said A. B. for that whereas &c. (*state the deed and breaches &c. as directed ante, p. 865, and conclude thus*) Wherefore the said A. B. saith that he is injured and hath sustained damage to the amount of £ and thereupon he brings his suit &c.

Statement of cause of action.

The statement of the cause of action will be found under the various titles of actions throughout the work.

Plea of *non est factum*.

In the Q. B. (C. P. or Ex. of P.). On the day of , A. D. 1850. C. D. } And the deft. by E. F. his attorney (or "in person") says that the said inden-
ats. } ture (or "articles of agreement" or "deed-poll") is not his deed. And of this the
A. B. } deft. puts himself upon the country &c.

Plea of performance.

[*Commencement as in preceding form.*] Says that he did &c. (*Here state the performance in the words of the covenant if such covenant were in the affirmative, and conclude thus*) according to the form and effect of the said indenture (or "deed-poll" or "articles of agreement") and covenant and of this the deft. puts himself upon the country &c.

See other pleas of "PAYMENT," "LICENSE," "ACCORD AND SATISFACTION," &c. under those titles.

Replication.

[*Commencement as post, "REPLICATION."*] Saith that the defts. of their own wrong and without the cause alleged in the said plea committed the said breach of covenant in manner and form as the plt. hath in his said declaration alleged. And this the plt. prays may be inquired of by the country &c.

For other forms of replications, see 3 Ch. Pl. 464; 5 Wentw. cii. to cxliv.

Evidence.

The plt.'s evidence in this action will depend entirely on the issue taken

by the pleadings. See the various titles of actions throughout the work, especially "LEASE." Where ejectment is brought for a breach of a covenant to insure in "some office in or near London," it lies on the plt. to give at least some slight proof of the omission, though it would be otherwise in an action of covenant, in which the deft. puts in an affirmative plea that he has insured (*Doe v. Whitehead*, 8 A. & E. 571).

If *non est factum* is not pleaded the execution of so much of the deed as is set out is admitted; but if the plt. wish to avail himself of any other part of it, he must prove the execution by the attesting *witness in the [*873] usual way (*Williams v. Sills*, 2 Camp. 519; see *ante*, "ADMISSIONS"). So also, if *non est factum* is pleaded, the deed must be produced and proved (*post*, "DEED"); but payment of money into court admits the execution (*Randall v. Lynch*, *ib.* 356). If the deed be not set forth on oyer, and there be any material variance between that proved and that stated, it will be fatal under this plea (*ante*, p. 869), unless the judge or court will amend under 9 Geo. IV. c. 15, or 3 & 4 Will. IV. c. 42. Where profert has been made, and *non est factum* pleaded, the plt. will not be allowed to prove that the deed has been destroyed, nor to give secondary evidence of its contents (*Smith v. Woodward*, 4 East, 585); and the judge at nisi prius will not postpone the trial, upon application, for the purpose of amending the declaration (*Paine v. Bustin*, 1 Stark. 74). If an excuse for profert be made, the deed may, nevertheless, be proved, if found (*Hawley v. Peacock*, 2 Camp. 557).

Variance.] The deed must be proved as stated in the declaration, so that if a covenant be set out absolutely, without the qualifying context which belongs to it, it will be a fatal variance (*Howell v. Richards*, 11 East, 641; *Timpany v. Burnard*, 4 Camp. 20; see *Swallow v. Beaumont*, 2 B. & A. 765). It is not a material variance to make profert of the "said indenture," and to produce only the counterpart executed by the lessee (*Pearse v. Morris*, 3 B. & Ad. 366); or to omit a word or insert a wrong word, where the context removes all mis-apprehension (*Loveland v. Knight*, 1 M. & R. 597; 3 C. & P. 106); or to use the word "soughs" for "sloughs" (*Morgan v. Edwards*, 2 Marsh. 96; 6 Taunt. 695); or "an" for "one," or "Burl" for "Burt" (*Hill v. Saunders*, 1 C. & P. 80; and see 7 D. & R. 17; 4 B. & C. 528; 9 Moo. 238; 2 Bing. 112); or in an action against a mortgagor to aver that he bound himself, his heirs, and executors, when "heirs" was not in the covenant (*Hanborough v. Wilkie*, 1 Chit. Rep. 518; 4 M. & S. 474, n.); or in an action against a surety in an annuity bond to mis-state the day of payment, when the day is not material (*Hearn v. Cole*, 1 Dow, 459, 463); or to describe a lease determinable at the option of either party at the end of seven or fourteen years as a lease for twenty-one years (*Hill v. Saunders*, 1 C. & P. 80, per Gifford). Where it is stated that by a certain deed "it is witnessed," there is no variance if the words of the deed are set out (*Ross v. Parker*, 1 B. & C. 362; *Bushell v. Beavan*, 1 Bing. N. C. 119, 120; see *ante*, p. 866). Where a declaration stated a demise and a breach of agreement for quiet enjoyment, the court held that the judge at nisi prius had rightly refused to alter it into an action on an agreement for a breach, on want of title to grant it (*Brashier v. Jackson*, 6 M. & W. 549; see "VARIANCE"). A declaration in covenant set it out as a covenant by the deft. that he, the deft., would pay money. The covenant proved was that the deft., or W. G. or L. J. G. or some or one of them, or some or one of his or their executors or administrators, would pay, &c. On *non est factum* pleaded, held, no variance (*Addison v. Gibson*, 16 Law J. 165, Q. B.).

Where, in covenant against A. and B. on a joint covenant supposed to be

implied as incidental to a demise, it appeared, on production of the lease, that in point of law A. only demised, and B., who had an equitable interest, merely conformed; it was held that this was a fatal objection (*Smith v. Pocklington*, 1 Cr. & J. 445; 1 Tyrw. 309).

The plt. cannot support a declaration on a covenant to build two houses within a given time, averring that they were built within that time, by evidence of a parol agreement to enlarge the time, and that they were built within the enlarged time *(*Littler v. Holland*, 3 T. R. 590; see *Bailey v. Homan*, 5 Sco. 94; 3 Bing. 915; 3 Hodges, 184). See, [*874] as to variances, Index, "LEASES," "VARIANCE." See 9 Geo. IV. c. 15, and 3 & 4 Will. IV. c. 42, as to amendment at trial.

Where the action is not for any liquidated sum it is necessary to prove the amount of damage.

Evidence for Defendant.

The evidence for the deft. depends entirely, like that for the plt., on the nature of the issue taken.

Non est factum.] Under this plea he may take advantage of a variance, an alteration since execution, the want of a proper stamp, &c. "See "ALTERATION," "ASSUMPSIT," "STAMP.")

He cannot prove by parol evidence that a deed which is absolute on the face of it is merely conditional (*Anon. Lofft.* 457).

Non infregit Conventionem.] Where the deft., having assigned his practice to the plt., and covenanted not to practise within a certain distance as a surgeon and apothecary, but afterwards acted on several occasions within the forbidden limits, but with consent and knowledge of the plt., and in order to assist him in his business, it was held, in an action for practising within the prescribed limits, that this conduct of the deft. did not amount to a breach of the covenant (*Rawlinson v. Clarke*, 14 Law J., N. S., Ex. 364). See how a breach of covenant may be excused by compulsion of law (*Doe dem. Anglesey v. Rugeley*, 13 Law J., N. S., M. C. 137; 8 Jur. 615, Q. B.).

On Plea that Defendant has assigned over.] If the action be brought against the assignee of a term on a covenant in the lease, and he has pleaded an assignment before breach, and that plea is traversed, he must prove the assignment as stated. But, although it would not suffice to show that the assignment had been delivered as an escrow, or was not accepted, yet he may show that he had executed the assignment, but that it had not been delivered to the assignee, because the solicitor of the deft. retained it for a lien (*Adele v. Wake*, 3 Camp. 394). But notice of the assignment to the plt., as well as the assent of the assignee to the assignment, will be presumed (*Pa'chier v. Tovey*, 1 Salk. 81; *Taylor v. Shurn*, 1 B. & P. 21; see *Townson v. Tickell*, 3 B. & A. 31).

COVERTURE.

See "ABATEMENT," *ante*, p. 7.

In support of a plea of coverture, an examined copy of a register of marriage between the deft. and one J. G., was given in evidence. A witness deposed that he knew one J. G. and his handwriting, and that the hand-

writing of the said J. G. in the register was that of the person whom he knew : held, that the evidence was admissible without the production of the original register (*Sayer v. Glossop*, 2 Exch. 409).

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CRIMINAL CONVERSATION.

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Form of Remedy.

It has been said that trespass is the most proper form of remedy by a husband for the seduction of his wife, force being implied, in consequence of the wife not being able to give her consent (*Woodward v. Walton*, 2 N. R. 482; 4 D. & R. 216; *Guy v. Levisay*, Cro. Jac. 501); but it has been always the practice to bring trespass or case indiscriminately (*Chamberlaine v. Hazlewood*, 5 M. & W. 517; *Woodward v. Walton*, 2 N. R. 481; 5 East, 39; 2 Ch. Pl. 652, n.), and case is advisable where the deft. has been guilty of harbouring plt.'s wife.

Form of Pleadings.

There is nothing distinguishing the form of the pleadings in this from any other action of trespass or case. It is not necessary to allege or prove that deft. knew the female was plt.'s wife (2 East, 446). When it may be doubted whether the criminal conversation can be proved, and the deft. has been guilty of enticing away or harbouring the wife, it may be advisable to add a count for such injuries (see 2 Ch. Pl. 652, n.; Willes, 578-9). The usual *plea* is the general issue, not guilty. The court has allowed the deft. to add a plea, "that the plt., at the time of the trespass, had renounced the comfort and fellowship of his wife, and had finally separated himself by deed and was living apart from her (*Harvey v. Watson*, 2 D. & L. 343; 8 Sco. N. R. 379).

Precedents.

Declaration and trespass for crim. con. with plt.'s wife.

Commencement as usual, post, "DECLARATION," "TRESPASS,"] For that the deft. on

&c. (any day about the time when the injury first took place) and on divers other days and times between that day and the commencement of this suit with force and arms &c. assaulted and ill-treated E. F. then and still being the wife of the said plt. and then debauched and carnally knew her whereby the plt. for a long space of time to wit from the day and year first above-mentioned hitherto hath wholly lost and been deprived of the comfort fellowship and assistance of his said wife in his domestic affairs which he during *all that time ought to have had and otherwise might and would have [*876] had and other wrongs to the plt. then did against the peace of our said Lady the Queen, and to the damage of the plt. of £ and thereupon he brings his suit &c.

See form in case, 2 Ch. Pl. 483. See form of enticing away, &c., plt.'s wife, Willes, 578, which should be used when there is a doubt as to the criminal conversation, and deft. has enticed away or harboured plt.'s wife.

Evidence for Plaintiff.

The plt. must prove his marriage, the criminal conversation, and the damages.

Proof of Marriage.] It is necessary that plt. prove his actual marriage, to enable him to recover (Morris v. Miller, 4 Burr. 2057). He must prove a marriage valid in all respects, and it is not sufficient *prima facie* evidence on his part to show that he and his alleged wife went through a religious ceremony with the *bona fide* intention of thereby contracting a valid marriage, and afterwards lived together as man and wife, in the belief that they had thereby contracted a valid marriage, if in law such marriage was not valid (Catherwood v. Caslon, 13 M. & W. 261). It has been long held that mere proof of cohabitation and general reputation would not be sufficient evidence of marriage (Morris v. Miller, 1 Bla. R. 632; B. N. P. 27; Leader v. Barry, 1 Esp. 353). Deft., being surprised at a lodging with the plt.'s wife, was asked, "Where is Morris's wife?" and replied "In the next room;" it was held not an admission of the marriage, but that she went by that name (Morris v. Miller, *supra*).

An admission, however, by the deft., that the parties are married, is fit evidence for a jury, as it is for them to decide whether it was sufficient to substantiate the fact of marriage (Rigg v. Curvengen, 2 Wils. 399; Dickenson v. Coward, 1 B. & A. 679; when Lord Ellenborough said, "I take it to be quite clear, that any recognition of a person standing in a given relation to others is *prima facie* evidence against the person making such recognition that the relation exists"). But where, prior to 1754, when the first Marriage Act was passed, the validity of marriages depended on the common law, it has been held to require the presence of a priest in holy orders as necessary to constitute a valid marriage (Catherwood v. Caslon, 13 M. & W. 261; Reg. v. Millis, 10 Cl. & Fin. 534; 8 Jur. 717). In the former case a marriage celebrated at Beyrout, between English subjects, according to the rites of the Church of England, by an American clergyman, not a priest in orders was held invalid, and in the latter, a marriage celebrated in Ireland, between a member of the established Church of Ireland and a presbyterian, by a presbyterian minister, according to the rites of the presbyterian church, was held not to be such a contract of marriage as would sustain an indictment for bigamy. The lords were equally divided on the question, and the judgment of the court below against the validity of the marriage was affirmed, on the principle *semper præsumitur pro negante*. All the common-law judges, who had been summoned to the assistance of the house, were unanimously against the sufficiency of the marriage (S. C. 8 Jur. 717). By the Marriage Act, the 26 Geo. II. c.

33, it was required that the banns should be published and the ceremony be solemnized in some church or chapel where banns had been theretofore usually published, that two witnesses besides the minister

*should be present, and that the register should be signed by the [*877] minister, parties, and witnesses. The 44 Geo. III. c. 77, and 48

Geo. III. c. 127, made valid marriages which had been solemnized in churches and chapels in which banns had not been so usually published before the Marriage Act. The 3 Geo. IV. c. 75 repealed so much of the 26 Geo. II. c. 33 as made void marriages of infants by license, without consent, and declared them valid. The 4 Geo. IV. c. 76, amended by the 5 Geo. IV. c. 32, repealed so much of the 26 Geo. III. c. 33, as was then in force, and made full provision for the celebration of marriages in future, in churches and chapels in which, before its passing, it had been usual to solemnize marriages. The 6 Geo. IV. c. 92, and 11 Geo. IV. c. 18, made provisions for the validity of marriages celebrated in churches and chapels in which banns have not been usually published. By the 6 & 7 Will. IV. c. 85, amended by 7 Will. IV. & 1 Vict. c. 22, and 3 & 4 Vict. c. 72, and 7 & 8 Vict. c. 56, provision is made for the celebration of marriages between persons who dissent from the rites of the established church; and it does not affect marriages between the latter persons, except that it makes the registrar's certificate equivalent to banns (sect. 1). Superintendant registrars may grant licenses either to be married in a building registered under the act, or in his office (sect. 11); and provision is made for the registration of chapels, &c. and the formation of the list of such chapels (sects. 18, 19, 34). If any person shall knowingly and wilfully intermarry in any place other than the church, chapel, registered building, office, &c., specified in the notice and certificate required by that act, or without due notice to the superintendant registrar, or without certificate of notice, duly issued, or without license, when license is necessary under the act, or in the absence of a registrar or superintendant registrar, when their presence is requisite, the marriage is made null and void (sect. 42); but there is an express exception in favour of marriages solemnized under 4 Geo. IV. Under the 26 Geo. II. c. 33, s. 8, it was held, that a marriage would not be rendered invalid by evidence that plt. was not married by his right name, but by his reputed one (*R. v. Burton-upon-Trent* (Inhabitants of), 3 M. & S. 537); the object of the 26 Geo. II. c. 33, s. 8, being to secure notoriety to the transaction, by the publication of banns, and to apprise all persons of the intention of the parties to contract marriage; and, per Lord Ellenborough, "How can that object be better attained, than by a publication in the name by which the party is known?" (*R. v. Billingshurst*, 3 M. & S. 257). But where a party changed his name, and was married by that name for the purpose of fraud (*Frankland v. Frankland*, cited ib. 259); or deliberately omitted parts of his real name, with a view to mislead (*Pougett v. Tomlyns*, cited ib. 262; *Tongue v. Tongue*, 1 E. F. Moore, 90); or, where there was no fraudulent intention, but the parties were married by wrong names from mere unthinking levity (*Mather v. Ney*, 3 M. & S. 262); the marriage, under such circumstances, was void. But, when a widow assumed her maiden name for several years, and by that name, though with the description of widow, was married to a second husband, it was held, in the absence of fraud, to be a legal marriage (*R. v. St. Faith's, Newton*, 3 D. & R. 348). By 26 Geo. II. c. 33, s. 1, it is incumbent upon the plt. to prove that the banns have been published in a chapel (if the marriage took place under that act) in which it was usual for banns to be published (*R. v. Northfield*, Doug. 658); or he may adduce evidence to found a presumption that banns were usually published there before 1754 (*Taunton v. Wybourn*, 2 Camp. 297). Marriages in chapels erected and

consecrated *since 26 Geo. II., have been rendered valid by various acts (see 21 Geo. III. c. 53; 44 Geo. III. c. 77; 48 Geo. III. c. 127; 6 Geo. IV. c. 94), which also make the registers, or copies of the registers, receivable in evidence. "If there be a total variation of name, or names, i.e., if the banns are published in a name, or names totally different, from those which the parties, or one of them, ever used, or by which they were ever known, the marriage in pursuance of that publication is invalid, and it is immaterial in such cases whether the misdescription has arisen from accident, or design, or whether such design be fraudulent or not. But if there be a partial variation of name only, as the alteration of a letter, or letters, or the addition or suppression of one christian name, or the names have been such as the parties have used, or been known by at one time, and not another, in such cases the publication may or may not be void. The supposed misdescription may be explained, and it becomes a most important part of the inquiry, whether it was consistent with honesty of purpose or arose from a fraudulent intention. It is in this class of cases only that it is material to inquire into the motives of parties." These cases have been decided on the 26 Geo. II.

A marriage by banns published in false names is not void under the 4 Geo. IV. c. 76, s. 22, which enacts that, "if any persons shall knowingly and wilfully intermarry, without due publication of banns, the marriage of such persons shall be null and void," unless both parties were privy to such mispublication (Rex v. Wroxtton, 1 Nev. & M. 712; 4 B. & Ad. 641; 6 & 7 Will. IV. c. 85); nor is a marriage by license in a false name (Lane v. Goodwin, 4 Q.B. 361; 3 Gal. & Dav. 610).

The form of words prescribed in the rubric for the publication of banns needs not be precisely followed (Standen v. Standen, Pea. 34, per Ld. Kenyon). The 4 Geo. IV. c. 91, s. 2, declares valid all marriages celebrated by a minister of the Church of England, in the chapel or house of a bishop, ambassador, or minister, or the chapel of any British factory abroad, or by any *person* officiating under the orders of the commanding officer of a British army serving abroad (see 9 Geo. IV. c. 91; Waldegrave Peerage, 4 Cl. & Fin. 649; R. v. Brampton, 10 East, 286). With these exceptions marriages solemnized abroad are not affected by the Marriage Act; and that which would be a valid marriage in the place where it was solemnized, is recognised as such in this country (Middleton v. Janverin, 2 Hag. 437; Lacon v. Higgins, 3 Stark. 183; Kent v. Burgess, 11 Sim. 361).

As to what would be sufficient presumptive evidence that the marriage was solemnized according to the *lex loci*, see R. v. Brampton, 10 East, 286). Where it was solemnized in the office of the British consulate at Beyrout, not according to the custom of the country, and there was some doubt whether it was strictly according to the rules of the Church of England (the minister not being a clergyman of the Church of England), and the parties lived as man and wife for two years afterwards, Lord Abinger, C.B., held, that for the purpose of the verdict it should be considered a marriage in fact (Catherwood v. Caslon, 1 Car. & M. 431; but see S.C. 13 M. & W. 261). In proving a foreign marriage some evidence must be given of the law of the foreign state; the evidence is received in the ecclesiastical courts from professors of the law in question (see Lind v. Belisaria, 1 Hag. Cons. 248; Middleton v. Janvelin, *supra*; but see Harford v. Morris, *infra*). As to the proof of the law of foreign states, see *post*, "FOREIGN LAW." So, the marriage of parties in an English ambassador's chapel is valid (Rex v. Brampton, 10 East, 286). Such marriage is, however, further rendered valid *by the enactment of 4 Geo. IV. c. 91. And a marriage [*879] in Scotland, between English subjects, according to the law of

Scotland, is valid (*Dalrymple v. Dalrymple*, 2 Hag. 54; *Harford v. Morris*, ib. 430). And so is a marriage by a Roman Catholic priest between British subjects in a British colony (*Lantour v. Teesdale*, 8 Taunt. 833).

A marriage in Ireland by a clergyman of the Church of England in a private room, was held good (*Smith v. Maxwell*, R. & M. 80); but it would not be so held now (see *Reg. v. Millis*, *ante*, p. 876, where it was held that the presence of a priest in holy orders was essential to a valid marriage at common law). The 26 Geo. II. c. 33, and 4 Geo. IV. c. 76, did not extend to the marriages of Jews and Quakers, and therefore those marriages were considered good if solemnized according to the forms of their respective religions. Such marriages are good only if both parties are Jews, or Quakers respectively, and notice shall be given to the registrar of the intended marriage, and a certificate be issued by the registrar pursuant to 6 & 7 Will. IV. c. 85, ss. 2 and 4 (see 3 & 4 Vict. c. 72, s. 5); see, as to the proof of a Jewish marriage, *Horn v. Noel*, 1 Camp. 61; *Lindo v. Belsario*, 1 Hag. Cons. 225, App. p. 9; *Goldsmid v. Bromer*, ib. 324; and as to Quaker marriage, see ib. App. p. 9; and *Deane v. Thomas*, Moo. & M. 361. But in the recent case of *Catherwood v. Caslon*, 13 M. & W. 261, the validity of Quakers' and Anabaptists' marriages before the first Marriage Act was doubted. As to the marriage of dissenters, see 6 & 7 Will. IV. c. 85, p. 878.

Mode of Proof.] The usual proof of ordinary marriage is the production of a copy of the marriage register (B. N. P. 27). It is not necessary to call the attesting witnesses of the marriage, but some evidence of identity must be given. The evidence of a person present sufficiently establishes the fact of the marriage, and will supersede the necessity of producing the register, &c. (*Allison's case*, C. C. R. 109).

The register alone is no evidence of the identity of the parties, which it is also necessary to prove (*Birt v. Barlow*, Doug. 162). This is usually proved by some persons present during the ceremony, as the minister, clerk, or subscribing witness to the register; or identity of the parties may be proved by the bell-ringers who rang the bells at the wedding; by persons present at the wedding-dinner; or by a maid-servant, who should prove that her mistress went always by her maiden name till the day of the marriage; that she went out on that day, and, on her return, and ever since, had been called by the name of her husband (Ib.; and see *Morris v. Miller*, 1 Bla. R. 632; *S. C.* 4 Burr. 2057). Evidence of a marriage *de facto*, cohabitation, and of a criminal intercourse between the deft. and a woman who passed for plt.'s wife, is sufficient to go to a jury without absolute proof of the identity of the former woman with the latter (*Hemmings v. Smith*, 4 Doug. 29). By 4 Geo. IV. c. 76, s. 26, it is not necessary in support of marriage to give evidence of the residence of the parties as directed in the act, nor can any evidence be received to prove the contrary; the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion (*Loveden v. Loveden*, 2 Hag. Cons. 2).

A copy of a register of marriage, signed with the name of a person who had been curate of the parish eighty years before the trial, and who signed as curate, was produced by a witness who had been seven years parish clerk, and who said that the same signature in the same handwriting appeared in several places of the original register: held admissible, though no proof was given of the curate's death, and no further proof of his handwriting (*Doe d. Jenkins v. Davies*, 10 Q. B. 314).

Proof of Criminal Conversation.] The fact of the adultery must be proved to have been committed, which, though it be frequently difficult to

prove, yet, if plt. prove circumstances, immediately connected with the fact, it will be deemed sufficient evidence for a jury *to decide (2 Ph. Ev. 202); as a discourse between the wife and the deft., or letters [*880] written to her by him (B. N. P. 28 a); and indecent familiarities may be proved to have taken place between them (Norfolk (Duke of) v. St. Germaines, 3 St. Tri. 6); the elopement of the parties, and their passing as man and wife (Stark. Ev. 440). In a case (Trevanion v. Daubuz), tried at the Bodmin Summer Assizes, 1834, Patteson, J., refused to nonsuit, and the plt. had a verdict, though the evidence was of a general nature, and pointed to no precise act or time (Rosc. Ev. 491). Where the writ issued on the 11th December, 1840, and there had been suspicious circumstances touching the plt.'s wife, and the deft. before that time, and they had both left this country about June, 1840, but it was not shown that they left together, and they lived in open adultery here in August, 1841; Lord Abinger, C. B., directed the jury to dismiss from their minds everything which occurred subsequently to the date of the writ (Catherwood v. Caslon, 1 C. & M. 431). Where the Statute of Limitations is pleaded, the plt. may give evidence of acts of adultery which have taken place more than six years since, to show the nature of the connexion subsisting between the parties within the six years (Norfolk (Duke of) v. St. Germaines, *supra*).

Proof as to Damages.] In order to increase the damages, the plt. may show that he and his wife lived on terms of the most cordial affection, which may be proved by persons intimate in the family (Trelawney v. Coleman, 1 B. & A. 90); that deft. was admitted as a friend, and took an undue advantage of the confidence reposed in him. "What the husband and wife say to each other, is, beyond all question, evidence to show their demeanour and conduct, whether they were living on better or worse terms: what they write to each other may be liable to suspicion, but, when that is cleared up, the ground of objection fails" (per Lord Ellenborough, Trelawney v. Coleman, 1 B. & A. 91). So, it is necessary, in order to guard against collusion, that the time when the letters were written be proved (Edwards v. Crock, 4 Esp. 39; 2 Stark. 191); and the dates are sufficient proof of the times when they were written (Houlston v. Smith, 2 C. & P. 24; 3 Bing. 127; 10 Moo. 482). But letters by the wife to the husband are not receivable if written at a time when at least an attempt at adultery had been made by the deft., but a draft in the deft.'s handwriting written by her in answer to a letter of Mrs. B. to her is receivable, as is also the letter of Mrs. B. (per Coleridge, Wilton v. Webster, 7 C. & P. 198). Letters by her to her husband and others, before the adulterous intercourse, are admissible to show the state of her feelings, though they may state a fact which would not strictly be evidence (Willis v. Bernard, 8 Bing. 376; 1 Moo. & S. 584; 5 C. & P. 342). Proof that a letter produced corresponds as to its contents with a letter which the wife wrote to her husband and read over to the witness is sufficient to warrant the reception of the letter (Trelawney v. Coleman, 1 B. & A. 90; 2 Stark. 191); though the wife has died since the commencement of the suit, damages should be given for the loss of her society from the time of the discovery of the adultery up to the time of her death, and for the shock to the husband's feelings, even although there was no suspicion of her infidelity till she was on her deathbed, and the husband continued to treat her kindly up to her death (per Coleridge, Willon v. Webster, 7 C. & P. 198). Proof of a settlement and provision for children may also be given, to enhance the damages (B. N. P. 27). For the purpose of answering the imputation of connivance on the part of the husband, the plt. may prove *representa- [*881] tions made by the wife as to the place where she was going previous

to her elopement (*Hoare v. Allen*, 3 Esp. 276). It may also be shown that her character, previous to her acquaintance with deft., was unimpeachable (*B. N. P.* 27). But, when evidence of character is admissible see, "*CHARACTER.*" Evidence of the amount of the deft.'s property is admissible with a view to damages (per Alderson, B., *James v. Biddington*, 6 C. & P. 589; *contra*, 1 Selw. N. P. 25).

Evidence for Defendant.

Disproof of Marriage.] Whether the plea of not guilty admits the marriage has not been decided. But at common law this plea put the whole declaration in issue, and the new rules do not expressly alter the effect of it in trespass in personal injuries, and in an action for seduction the plea was held to admit the service (*Torrence v. Gibbons*, 4 Q. B. 267). The evidence will consist, in most instances, in showing the marriage to have been irregular and void, as by its not having been celebrated in compliance with the provisions of the law peculiarly relating to it (see *ante*, p. 876).

Plaintiff's Misconduct.] Whether any and what degree of misconduct on the part of the husband is a bar to this action, seems to be still undetermined. In *Coote v. Berty*, 12 Mod. 232, it was said that the license of the husband or the bad conduct of the wife could not be pleaded in bar, but went only in mitigation of damages. Lord Kenyon held, that where the plt. neglected the society of his wife and lived openly with other women, he could not bring this action (*Wyndham v. Wycombe* (Lord), 4 Esp. 16; *Stuart v. Blandford* (Marquis of), cited *ib.*). Lord Alvanley a few years afterwards held that the plt.'s misconduct went only in mitigation of damages (*Bromley v. Wallace*, 4 Esp. 237). It has been repeatedly ruled that if he consent to the adultery he cannot recover (*Howard v. Burtonwood*, 1 Selw. N. P. 10; *Hoare v. Allen*, *ib.* 11, n.; 3 Esp. 276). In *Duberley v. Gunning*, 4 T. R. 651, Buller, J., said the law was then clearly settled to be, that if the husband consented to his wife's adultery, it went in bar of his action (*ib.* 657). In a preceding case, *Cibber v. Sloper*, Lee, C. J., is said to have held on the other hand that it did not go the ground of the action, but only in mitigation of damages (1 Selw. N. P. 9, n. 3). If he knowingly suffer her to live as a prostitute, and a man is thereby drawn into adultery with her, Lord Mansfield laid it down as clear law that no action would lie (*Smith v. Allison*, B. N. P. 27; *Hodges v. Wyndham*, Pea. 39). But, if without his privity, it will go only to the damages (B. N. P. *ib.*). It has been recently ruled that the plt. is entitled to recover unless he has been in some degree a party to his own dishonour, either by giving a general license to his wife to act as she pleased, or by assenting to the particular act of adultery, or by having totally and permanently given up her society (*Winter v. Henn*, 4 C. & P. 494; Alderson, B.); or, unless his neglect or misconduct was occasioned by a desire to get rid of her, and he encouraged the advances of the deft. and testified a desire "to throw her away" (*Trevanion v. Daubuz*, Bodmin Summer Assizes, 1834; Rosc. Ev. 482). It has been held that evidence that the plt. married an actress, concealed the marriage from her mother, very seldom saw his wife, and suffered her to live with her mother as if she were a single woman, and to continue her theatrical performances in her maiden name, was not matter of defence, but only in mitigation of damages [**882*] (*Calcraft v. Harborough* (Lord), 4 C. & P. 499; per **Tindal*). So, neither is a recovery against another deft. for a similar cause of action which accrued during the same period a bar to the action (*Gregson v. M'Taggart*, 1 Camp 415); nor is the fact that plt. allowed the deft. to

remain in his house after a suspicion of the wife's infidelity had been intimated to him (*Foley v. Peterborough* (Lord), 4 Doug. 294).

Separation of the Parties.] Where a deed of separation has been entered into between husband and wife, and the wife committed an act of adultery while living separate, though not pursuant to the terms of the deed, the trustees not having given their consent, it was held the husband might maintain an action, as he had not wholly renounced his marital rights (*Chambers v. Caulfield*, 6 East, 244). But, where an actual separation has taken place, and the criminal conversation occurs after the separation, no action can be maintained by the husband, as he voluntarily parts with that comfort and society for the loss of which he seeks a compensation (*Weeden v. Timbrell*, 5 T. R. 357; 1 Esp. 16; *Bartelot v. Hawker*, Pea. 11; but see *Hodges v. Windham*, Pea. 39). The separation must be with the consent of the husband; or, in the case of trustees, with their consent; and, if the wife lived apart without their consent, the husband is still entitled to maintain his action (*Chambers v. Caulfield*, 6 East, 248). Where a necessary separation takes place, in consequence of the parties residing in different families or such like, it will be no bar to plt.'s action, as there is no abandonment of his marital rights (*Edwards v. Crock*, 4 Esp. 39). So also, a voluntary separation without deed, so that there might be still a suit for restitution of conjugal rights, is no bar (per Abbott, C. J., in *Graham v. Wigley*, 2 Roper's Husband and Wife, 2nd ed. 323; see *Harvey v. Watson*, 7 Man. & G. 644).

Mitigation of Damages.] To mitigate damages, deft. may show that the wife was a prostitute, though the husband was not privy to it (*Hodges v. Windham*, Pea. 53); he may show letters written by the wife to the deft. previously to any illicit intercourse, whereby to prove that she had solicited and enticed him into the criminal connection (*Elsam v. Fawcett*, 2 Esp. 362; Selw. N. P. 25); and evidence of loose conduct and criminality with others, before the cause of action, is admissible; but acts of subsequent misconduct are not (*Ib.*); nor is evidence of the general reputation of her being or having been a prostitute, unless perhaps after having laid a foundation by proving her being acquainted with other men (*B. N. P. 27*). He may also show that the husband was in the habit of criminally associating with other women (*Bromley v. Wallace*, 4 Esp. 237); or that the wife had had a bastard before her marriage with plt. (*B. N. P. 296*); or he may show the gross neglect and misconduct of the plt., as the turning her out of his house, and refusing her the common necessities of her station in life (*B. N. P. 296*; *Duberlèy v. Gunning*, 4 T. R. 651); or that she complained, before the criminal intercourse, of his treatment of her (*Winter v. Wroot*, 1 Moo. & R. 404, per Lyndhurst). Deft. may also show that his means and expectations are inconsiderable, and not calculated to meet heavy damages (2 Stark. Ev. 445).

Competency of Witnesses.] The confessions of the wife are not evidence for the plt. (*B. N. P. 28*); but a discourse between her and the deft. is (*Ib.*); as are also letters written by the deft. to her; and so would letters from her to him and received by him, coupled with his conduct after the receipt, be evidence against him (2 Stark. *Ev. 354, referring to [*883] *Loveden v. Loveden*, 2 Hag 52). The wife is not a competent witness in any case against her husband (*Hale*, P. C. 4). The declarations of the wife at the time of elopement that she fled from the terror of personal violence of her husband, seem to be evidence against him (see *Aveson v. Kinnaird*, 6 East, 193); and where the defence was that the husband con-

nived at the elopement, evidence of the wife's declarations as to intention in going were received for the plt. (*House v. Allen*, 3 Esp. 276; see further "ADMISSIONS").

Damages, Costs, &c.] Where there were two pleas, Not guilty, upon which there was a verdict for the plt. and Not guilty within six years, to which there was a demurrer and judgment for the deft. it was held, that plt. could have no damages, and that costs could not be paid on either side on account of the trial (*Coke v. Sayer*, 2 Wils. 85). Since the 3 & 4 Vict. c. 24, if the damages are under 40s., there will be no more costs than damages, unless the judge certifies forthwith. Whatever damages the jury give, the court will not reduce them, unless a very strong case is made out (*Wyatt v. Rochfort*, 2 Jur. 13, Q. B.).

CUSTOMS.

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Local Custom, p. 887.

Form of Pleadings.

Declaration.] As the courts are bound to notice all *general* customs existing by the common law, they need not be stated in pleading (*R. v. Lyme Regis*, Doug. 150; *post* "DECLARATION"). Thus in an action against a common carrier, &c., for the loss of goods, &c., which is a liability founded on the common law or custom of the realm, it is improper to state the custom, as it tends to confound the distinction between general and special customs (*Co Lit.* 89 *a*, n. 7). So, it is improper, in a declaration on a bill of exchange, to set out the custom of merchants, because it is part of the law of the land (*Pinkney v. Hall*, Raym. 175). Such of the customs of gavel-kind and borough English as are of the essence of the tenure, as the course of descent, need not be specially set out nor prescribed for, as the common law notices them; and it is sufficient to state that the land is of the custom of gavelkind, and subject thereto; but, in regard to other customs, though incident to these tenures, they must be set out (*Co. Lit.* 175 *b*, n. 4; *Clements v. Scudamore* 2 Ld. Raym. 1025).

Particular Customs.] But, if the plt. rely on the custom of a particular parish or place, the custom should be stated in the declaration in such a manner as to show the duty thereby chargeable *upon the deft. : as in an [*884] action on the case for not keeping a common bull or boar within the parish, the declaration should show the custom (4 Mod. 241; *Winton (Mayor of) v. Wilkes*, 2 Ld. Raym. 1134). A declaration on a local custom ought to set out specially the nature and particulars of the custom; and they ought to be pleaded with precision as to the extent, place, &c., and in

the present tense, and not that they should have a way (2 Vent. 144; And. 32; Forst. 347; 1 Sid. 237); and a custom cannot be laid in the negative (2 Ld. Raym. 869). And, in pleading a custom which admits of exceptions, the exceptions must be noticed (Griffin v. Blandford, Cowp. 62); but modifications of a custom not inconsistent with the right claimed need not be shown (Ball v. Herbert, 3 T. R. 264). And, where the law raises the exception, it need not be stated in pleading (Cro. Eliz. 485). So, where a copyholder, under custom claims common, it is not necessary to show what estate they have in the copyhold (Hoskins v. Robins, 2 Saund. 326); and a custom, though apparently subsequent to another, may be laid as founded time out of mind; for customs are not coeval (Lovelace's case, 1 Salk. 203). The courts will not take judicial notice of the customs of London unless certified by the recorder (Blacquiere v. Hawkins, 1 Dougl. 378; Piper v. Chappel, 14 M. & W. 624).

Variance.] The courts are not so strict with respect to stating a custom in declarations as in pleas (4 Cro. Car. 347). Care should, however, be taken to state the custom truly, as any material variance between the custom laid and that proved will be fatal. Where a plea of justification for taking two horses as heriots stated a custom in the manor, that the lord, from time immemorial until the division of a certain tenement into moieties, had taken, and been accustomed to take, a heriot upon the death of every tenant dying seised, and, since the division, the lord had taken and been accustomed to take, on the death of every tenant dying seised of either of the moieties, a heriot for each moiety, it was held that this must be taken to be one entire custom, and not two distinct customs; the one applicable to the tenement before and the other after the division of it; and that, being alleged to be an immemorial custom, it was disproved by evidence that the division was made within memory (Kingsmill v. Bull, 9 East, 185). On a justification by the lord of a manor, that the lord should have the best beast on the tenant's death, the custom proved was, that the lord should have the best beast or good, &c., and the variance was held fatal by the whole court of C. B. (Adderly v. Hart, 1 B. & P. 394, n.).

So, a claim of easement to dry linen in a certain close in respect of a messuage, is not supported by proof of a right for the occupiers to dry the linen of their own families only (Drewell v. Towler, 3 B. & Ad. 735).

So, where a prescription was alleged in bar, it should be proved as laid (per Holroyd, J., in Ricketts v. Salwey, 2 B. & A. 366); and therefore a prescription for all commonable cattle was not proved by common for sheep and horses only (Pring v. Henley, B. N. P. 59); but might be found by the jury upon proof that the claimant turned in all the commonable cattle he ever kept, though these happened to be only sheep (Manifold v. Pennington, 4 B. & C. 165). But if a deft. prescribed for all cattle, &c., at all times of the year, and it appeared that sheep were excepted during a certain time of the year, it was a variance (R. v. Hermitage, Carth. 241).

So, where on a justification under a prescription to enter upon lands for the purpose of getting coals, &c., doing no more damage *than was necessary, the proof was of a prescription to enter, &c., [*885] making compensation for the damage done (Paddock v. Forrester, 3 Sco. N. R. 715; 1 Dowl. N. S. 527). The right to the whole of a given substratum of coal lying in a close is a right to land, and cannot be claimed by prescription: a right to take coal is different (Wilkinson v. Proud, 11 M. & W. 33; 7 Jur. 284; 12 Law J., N. S. 227). But a plea of prescription is supported if the party prove a right more extensive than that pleaded, so that it be of such a nature that it may comprehend the right pleaded

(*Bailey v. Appleyard*, 3 N. & P. 257; 8 Ad. & E. 161). A prescription for a right of common for 100 sheep, is supported by proof of a right for 100 sheep and six cows (*Bushwood v. Pond*, Cro. Eliz. 722). But if it had been for 150 sheep, the court thought it would be a variance (*Ib.*; and see *Bruges v. Searle*, Carth. 219; 4 Mod. 89; *Tewkesbury (Bailiffs of) v. Becknell*, 1 Taunt. 141; 1 Camp. 315, n.). A right of ferry from A. to B. is proved by evidence of a ferry from A. to B. and back (*Pim v. Cierée*, 6 M. & W. 234). A plea of the exercise of a right for 30 years, every year and at all times of the year, is supported by proof of its exercise whenever the party had occasion to do so (*Clayton v. Corby*, 8 Jur. 212). A common of pasture, "paying so much for it," must not be pleaded as unqualified common (*Gray's case*, 5 Rep. 79).

By the pleading rules of H. T. 4 Will. IV. r. 5, art. 4, 5, 6, all pleas of right of way, common of pasture, and "other similar rights," so pleaded as to be capable of being construed distributively, shall be taken distributively. Thus, if the deft. plead a right of way with carriages, cattle, and on foot, and the jury find with carriages, and on foot, or he plead a right of common for divers kinds of common, and the jury find only for a particular kind, there shall be a verdict for him for such trespasses as are justified by the right found, and for the plt. as to the rest.

Pleas.] The rules as to stating general and particular customs are the same both in declarations and pleas; but greater strictness is, in general, requisite in pleas than in declarations (4 Cro. Car. 347). A plea under the 2 & 3 Will. IV. c. 71, ss. 2, 5, alleging an easement enjoyed for twenty years, must state in the words of sect. 5, that the enjoyment was had "as of right" (*Holford v. Hunkinson*, 5 Q. B. 584; 1 D. & M. 473). Where, during the alleged enjoyment, the estates, over which and in right of which it has been exercised, were held by the same person, as this fact destroys the enjoyment "as of right," it need not be specially pleaded, but is admissible under a mere traverse of the enjoyment (*Clayton v. Corby*, 2 Q. B. 813; see "COMMON").

To a declaration in case for digging mines near the foundation of plt.'s dwelling-house, without leaving due support, so that the said foundations were injured, and the dwelling-house cracked, sank in, and was in danger of falling and being destroyed, deft. pleaded that the dwelling-house from time whereof, &c., was part of the manor of N., and was situate in a township within the said manor; that the queen was seised in fee of the manor, and of the mines, collieries and seams of coal therein; and that she and all those whose estate she had, &c., and their tenants, and those to whom she or they have granted license to mine from time whereof, &c., have been used, &c., and of right ought, &c., to work the said mines, collieries, &c., under any messuages, dwelling-houses, buildings and lands, parcel of the manor, and within the township, and for the purpose of working the said mines, collieries, &c., to dig and make under-ground all such mines, pits,

&c., under *the said messuages, dwelling-houses, buildings, lands, [*886] or any part thereof, as might from time to time be expedient and necessary for that purpose, and out of the said mines, &c., to get the coals, &c., and carry away and convert the same, doing no more than necessary for the purpose aforesaid, and paying to the tenants and occupiers of the surface of lands damaged thereby a reasonable compensation, when demanded, for the use of the surface, or any damage occasioned thereto in and about the working of the mines, collieries, &c., but without making compensation in respect of the surface on any other account, and without making compensation for any damage occasioned to any messuages, dwelling-houses,

or other buildings within and part or parcel of the manor by or for the purpose of working the said mines, collieries, &c. Justification, stating that deft. as lessee and grantee of the crown, committed the alleged grievances, &c., in exercise of the above right, doing no more than was necessary for the purposes aforesaid: held, that the prescription was void as being unreasonable; that a custom similarly pleaded was void on the same ground: that the right, if maintainable in itself, might have been pleaded in virtue either of prescription or of custom; and that it might have been claimed as well against copyholders as against tenants of customary freehold (*Hilton v. Granville* (Earl of), 5 Q. B. 701).

De injuriâ is a good replication to a plea justifying under a custom (*Mortimer v. Moore*, 15 Law J. 118, Q. B.; 10 Jur. 370; 6 Law T. 255).

Evidence.

General Customs, being part of the common law, need not be proved.

Local Customs must be proved. To establish a particular local custom before a jury, it must be proved that it has existed since the time of legal memory; that is, since the reign of Richard I.: for, if it appear to have originated within time of legal memory, it is not a good custom (1 Bla. Com. Intro. s. 3). It is also essential that the usage has been continued; for, if there be any interruption of the right within the time of legal memory, the custom will be void; but an interruption in the possession or enjoyment only, though for ten or twenty years, will not destroy the custom. Thus, if the inhabitants of a parish have a customary right of watering their cattle at a certain pond, the custom is not destroyed though they do not use it for ten years (*Ib.*); and where to trespass for taking plt.'s cattle in an open field called P. and G. field, and impounding them, the deft. pleaded a sole right of pasturage in gross in 217 acres of the land of P. and G. field for thirty years before the commencement of the suit (under 2 & 3 Will. IV. c. 71, s. 2); and it appeared that within twenty years there had been encroachments, by building and enclosures, to the extent of thirty acres on the 217 acres, but no encroachments had been made on that part of the 217 acres in which the alleged trespass was committed; it was held that these interruptions not being made on the part of the land where the plt.'s cattle were depasturing, they were not conclusive evidence of the interruption of the enjoyment by the deft. and those from whom he derived (*Welcome v. Upton*, 5 M. & W. 398; 7 Dowl. P. C. 475). But, if the right be *discontinued*, though but for a day, the custom is at an end (1 Bla. Com. *supra*). Customs, also, must have been peaceable and acquiesced in, and not subject to contention and dispute in their origin, as they must, in the first instance, have been created by consent. The usual evidence of custom consists in acts of usage

*within the knowledge and experience of living witnesses, upon [*887] which alone, and without the aid of more remote evidence of a documentary or traditional nature, the presumption of a custom may be founded. As, if its existence at a distant time be shown, and there is no evidence that at any certain time it did not exist, a jury may infer that it went back as far as the reign of Rich. I. (*Leuckhart v. Cooper*, 7 C. & P. 119, per Tindal). So, if it be proved to have existed from time immemorial, till 1689, it must be taken to exist still, if there be no further evidence proving or disproving its existence (*Scales v. Key*, 11 Ad. & E. 819; 3 P. & D. 505). So, where rights are claimed by prescription, the jury ought to be directed that from modern usage they are warranted in presuming that the right claimed is immemorial, unless they are satisfied of the contrary by

other evidence (*Jenkins v. Harvey*, 1 C. M. & R. 877; 2 C. M. & R. 383; 1 Gale, 23; 5 Tyrw. 326). So, evidence of a profit à *prendre* within living memory, without any evidence as to user or non-user at any antecedent period, is evidence of a prescriptive right (*Blewit v. Tregonning*, 5 Nev. & M. 308; 3 Ad. & E. 554). A plea of pasturage by prescription is disproved by showing a grant to the deft.'s ancestor 81 years before for a valuable consideration, and such a plea is not aided by the 2 & 3 Will. IV. c. 71, s. 1 (*Welcome v. Upton*, 5 M. & W. 398; 7 Dowl. P. C. 475). A jury cannot from the same evidence find a customary right in all the inhabitant occupiers of land within a district, and a prescriptive right to the same subject-matter in respect of a particular estate within the district (*Blewit v. Tregonning*, *supra*); and on a question as to the existence of a particular custom in a manor, evidence of a similar custom in an adjoining manor, though within the same parish and leet, is not admissible (*Anglesea (Marquis of) v. Hatherton (Lord)*, 10 M. & W. 218; 12 Law J., N. S. 57; see "*COMMON*").

As a custom is properly a local usage, applying generally to a place, and concerning public rights, and not, as in the case of prescriptions, to any particular person in it (2 Bla. Com. 263), common reputation is admitted to be evidence; for such rights, being matter of public notoriety, and of great local importance, become a frequent subject of discussion in the neighbourhood, where all have the same means of information and the same interest to ascertain the claim (*Morewood v. Wood*, 14 East, 329). And the same reason applies in a less degree to questions respecting general customs which concern parishes or manors, or the inhabitants of towns and other places. In such cases, general reputation is some evidence of a right beyond the memory of living witnesses, and thus tends to support the modern usage (1 Ph. Ev. 236). Concerning questions upon parochial or manorial customs (*Denn v. Spray*, 1 T. R. 466), declarations as to the common opinion of the place, made by deceased persons, who, from their situation, had the means of knowledge, and no interest to misrepresent, have been generally considered admissible evidence. A right of common by custom, though, strictly speaking, a private, is also a general right, as it affects a number of occupiers within a district. But the evidence is to be confined to what such old persons have said as were in a situation to know what the rights were; and, before a customary right can be proved by such evidence, a foundation ought to be laid by showing an exercise of the right or acts of enjoyment within the period of living memory (*Weeks v. Sparke*, 1 Moo. & S. 689; *Doe v. Lisson*, 12 East, 65; *Morewood v. Wood*, 14 East, 330); and, though one undisturbed act does not make a custom, it may be evidence of it (per Lord Ellenborough, *Roe v. Jeffery*, 2 Moo. & S. 93).

A custom may be destroyed by unity of possession (*Bolus v. [*888] *Hinstroke*, Raym. 192), or by showing that it is unreasonable, uncertain, &c. (1 Bla. Com. 78, 79). But a custom is not destroyed by a mere disusage of ten or twenty years (*Cart*. 118). By letters-patent of the 15 Car. I. (A. D. 1639), a weekly market and two fairs at E., "with all tolls and profits therefrom coming and arising," were granted to one G. H. and his heirs, through whom the plt. claimed. By a deed bearing date the 31st of August, 1646, and made between the said G. H. of the one part, and four other persons therein described as yeomen and by-law men for the year 1646, for the said township of E., on behalf of themselves and all the inhabitants of E., aforesaid, mentioned in the schedule thereto annexed, of the other part; the said by-law men and inhabitants granted to the said G. H., his heirs and assigns, the market-place at E., and the said G. H. covenanted that the said by-law men and the rest of the inhabitants,

their heirs and assigns, for ever, should have a free market within the said town of E., to buy and sell all cattle and commodities toll free, in as ample a manner as the said G. H. had by the recited letters-patent. It was proved that the plt. was seised in fee of the freehold of the market-place, and that the deft. was an inhabitant of E., but it was not shown that he was either the heir or assignee of any of the grantees named in the schedule. It had been previously decided that the exemption included stallage dues, but also that inhabitants cannot, *quâ* inhabitants, prescribe for an easement *in alieno solo*, which a right to place a stall in the market without payment would be, or claim an exemption by grant: and at a subsequent trial, there was evidence of exemption from tolls and stallage dues, subsequent to the deed of 1646, but no evidence of any exemption, or of the existence of any market at E. prior to that date: held, that it was a mis-direction to direct the jury that they might infer that the exemption originated in some custom independent of the deed, there being no ground for referring it to any legal foundation (*Lockwood v. Wood*, 1 N. P. C. 193).

It is not a mere discontinuer of user by the claimant himself, but an adverse obstruction, that defeats a prescriptive right, under the 2 & 3 Will. IV. c. 71 (*Carr v. Foster*, 3 Ad. & E., N. S. 581); as, where a commoner ceased to use the common during two years, having at the time no commonable cattle, the jury were held to be justified in finding continued enjoyment notwithstanding (*Ib.*); but it was a question for them, the enjoyment of the right at the time of the action and for thirty years before, including those intermediate two years when it was so disused, to say, whether at the time of that disuser the right had ceased, or was still substantially enjoyed (*Ib.*). Where the deft. pleaded an enjoyment as of right for thirty years *next before* the commencement of the action, and the plt. replied a life estate outstanding during twenty-seven of the said thirty years, and the deft. rejoined that such estate did not continue during any part of the said thirty years; evidence of enjoyment during two periods, amounting together to thirty years, one period before and the other after the life estate, was held to support the issue on his part (*Clayton v. Corby*, 2 Q. B. 813; see *ante*, "PLEA," p. 885).

Where a custom of the country is proved to exist, it is to be considered applicable to all tenancies, in whatever way created, whether verbal or in writing, unless expressly or impliedly excluded by the written terms themselves, (*Wilkins v. Wood*, 12 Jur. 583; 17 Law J. 319, Q. B.).

*DAMAGES(a).

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Statement of, in Declaration, post, "DECLARATION," p. 911.

When recoverable, p. 889.

When Nominal or Actual, p. 889.

Amount of, p. 890.

Mitigation of, p. 892.

Double and Treble, p. 893.

Withholding Duties, p. 893.

(a) 2 U. S. Dig. Tit. "Damages," p. 1; 1 Supp. U. S. Dig. p. 499; 1 Ann. Dig. p. 151; 2 Id. p. 90; 3 Id. p. 124.

[*When recoverable.*] Damages are a pecuniary compensation for an injury, and may be recovered in every personal action that lies at common law, except in an action by a common informer for a penalty given by statute (1 Rol. Abr. 574; 4 Burr. 2018, 2489); or for delay of execution in a *sci. fa.*, founded on the statute of Westminster 2, c. 45 (3 Burr. 1791). In actions purely real, no damages are recoverable (Booth on Real Actions, 74); as in a writ of right, &c.: but damages may be recovered in actions of a mixed nature, as in ejectment (3 Bl. Com. 200, 201); or in an assize, or writ of entry in nature of an assize of novel disseisin, against the disseisor (2 Inst. 286). "And, by the Statute of Gloucester (6 Edw. I.), c. 1, damages were given in an assize, or writ of entry. But see 3 & 4 Will. IV. c. 27, ss. 36, 37.

The plt. contracted for the purchase of an estate from the deft.; the plt.'s solicitor made objection to the title as disclosed by the contract; the deft. affirmed it to be good, and threatened to resell the estate if the plt. did not complete. The plt. afterwards filed a bill for a specific performance against the deft.; the deft., by his answer, still contended that the title was good. The Master (to whom it was referred) reported that the deft. could not make a good title according to the terms of the contract, and the plt.'s bill was, thereupon, dismissed, without costs: held, that the plt. could not recover against the deft. in an action at law his costs of the Chancery suit (Malden v. Tyson, 12 Jur. 228; 17 Law J. 85, Q. B.).

Where a party agrees to grant a good and valid lease, having full knowledge that he has no title, the plt., in an action for the breach of such agreement, may recover, beyond his expenses, damages resulting from the loss of his bargain; and the deft. cannot, under a plea of payment of money into court, give evidence that the plt. was aware of the defect of title (Robinson v. Harman, 1 Exch. 850; 18 Law J. 202, Exch.).

The deft. gave the plt. into custody on a charge of felony, and he was taken before a magistrate, who remanded him, and on his again being brought up he was discharged. In trespass for the false imprisonment, the judge told the jury that the plt. was entitled to damages for the whole time he was in custody: held to be wrong, as the damages ought to be limited to what occurred prior to the remand, which was the act of the magistrate and not of the deft. (Lock v. Ashton, 18 Law J. 76, Q. B.).

Where a count for work done and money paid for a testator, was joined with a count for work done for, and money due on an account stated with, the defts. as executors, and the jury found for the plt. with general damages, the Court arrested the judgment. Such objection might have been cured by a verdict for the deft. on, or a *nolle prosequi* entered as to the second count (Kitchenman v. Skeel, 3 Exch. 49; 18 Law J. 23, Exch.).

Where general damages are found on a declaration consisting of several counts, which are good, but cannot be joined, the proper course is to arrest the judgment; where some of the counts are good and others bad, a *venire de novo* issues; but in the case of a single count containing good and bad causes of action, the court will neither arrest the judgment nor grant a *venire de novo*, inasmuch as it will be intended that the damages were given in respect of the good causes of action only (Ib.).

In an action for breach of contract in the sale of goods, the measure of damages is not merely the amount of difference between the contract price and the price at which such goods could be bought at the moment when the contract was broken, but likewise a compensation for such profit as might have been made by the purchaser, had the contract been duly performed (Dunlop v. Higgins, 1 Ho. L. Ca. 381; 12 Jur. 295).

When nominal or actual.] In most cases, damages are the sole object of the action; in some merely nominal. In assumpsit, covenant, case, trover, and trespass, damages are the sole object of the suit; in debt, damages are, in general, merely nominal, the recovery of the debt itself being the principal object of the action (1 H. Bl. 550; Cowp. 588; 6 T. R. 303; 13 East, 342); but, in actions of debt on articles of agreement for a penalty (2 Wils. 377); or on bond conditioned for the performance of covenant contained in the same, or in any other deed or writing (3 Burr. 824, 826), and other actions on bonds, where breaches are assigned in pursuance of the 8 & 9 Will. III. c. 11, s. 8 (see *ante*, "BOND;" Arch. Pr. 444, 445), the jury first assess nominal damages for the detention of the debt, and then assess actual damages for the breaches assigned (see 1 Saund. 58; 2 Saund. 187). In *detinue*, the damages are merely nominal, but the jury find the value of the articles detained (*post*, "DETINUE;" Arch. Pr. *supra*). In *replevin*, a verdict for the plt. gives damages precisely as in trespass (see "REPLEVIN").

If the plt. has evidently sustained some damages, but the jury, being unable to ascertain the amount, find a verdict for the deft., the court will permit the plt. to enter a verdict for nominal damages (Feize v. Thompson, 1 Taunt. 121). Payment and acceptance of the amount of a debt certain, in respect of the omission to pay which the creditor is entitled to nominal damages, is sufficient evidence to support a plea of payment of the debt and damages. A person who accepts the amount of a debt in respect of the non-payment of which at the stipulated period he has become entitled to nominal damages, cannot, after the acceptance of the debt, sue for such nominal damages (Beaumont v. Greathead, 15 Law J. 130, C. P.). A. being indebted to B., agreed to convey a certain estate to him, and to deliver to him an abstract of title by a certain day: held, in an action against A. for the non-performance of this agreement, that B. *was only entitled to nominal damages (Bradley v. Tonge, 7 Law T. 231).

When a verdict is found for the deft. on an issue that bars the action, the jury cannot assess contingent damages for the plt. without the assent of the deft. (Newton v. Harland, 1 Man. & G. 645); nor can they, without the plt.'s consent, be discharged from finding on the other issues (Tinkler v. Rowland, 4 Ad. & E. 868).

If the jury find for the plt. on two issues, without assessing damages, the verdict is void, and a *venire de novo* will be awarded, to try those issues again (Clement v. Lewis, 3 B. & A. 701; 3 B. & B. 297; 7 Moore, 200). It is an established rule that where one count contains two claims or demands, for one of which the action is maintainable, and for the other not, all the damages may be applied to the good cause of action. *Secus* if stated in different counts (Doe v. Dyeball, 8 B. & C. 70; 2 M. & R. 184).

Where judgment has been given for the deft. on demurrer to pleas which go in bar of the whole cause of action, and there are issues of fact remaining to be tried, the court will not compel the deft. to enter up judgment of *nil capiat*, in order to enable the plt. to bring error, unless it clearly appears that the issues are immaterial (Hinton v. Acraman, 10 Jur. 927).

Amount of.] Damages are to be measured by the rank and ability of the party, the nature of the offence, and the circumstances of aggravation or extenuation distinguishing the transaction (Gilbert v. Berkinshaw, Lofft, 771). Therefore, where a party has undertaken to refrain from an act under a certain penalty, if a stranger commit the act, the measure of damages, in an action against such stranger, should be estimated after the rate of the contractor's penalty (Caswell v. Coare, 1 Taunt. 566). So, if, by the misfeasance of a party, who is to do a particular act, another party is involved in

an action, the injured individual may recover for the breach of contract, together with the costs of the collateral action, as parcel of the damage (Lewis v. Peat, 2 Marsh. 431). Where two persons are jointly sued for false imprisonment, one of whom has acted from improper motives, the damages ought not to be assessed with reference to the act and motives of the most guilty or the most innocent party, but the true criterion of damage is the whole injury which the plt. has sustained from the joint act of trespass (Clark v. Newsam, 1 Exch. 121).

We have already seen what damages should be given in the case of damages liquidated by agreement between the parties (*supra*); also, what damages are generally recoverable in an action of assumpsit (*ante*, p. 221, 238). Where, under agreement not to do a certain act, under a penalty of 30*l.*, and to an action upon the agreement, the deft. paid into court the sum of 30*l.* in satisfaction; the plt. replied that he had suffered more damages; the cause was tried, and at trial the plt. recovered 30*l.* in addition to the sum paid into court. Held, that the verdict was right, as the only issue was, whether or not, the plt. had sustained more damages, and that the deft. ought to have demurred, or to have moved in arrest of judgment (Ballinger v. Sheppard, 11 Law T. 204, Exch.). Where the deft. covenanted that he would not practise within fifty miles of a place within seven years, and also that he would not interfere with, nor solicit or influence any of the clients of the firm of which he was then a member; and if he should break either of these covenants, it was stipulated that he should pay 1000*l.*; this sum is to be considered as liquidated damages, and not as a penalty (Galsworthy v. Strutt, 10 Law T. 329, Ex.). The plt., having recovered judg-

[*891] ment against W. F., the deft. promised *that if the plt. would forbear to issue execution against W. F., she would, on or before a certain day, erect a house, and cause a lease of the same to be granted to the plt.; and the plt. promised that such lease, when granted, should be in full satisfaction of the judgment. In an action against the deft. for not erecting the house, and causing the lease to be granted, held, that the measure of damages was the value of the lease, and not the difference between the value of the judgment and the value of the lease (Strutt v. Farlar, 16 Law J. 88, Ex.; 16 M. & W. 249). Plts., on the 20th of October, 1845, sold the deft. twenty railway shares at 25*s.* premium, no day being mentioned for the delivery of the scrip. On the 21st of October the shares had fallen to 14*s.* premium, and on that day, but after business hours, the deft. gave the plts. notice that he should not take the shares. On the 22nd the shares were at 8*s.* premium, and the price continued to fall till the 6th of December, when the plts. sold the shares at 17*s.* discount. An action being brought for breach of the deft.'s contract: held, that the proper measure of damages was the difference in price between the shares on the 20th and 22nd of October (Pott v. Flather, 16 Law J. 366, Q. B.; 11 Jur. 735). Where, in an action for breach of an agreement to assign a lease, the plt. alleged, as damage, that he had been "put to expense" in investigating the title, &c.: held, that, under such allegation, he might recover the amount of his attorney's bill for so doing, though not actually paid before action brought (Richardson v. Chasen, 16 Law J. 341, Q. B.; 11 Jur. 890; see "ASSUMPSIT," "COVENANT"). As to the amount of damages recoverable in an action on the case, see that title; also, "SEDUCTION," "CRIMINAL CONVERSATION." See the other titles throughout the work.

Where 28 Geo. III. c. 37, s. 24, gave the plt. only 2*l.* damages, "besides the goods seized or the value thereof," if the judge certified that the officer had probable cause for seizure, and an officer seized and returned goods, it was held that the jury might give as damages the difference in the value of

goods by deterioration between the seizure and the return (*Laugher v. Brevitt*, 1 D. & R. 417; 5 B. & A. 762).

Where the execution creditors of a bankrupt seized his goods after an act of bankruptcy, and the assignees having claimed them, the sheriff forced both parties to interplead, and the judge who granted the interpleader rule made an order that the goods should be sold, and the produce brought into court, the assignees making no objection, and suggesting no other mode of disposing of them, and the creditors afterwards abandoned all claim; it was held, in an action against them by the assignees, to recover the difference between the produce of the sale and the value of the goods at the time of the seizure, that they were not entitled, as a matter of law, to recover such difference, and that the judge might direct the jury, if they thought the sale *bona fide*, to consider the produce of the sale the measure of the damages (*Whitmore v. Black*, 13 M. & W. 507; 2 D. & L. 445).

In trespass for seizing goods under colour of a judgment, the plt. cannot recover the costs of setting aside the judgment, (*Halloway v. Turner*, 14 Law J., N. S., Q. B. 142; 9 Jur. 160). So, where a landlord distrained for rent, amongst other things, goods not distrainable at law, and the tenant paid the rent and the costs of the distress, he could not, in trespass, recover more than the actual damage caused by the taking of those particular goods (*Harvey v. Pocock*, 11 M. & W. 740). So, where goods were distrained for rent, when no rent was due, and the tenant, in order to procure the distress to be withdrawn, paid 9*l.* 13*s.*, his executor could only

*recover this amount of damages in trespass for taking the goods [*892] (per Denman, C. J., *Lockier v. Patterson*, 1 C. & K. 271). In an action for malicious prosecution by one of several parties, together indicted for conspiracy and acquitted, it is competent to the jury to include in the damages the whole amount of the bill of costs of the attorney employed to conduct the defence of himself and the other parties jointly indicted with him (*Rowland v. Samuel*, 10 Law T. 109, Q. B.; see "COVENANT," "DISTRESS," "TRESPASS"). Where deft., after signing an acknowledgment that certain scrip had been "lodged in his hands" by plt., which was to be re-delivered to him on request, wrongfully detained the scrip for a considerable time, so that its market value had been much diminished, and did not re-deliver it until after action brought: held, that the action was rightly brought in *detinue*, as the term "lodged" implied that the identical scrip was to be returned, and also that plt. was entitled to more than nominal damages. On the second point a bill of exceptions was tendered. But where the plt. suffered loss by the detention, in this, that he was thereby deprived of the means of paying up his deposits, which would have entitled him to claim an allotment of one hundred other shares: held, that the damage was too remote, and plt. could not recover (*Archer v. Williams*, 2 C. & K. 26, Cresswell; see "GOODS SOLD," "PAYMENT," "TRESPASS").

In general, the jury are at liberty to give what damages they may think proper, proportioned to the degree of injury they may judge the plt. to have sustained from the tort, or breach of contract complained of.

Where the amount of the damages is a mere matter of computation, and they give an excessive amount, the court will review the verdict (*Sowerby v. Lockerby*, 1 Jur. 796). But where the damages found by the jury were calculated on a value assented to by the counsel on both sides, the court would not interfere on affidavits that counsel were mistaken in what they assumed as the basis of calculation (*Hilton v. Fowler*, 5 Dowl. P. C. 312). So where, in an undefended action on a mortgage deed, the plt.'s counsel inadvertently took a verdict for the principal only (*Baker v. Brown*, 2 M. & W. 199; 5 Dowl. P. C. 313; 2 Gale, 223). So, where a plt. has

obtained a general verdict for several items, while he has a good cause of action, even if he could not by strict law recover for some of them in the form of action in which he has declared (*Mayfield v. Wadsley*, 5 D. & R. 224; 3 B. & C. 357). But where it is admitted that a payment has been made to the plt. since the action was brought, the court will reduce the verdict by that amount (*Richardson v. Robertson*, 2 Gale, 80. In actions for tort, the court will not interfere with the damages found by the jury; unless they appear to be grossly disproportioned to the injury sustained. Where, therefore, a landlord caused considerable injury to the crops of his tenant, by selling, felling, and removing timber, without applying for leave to enter, and the jury assessed the damages at 300*l.* the court refused to interfere, although the net value of the entire crops did not exceed 200*l.* (*Williams v. Currie*, 1 C. B. 841).

The jury cannot give damages sustained from a cause of action subsequent to the commencement of suit, or previous to plt.'s having any right of action (2 Saund. 171 *a, b*); but they may in general give damages sustained after the commencement of the suit from a cause happening before (*Ingram v. Lawson*, 9 C. & P. 326; *Hodsoll v. Stalebrass*, 11 Ad. & E. 301; see *Gosling v. Corry*, 8 Sco. N. R. 21).

Mitigation of Damages.] It is a general rule that the jury [*893] cannot *take into consideration, in mitigation of damages, any fact or circumstance not pleaded, which could and should have been pleaded as a defence to the action (see *Watson v. Christie*, 2 B. & P. 224; D. & Ry. 10; *Speck v. Phillips*, 5 M. & W. 279). It is also a general rule, that the jury can in no case exceed the damages laid in the declaration (2 Bla. 1300); and it is the duty of the clerk of nisi prius, if the jury, by mistake, find a verdict for greater damages, to enter it for the amount laid in the declaration merely (MS. M. 1814; 1 Arch. 447). If entered, however, for more, the mistake may be rectified by application to the court, who will allow the plt. to enter a *remittitur* for the excess (1 H. Bl. 643, and see 2 Bla. 1300); and the court have ordered their judgment to be amended in this respect, even in a subsequent term (MS. M. 1814); or the court, in such a case, will, if the plt. wish it, grant a new trial, and allow the declaration to be amended (*Tomlinson v. Blacksmith*, 7 T. R. 132). There may be a *remittitur* of damages after judgment by default, on a remedial statute (*Gurney v. Gordon*, 2 Tyrw. 616).

In an action for false imprisonment, where the deft. pleaded in justification that the plt. had committed a felony, it was held that the putting of this plea on the record was a persisting in the original charge, and proper to be taken into consideration by the jury in estimating the damages (*Warwick v. Foulkes*; 12 M. & W. 507; 1 D. & L. 638).

Double and treble Damages are given by statute; and, where a statute gives double or treble damages, the plt. is entitled to double or treble the sum actually found by the jury, and the damages are not to be calculated in the same manner as treble costs (see *Dick*. 420; *Buckle v. Bewes*, 6 D. & R. 1; 4 B. & C. 154); and they may be assessed at any time before judgment, if the jury omit to assess them in their verdict (*Bennet v. Hart*, cited *Sayer on Damages*, 244).

Withholding Duties.] Where a statute gives by way of penalty double or any other multiple of the sum withheld, the sum found by the jury is to be taken as the amount due in point of fact, and it is the course of the court

for the officer to enter the verdict for the multiplied amount of that sum (*Attorney-General v. Hatton*, 13 Pri. 476; *McCle*. 214).

DEATH.

FORM OF PLEADINGS AS TO, p. 893.

EVIDENCE AS TO, p. 894.

Form of Pleadings in Case of.

In declaring on a contract *by* a surviving partner, or otherwise, it is necessary to describe plt. as such survivor, noticing the deceased (*Jell v. Douglas*, 4 B. & A. 374; 2 Saund. 121, n. 1; *Note v. Ingham*, 1 Wils. 89). And, in the case of a deed, if one or more of several obligees or covenantees, who ought, when living, to join, be dead, or did not seal the contract, and refused to do so, that fact should be averred in the declaration, at the suit of the others, or the deft. may craveoyer, and demur (2 Saund. *supra*). The omission of the statement of the death in the declaration, in these cases, *would be ground of nonsuit, though the plt. should be prepared [*894] to prove the death (*Jell v. Douglas*, 4 B. & A. 374). In an action at the suit of a surviving partner, he may include a debt not due to him as survivor (3 T. R. 433; *French v. Audrade*, 6 T. R. 582); and, when the survivor is sued for his own separate debt, he may set off a demand due to him as survivor (*Slipper v. Mastone*, 5 T. R. 493; 1 Esp. 47); and so where a deft. is sued for a debt due to the plt. in his own right he may set off a debt due to him from the plt. and a deceased partner of the plt. (*French v. Audrade*, 6 T. R. 582).

In declaring in contract *against* a survivor, it is usual to describe him as such, noticing the death of the deceased obligee or partner (*Bovill v. Wood*, 2 M. & S. 25; *Malding v. Mare*, 6 T. R. 363); but this is unnecessary, and the survivor may be declared against without noticing the deceased (*Richards v. Heather*, 1 B. & A. 29; *Calder v. Rutherford*, 3 B. & B. 302; Comb. 383).

Where one of several plts. or defts. dies, after the issuing of the writ, and before declaration, the commencement should suggest such death (1 Burr. 363; see form, *post*). Where a sole plt. dies, pending the suit, such death may be pleaded in abatement (Bac. Ab. Abat. F; Com. Dig. 32, 33; see "ABATEMENT"); but, in case of several plts. or defts., the death of one does not abate the suit, if the cause of action survive, for or against the survivors (1b.; Bac. Ab. *supra*).

Evidence.

It is incumbent on the party who asserts the death of another, to prove it, as the presumption is that the party is still living (*Wilson v. Hodges*, 2 East, 312). But a presumption of death arises after a lapse of seven years from the time when the person was last known to be living, if no account can be given of the person by his family or connexions, or neighbours, who should be called (*Doe v. Jesson*, 6 East, 85; *Doe v. Deakin*, 4 B. & A. 433; *Paterson v. Black, Park, Ins.* 433; *Rowe v. Hasland*, 1 Bl. R. 404; *Grissale v. Stelfose*, 9 Jur. 890); but there is no presumption raised by law as to when the

death occurred. This is for the jury upon the facts of each case (*Doe v. Nepean*, 3 N. & M. 219; 5 B. & Ad. 86; 2 M. & W. 894; *Mur. & H.* 291; *Watson v. England*, 14 Sim. 28, 277). Proof by one of a family, that, many years before, a younger brother of the person seised had gone abroad, and that the repute of the family was, that he had died there, and that the witness had never heard, in the family, of his having been married, is presumptive of his death without issue (*Doe v. Griffin*, 15 East, 293). And, where a person had sailed on board a vessel, which had not been heard of for two or three years, and was supposed to have perished, in consequence of the ship having encountered, soon after she sailed, some very strong gales and tempestuous weather, this was contended to be no proof of his death: but Lord Ellenborough, C. J., held, that his death ought, from the circumstances proved, to be presumed; and whether he was alive on a certain day it was for the jury to collect from the evidence (*Watson v. King*, 1 Stark. 121).

A person ought not to be presumed to be dead, from the fact of his not having been heard of for seven years, if the other circumstances of the case render it probable that he would not be heard of, though alive. The old law relating to the presumption of death is daily becoming more and more untenable, in consequence of the increased facility of travelling (*Watson v. England*, 14 Sim. 28).

[*895] A. claimed in ejectment as heir-at-law of B., and traced his pedigree *through the youngest son of a common ancestor, who in the year 1689 had four elder sons, whose descendants (if any) would have had a better title than B.: Vaughan, C., held that the length of time was a sufficient ground to presume their death, and that the court would take it that they all died without issue unless there was some evidence to induce a presumption that they or some of them married and left issue (*Doe d. Oldnall v. Deakin*, 3 Car. & P. 402; S. C. 2 M. & R. 195). But where, under a plea of coverture, it appeared that the deft.'s husband went abroad twelve years before, Lord Ellenborough held that she was bound to prove that he was alive within seven years (*Hopewell v. De Pinna*, 2 Camp. 113). Where a woman married twelve months after her first husband was last heard of, the court held it, as the law always presumes against the commission of a crime, incumbent on the party objecting to the second marriage to give some evidence that the first husband was then alive (*Rex v. Twynning*, 2 B. & A. 386). Where a person is shown to have been in existence a long time ago, as 100 years, his death, unmarried, and without issue, would be presumed in the absence of any evidence to the contrary (*Doe v. Wolley*, 8 B. & C. 22).

The best evidence of a party's death is by an examined copy of the register of it, and by proof of the identity (B. N. P. 247; see 52 Geo. III. c. 146; *Walker v. Beauchamp*, 6 C. & P. 552). By 3 & 4 Vict. c. 92, non-parochial registers of births, baptisms, deaths, burials, and marriages, transferred to the custody of the registrar-general, are made admissible in evidence, either by their production or by certified extracts from them, after previous notice to the opposite party of the intention to use them (see also 6 & 7 Will. IV. c. 86). A certified copy of the register of a death, under the seal of the general registry office, accompanied by an affidavit of identity, is sufficient evidence of the death (*Parkinson v. Francis*, 15 Sim. 160). But letters of administration, which have been granted to a person as administrator of the effects of A. B., deceased, are not legitimate proof of A. B.'s death (*Thompson v. Donaldson*, 3 Esp. 63).

To prove that W. F., of L., was dead; his will, dated in the year 1817, from the Prerogative Court, was produced, and also an examined copy of the register of burials of L., of the year 1817, containing an entry of the

burial of a "W. F., of L.," and it was stated by a niece of W. F., that he was dead, and that she had received a legacy under his will, but was not at the place when he died; Patteson, J., held it to be sufficient evidence of the death of W. F. (*Doe d. Hall v. Penfold*, 8 Car. & P. 536).

*DEBT.(a)

[*896]

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Nature of Remedy, and when it lies.

THIS action is for the recovery of a debt *eo nomine et in numero*, and the damages to be recovered in it are, in general, merely nominal. It lies upon a simple contract, a specialty, a record, or a statute, by-law, &c., for the recovery of a sum of money, capable of being reduced, by averments, to a certainty; for, as observed Lord Mansfield, in Doug. 6, "Debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought, but is not sustainable in cases of unliquidated damages" (B. N. P. 167, n. (a); see also Bac. Ab. Debt, E).

It is a first principle in an action of debt that there must be a direct duty to pay, and that it will not lie upon a conditional or collateral engagement to pay, if another does not pay (*Butcher v. Andrews*, 1 Salk. 23; *Viner's Ab. Debt*, D; *Randal v. Rigby*, 4 M. & W. 134). Where lands were en-

(a) 2 U. S. Dig. Tit. "Debt," p. 20; 1 Supp. U. S. Dig. p. 513; 1 Ann. Dig. p. 152; 2 Id. p. 90; 3 Id. p. 125.

feoffed to R. H. and the deft., to the use, that the plt., his heirs and assigns, for ever should receive a yearly rent out of them, and the deft. covenanted with the plt. that R. H., and the deft., their executors, or some or one of them, &c., should pay it, or cause it to be paid, it was held that the plt. could not sue the deft. in debt for the arrears of the annuity, as the covenant was collateral (*Randal v. Rigby*, *supra*). So where the declaration stated that by an indenture between J. H. of the first part, the deft. of the second part, W. A. the elder of the third part, W. A. the younger of the fourth part, and the plt. of the fifth part, the deft. covenanted with the plt. that he the deft., the said J. H. and W. A., their executors, &c., or some or one of them, &c., &c., should pay the plt. 300*l.*; it was held for the [*897] same reason that debt would not lie (*Harrison v. Mathews*, 10 M. & W. 768; *Dowl. N. S.* 318); but the court were of opinion that if the indenture had been executed by all the first four parties, debt would lie against the four, or against one, if he did not plead in abatement (10 M. & W. 771). But where there is an absolute covenant by a deft. that he will certainly pay a sum certain, debt lies, though the repayment of the same sum is by the same deed secured by a mortgage—as where a mortgagor and A. B., a third party covenanted with the mortgagee for the repayment of the mortgage money at the time appointed, A. B. was held liable in debt (*Evans v. Jones*, 5 M. & W. 295; 7 *Dowl. P. C.* 482; 3 *Jur.* 705).

On Parol or Simple Contracts, Legal Liabilities, &c.] Debt is sustainable, as well when the contract is express as when it is implied. In *Com. Dig. A*, it is said: “Debt lies upon every contract, in deed or in law.”

It lies by the payee against the maker of a promissory note (or a third party who joins in the making as surety (*Seson v. Kidman*, 3 M. & G. 810)); or the drawer against the acceptor of a bill of exchange, each expressing a consideration on the face of it (*Young v. Bishop*, 2 B. & P. 78; *Priddey v. Hendrey*, 1 B. & C. 674; *Sel. N. P.* 542); by an indorsee against his immediate indorser (*Watkins v. Wake*, 9 *Dowl. P. C.* 242; 7 M. & W. 488); by the first indorsee against the drawer of a bill payable to the drawer's own order (*Stratton v. Hill*, 3 *Pri.* 253; 2 *Chit.* 126); but not by a subsequent indorsee (*Lewin v. Edwards*, 1 *Dowl. N. S.* 639; 9 M. & W. 720); nor by an indorsee against the acceptor (*Clowes v. Williams*, 3 *Bing. N. C.* 868; 5 *Scot.* 68; *Powell v. Ancell*, 9 *Dowl. P. C.* 893; 3 M. & G. 171). It was formerly considered that if there were a want of immediate privity between the parties, or if a bill omitted to specify the consideration, so as to raise a debt or duty, an acceptance would operate merely as a collateral engagement, and that debt would not lie (*Priddey v. Hendrey*, 1 B. & C. 674; *supra*); but that it has been recently held that it will lie by the payee against the maker of a note, or by the drawer of a bill payable to himself against the acceptor, although no consideration is expressed on the face of the instrument (*Hatch v. Trayes*, and *Watson v. Knightley*, 3 P. & D. 408; 11 *Ad. & E.* 702). T., being employed by deft. to raise money for him how he could, procured 160*l.* from plt., and received a check for that sum from deft., payable to T. or bearer. T. afterwards applied to deft. for payment of the check: held, that there was a delivery of the check to plt., and, therefore, he could maintain debt upon the check against deft. (*Samuel v. Green*, 11 *Jur.* 607; 16 *Law J.* 237, Q. B.).

It also lies for the use and occupation of houses, &c., on a demise not under seal (5 *Taunt.* 25; *Wilkins v. Waigall*, 6 *T. R.* 62; *Gibson v. Kirk*, 1 G. & D. 252; 1 Q. B. 850); also, on the contract or sale of goods, and on a *quantum valebant* (2 *T. R.* 30); it lies for fees (B. Ab. Debt, A.;

Com. Dig. Pl. 2 V. 11); for work and labour, and the *quantum meruit* thereon (Com. Dig. Debt, B). Debt lies on *all contracts* for the payment of money; also, for money lent, had, and received, &c., and on the account stated (Com. Dig. Debt, A); and for interest (5 T. R. 553, 6); for all duties arising either from custom or from the common law (Com. Dig. Debt, A, 9); on by-laws (1 B. & P. 98); and on judgments not of record, whether English, Irish, or foreign (1 Saund. 92, n. 2; 3 Taunt. 85; 3 East, 221; 4 B. & C. 411; Doug. 1); for fines, tolls, &c. (Com. Dig. Debt, A, 9); for a legacy devised out of land (per Holt, *Emer v. Jones*, 1 Salk. 415; *sed quære*, see *Braithwaite v. Skinner*, 5 M. & W. 313, *post*, 900). And it would also *seem, that, although there were a deed between the parties, yet, if there were a debt independent of the deed, the existence of the [*898] deed will not prevent the party from recovering that debt, upon the common counts (per Bayley, J.; 4 B. & C. 968). Debt., to secure a debt owing from him to plts., assigned to them a policy of insurance on his life, and covenanted, by the deed of assignment, that he would pay the annual premium, stated to be 37*l.* 15*s.*, and that, if he at any time made default, the plts. might pay it, and recover the amount in an action at law as for money paid to his use. Plts. declared against debt. in debt. reciting the deed and alleging payment by them of a premium on default made by debt., whereby an action had accrued to plts., &c.: held, on special demurrer, that the count was good, though the deed contained no express covenant that the debt. should, in any stated event, pay the amount of the premium to the plts. (*Barber v. Butcher*, 8 Q. B. 863; 15 Law J. 289; 10 Jur. 814). So debt on the ordinary *indebitatus* counts is maintainable for the sum advanced as the consideration of a mortgage, if the mortgage deed contain no covenant for its repayment (*Yates v. Aston*, 12 Law J., N. S. 160; 7 Jur. 83; 3 G. & D. 351; 4 Q. B. 182).

Where a sum of money is secured by a deed, and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the account, and promises to pay it—debt on simple contract, on an account stated, will not lie, but the action must be brought on the specialty (*Middleditch v. Ellis*, 2 Exch. 623). A joint and several covenant by A. and other persons, that “they, or some or one of them,” will pay a certain sum, may be declared on as covenant by A. to pay, and debt will lie on such covenant (*Caldwell v. Becke*, 2 Ex. 318).

A declaration in debt may commence “for that whereas” (*Wilcox v. Haswell*, 6 C. B. 72). The declaration contained three counts in the ordinary form, plea 2ndly, as to the residue of first and last counts payment to plt. of, to wit, 50*l.*, after action in full satisfaction and discharge of the causes of action in this plea mentioned, plt. signed judgment for damages in respect of the first and last counts as unanswered: held, that the plea was an answer to the residue of the sums claimed in the first and last counts respectively, and also to the damages due in respect of the detention of each of those sums respectively, inasmuch as the word “count” included the sum claimed as a debt, and also the damages for the detention thereof (*Gell v. Burgess*, 13 Jur. 194; 18 Law J. 153, C. P.).

Debt lies on an express covenant for payment of a freehold rent charged on land conveyed in fee (*Varley v. Leigh*, 1 Exch. 446; 17 Law J., 289; Exch.; 2 Ex. 446). *Quære*, whether since the passing of the stat. 3 & 4 Will. IV. c. 27, s. 36, an action of debt lies for the recovery of the arrears of a rent in fee (*Ib.*).

On *Specialties*, debt is also a proper remedy, as on bonds (see *ante*, “BAIL-BONDS,” and “BONDS”); on annuity-deeds (1 N. R. 104; 3 Bl.

Com. 231); on mortgage-deeds (1 Saund. 276, 282, n. 1); on charter-parties (Hooper v. Shepherd, Str. 1089); on policies of insurance under seal (Marsh. Ins. 596; 6 Geo. I. c. 18, s. 4); and on leases (Com. Dig. Debt, A 5, B.; 8 Anne, c. 14; and 5 Geo. III. c. 17; 5 B. & C. 512). See these titles respectively.

On Records, debt also lies, as upon the judgments of courts of record (Gillb. tit. Debt, 391; 2 Salk. 209; Com. Dig. Debt, A, 2; 1 Wils. 316); and, even on an erroneous judgment, till it is reversed (1 Marsh. 284; 2 Lev. 161; 3 Taunt. 667; 1 Ch. Pl. 124); and the deft.'s having been rendered will make no difference, unless the plt. makes his election by charging the deft. in execution (Ib.; 6 Ves. 446); and, where the deft. has been in execution on the judgment, and discharged with the plt.'s concurrence, debt will not lie on the judgment (Vizers v. Aldrich, 4 Burr. 2482; 7 T. R. 420; Taylor v. Wat, 5 Moo. & S. 103; 1 Ch. Pl. 124); nor where deft. has been discharged under the Lords' Act. An action on a judgment has become less frequent since the 43 Geo. III. c. 46, s. 4, precluding the plt. from recovering costs in an action on a judgment, unless the court, or one of the judges, shall otherwise direct (1 Ch. Pl. 124). Debt lies on a sheriff's return of *feri feci* (2 Saund. 343), and on a statute merchant, being under the seal of the party (2 Saund. 69, 70, n.). It lies on a judgment of any of the superior courts in Ireland (Harris v. Saunders, 4 B. & C. 411; Guinness v. Carroll, 1 B. & Ad. 459); on a Scotch decree (Douglas v. Forrest, 4 Bing. 686; 1 M. & P. 663; Russell v. Smith, 9 M. & W. 810); on the judgment or decree of a foreign or colonial court (3 Taunt. 85; 9 Price, 1; 6 D. & R. 474). It does not lie on any interlocutory judgment of a court of law (2 H. Bl. 248; 4 Taunt. 705; 3 B. & A. 56); nor, *semble*, on a decree of a court of equity in this country, founded on equitable considerations only (3 B. & A. 52; 8 B. & C. 20; 2 M. & R. 165; Henderson v. Henderson, 8 Jur. 755, Q. B.); and it does not seem that the law is altered in this respect by the 1 & 2 Vict. c. 110, s. 18, which enacts that rules of courts of law and orders in equity, lunacy, and bankruptcy, touching the payment of money, costs, &c., shall have the effect of judgments in the superior courts of common law.

But it lies on the decree of a colonial *equity court, which has no [*899] power to enforce its judgments here (Henderson v. Henderson, *supra*; Sadler v. Robins, 1 Camp. 253; Henley v. Soper, 8 B. & C. 16; 2 M. & R. 153). It is doubtful whether it lies by the party interested where a local act directs that the verdict of a jury awarding compensation for damages shall be a record of the quarter sessions, but omits to provide any remedy for the recovery of the sum awarded (Rex v. Nottingham Old Water-works Company, 1 Nev. & P. 480; W. W. & D. 166).

On Statutes debt also lies. Where an act casts upon a party an obligation to pay a specific sum of money to particular persons, the law then enables those persons to maintain an action of debt (4 B. & C. 967). So, under the 28 Eliz. c. 4, which says, that the sheriff shall take for his fees no more than 12*d.* for every 20*l.* under 100*l.*, and 6*d.* for every 20*l.* above 100*l.*, the sheriff may maintain debt for his fees (Ib., 969). There are cases in which the stat. expressly gives an action of debt: as the 1 Ric. II. c. 11, and 13 Edw. I. c. 11, for an escape out of execution; 4 Geo. I. c. 28, s. 1, against a tenant for double value, for not quitting in pursuance of his landlord's notice; on the 11 Geo. II. c. 19, s. 18, for double rent for not quitting in pursuance of his own notice; on the 2 & 3 Edw. VI. c. 13, s. 1, for the treble value of tithes not set out (Johns v. Carne, Cro. Eliz. 621; on the 32 Geo. II. c. 28, against sheriffs or gaolers, &c., for extortion; and the 23

Hen. VI. c. 29, which gives treble damages (Ib. 966; see also, 1 Saund. 35, 39, 218; 1 N. R. 174). If a stat. prohibits the doing of a thing under a penalty, to be paid to the party grieved, or without saying to whom it shall be paid, and does not prescribe any mode of recovery, debt lies for the party grieved (1 M. & Y. 457). But surveyors of highways cannot maintain debt to recover compensation-money duly assessed, on a stat. giving a remedy by distress (Ib.); and it would seem, "that, in all cases of debt on stat., the money is given to individuals in respect of what is conceived to be a private injury or right" (Ib. 453); and no action of debt lies for a poor-rate (2 Burr. 1157). Where a stat. gives part of a penalty to a common informer, and enables him to sue by an express provision, debt lies (Com. Dig. Debt, A, 1; 5 East, 313, 5; Str. 828; 2 Saund. 374, n. 1, 2; 1 Saund. 196, n. 1).

When it does not lie.] Debt *does not* lie unless the claim be for a sum certain, or for a pecuniary demand which can readily be reduced to a certainty. It does not lie for the recovery of money due by instalments, till all the days are past (1 H. Bl. 554; 2 Saund. 303, n. 6; see "ASSUMPSIT"), unless the payment be secured by a penalty (Ib. 550); though debt lies for rent payable half-yearly, or otherwise, or for an annuity, or on an agreement to pay a specific sum on one day, and another sum on another (Ib.; Hunt's case, Owen, 42). Debt does not lie on a collateral promise (1 Salk. 23; Bishop v. Young, 2 B. & P. 83; 4 B. & C. 968; Sands v. Trevellian, Cro. Car. 107). Nor could it formerly be supported against an executor or administrator upon a simple contract of his intestate, because, as they are presumed to be ignorant of his contract, they could not wage their law (1 N. R. 293), unless in the Exchequer (1 Saund. 68, 216, 286; 2 Saund. 74, n. 2). However, they should demur, for it could not be taken advantage of in arrest of judgment, or upon error (Ib.; Plow. 182). But now, by 3 & 4 Will. IV. c. 42, s. 14, "an action of debt on simple contract shall be maintainable in any court of common law against an executor or administrator."

Where, by the terms of a contract, a service to be performed by A. for B. is to be paid for in goods, A. cannot declare in debt for the *value of the service, but must sue on the special contract. But [*900] if B., by his own act, render the delivery of the goods impossible, A. may sue in debt for the value of the service; so if B. allow the goods to be sold under an execution against him (Keys v. Harwood, 2 C. B. 905).

When preferable.] Wager of law having been abolished by the 3 & 4 Will. IV. c. 42, s. 13, this action is now more adopted than formerly, and is often to be preferred to assumpsit, the judgment being final in the first instance (1 Saund. 216); debt on a deed is also in some cases preferable to an action of covenant on it (*ante*, "COVENANT").

When the only Remedy.] It was, before the 11 Geo. IV. & 1 Will. IV. c. 47, the only remedy against a devisee of land for a breach of covenant by the devisor (7 East, 12; 1 Ch. Pl. 126); and, where lessee has been evicted from part of the premises by a third person, for an apportionment of the rent (2 East, 380, 579; 1 Ch. Pl. 126).

It seems to be the only remedy to recover rent where a trustee or assignee of the tenant has not taken actual possession (How v. Kennett, 3 Ad. & E. 659); so it seems the only remedy by the assignee of the reversion for occupation previous to the assignment (Mortimer v. Preedy, 3 M. & W. 605; per Parke, B.).

But, where B., as surety for J., joined with him in a covenant to pay the rent of a freehold farm, and also certain penal rents for bad husbandry, should J. not cultivate the land properly, B.'s devisees are not liable under the 3 & 4 Will. & M. c. 14, s. 3, for rents of either kind falling due after his death (*Farley v. Bryant*, 3 Ad. & E. 839; 5 N. & M. 42). It was said by Holt, C. J. (*Ewer v. Jones*, 1 Salk. 415), that it lay by a devisee of a legacy charged upon land; but that doctrine has not been acted on, and has been doubted in a late case (*Braithwaite v. Skinner*, 5 M. & W. 313; 3 Jur. 1054).

Form of Pleadings.

Declaration.] The description of the form of action in the usual commencement may be altogether omitted (11 East, 62). The debt demanded in the commencement is usually the aggregate of all the sums claimed by the declaration to be due; but a mistake in the calculation of such sums is quite immaterial, whether the total amount of such sums is more than the sum first demanded (*Lord v. Houstoun*, 11 East, 62; *Gardner v. Bowman*, 4 Tyrw. 412), or less (*McQuillin v. Cox*, 1 H. Bl. 249). In debt for goods and chattels other than money, the declaration shall be in the *detinet* only only (Com. Dig. Pl. 2 W, 8; Gilb. Debt, 359, 400, 401; Fitz. N. B. 27; 3 M. 274, 275). So, in strictness it should be in actions by or against executors or administrators (Com. Dig.; 2 D, 1, 2; 1 Saund. 1, 112, 216; 3 East, 2; Ld. Raym. 698); unless in action against them on a judgment suggesting a *devastavit* (Roll's Ab. 603; Bac. Ab. Debt); but if the *debet* is untechnically inserted in the *queritur* by an executor or administrator, it is not an irregularity or ground of demurrer, as the allegation may be rejected (*Collett v. Collett*, 3 Dowl. P. C. 211). The assignee of a replevin bond may sue in *detinet* only (*Wilson v. Hobday*, 4 M. & S. 125). Assignees of bankrupts or insolvents sue in *debet* as well as *detinet* (*Ferguson v. Mitchel*, 1 Tyrw. & Gr. 179). So, husband and wife are so sued (*Gilbert*, sup. 402), though for the debt of the wife *dum solo* (Com. Dig. Plead. 2 W, 8; 3 Leon. 206); though debt lie for guineas or foreign coin of so much value English (Com. Dig. ib.; Lutw. 488). The omission of the *debet* and *detinet* in the commencement has been held ill * (*Woodecock v. Morgan*, 6 Mod. [*901] 306); but as that part of the declaration may be altogether rejected (11 East, 64), that decision is questionable. As, under the new rules, no recital of the writ or mention of its contents is requisite (per Parke, B., 1 Tyrw. & G. *supra*, p. 181), there does not seem to be any valid reason for inserting the *queritur*. The omission of the "whereas" is not a ground of demurrer, though it is in the forms referred to in the pleading rules of T. T. 1 Will. IV., as it does not render the allegation of debt less clear (*Shepherd v. Gosden*, 4 Jur. 578, Q. B.; *Wilcox v. Haswell*, 6 C. B. 72). An action of debt lies upon a judgment of a county court. And the declaration need not state that the debt, resided within the jurisdiction of the county court; or was liable to be summoned to that court for the debt; it is enough to state that the plt. levied his plaint in the county court for a cause of action arising within its jurisdiction (*Williams v. Jones*, 13 M. & W. 628; 2 D. & L. 680).

Cause of action.] If the action be founded on a *simple contract*, the consideration for the contract must be stated, as also any inducement necessary to explain the contract or consideration, as in an action of assumpsit (see *ante*, "ASSUMPSIT"); and it should be stated, the party "agreed" to pay; stating that he "promised" to do so would be bad, as being in assumpsit and

not in debt (*Brill v. Neele*, 3 B. & A. 208; 1 Chit. Rep. 619). Saying in a *quantum meruit* count that the deft. agreed to pay is good (*Ninan v. Bland*, 3 Smith, 114); or that he "undertook and agreed to pay," as not necessarily importing the form of action to be in *assumpsit* (*Gardner v. Bowman*, 4 Tyrw. 412); but *aliter*, "undertook and faithfully promised" (*Ninan v. Bland, supra*), or "undertook to pay" (*Dalton v. Smith*, 2 Smith, 618). But where a count on a bill of exchange, after stating the drawing, acceptance, and indorsement, alleged that the deft. "promised to pay" the plt. the amount, according to the tenor and effect of the said bill, &c., whereby *actio accrevit*, it was held that this, though informal, was in substance a count in debt (*Cloves v. Williams*, 5 Sco. 68; 3 Bing. N. C. 868; 3 Bing. N. 868); and where the declaration set forth that the plt. complained of the deft. in an action on promises, and demanded of him such a sum which he owed, and justly detained from him, and then set out the drawing and acceptance of two bills of exchange, and the promise to pay, and the non-payment, and then three common counts in debt, and concluded with the *actio accrevit*: it was held, on demurrer for misjoinder, that the first two counts were in debt (*Compton v. Taylor*, 6 Dowl. P. C. 650; 4 M. & W. 130; 2 Jur. 875). But, where a declaration beginning in debt contained some counts stating that the deft. being indebted, undertook and promised to pay, &c., whereby *actio accrevit*, and other counts framed in debt, it was held ill for the misjoinder (*Brill v. Neele*, 1 Chit. Rep. 619; 3 B. & A. 208). A declaration commencing and concluding in the form of a declaration in debt, contained counts on bills of exchange by indorsee against indorser, in the form given by the rule of T. T. 1 Will. IV., and also *indebitatus* counts in debt: held, not a misjoinder (*Esdale v. Maclean*, 15 M. & W. 277; 16 Law J. 71, Ex.). A declaration in debt by the assignee of an insolvent debtor, stated that the plt. had brought an action against the deft. to recover a debt due to the insolvent; that after issue joined, the cause was referred to arbitration by order of *nisi prius*. The declaration then alleged mutual promises to abide by, perform, and fulfil the award; and that the arbitrator awarded that the plt. was entitled to recover a certain sum. Breach, non-payment; held, that the averment of mutual promises made it an action of debt, on a promise to perform *the award when made, and not an action of [*902] debt on the award itself; and that the declaration was therefore bad (*Sutcliffe v. Brooke*, 14 M. & W. 855; 3 D. & L. 302; 15 Law J. 118, Ex.). If the action be founded on a legal liability, the same should be stated, as in *assumpsit*, omitting the *promises*. In declaring on the common counts, it is not necessary to set forth the nature of the debt with more precision than in *assumpsit* (*ante*, p. 179; 2 T. R. 28). The usual conclusion in each count, that "by reason whereof, &c., an action hath accrued," &c., is unnecessary, and the usual breach at the end will suffice (*Gilb. Debt*, 414).

On Specialties.] In declaring on a specialty, no consideration need be shown (*ante*, p. 865), unless where the performance of the consideration constitutes a condition precedent, when performance of such consideration should be stated (see "*ASSUMPSIT*"). No inducement is, in general, necessary. When inducement should be stated in debt on lease, &c., see *post*, "*LEASE*," Except in the instance of debt for rent, and other instances (*ante*, "*COVENANT*"), the plt. cannot declare in debt generally, and give the deed in evidence (*Atty v. Parish*, 1 N. R. 104); but it would seem, from a subsequent case, that where there is a debt independent of the deed, the plt. may recover, without setting it out, and the omission to set it out is merely matter of form, and is cured by general demurrer (*Tilson v. Warwick Gaslight Company*, 4 B. & C. 962; but see *Edwards v. Bates*, 2 D. & L. 305,

ante, p. 163). It should be stated that the speciality was under seal ; but, if the words describing it are such as will import it was under seal, it will suffice, as *indenture*, *deed*, or *writing obligatory* (1 Saund. 290, n. 1, 320, n. 3 ; see *Tilson v. Warwick Gas-light Company*, *supra*). If the deft., by his pleading, admit the sealing, an omission to state such sealing will be cured (*lb.* ; 2 *Ld. Raym.* 1536). We have already seen, in declaring on a covenant, how to set forth the deed itself ; and the rules there stated will apply here (*ante*, p. 865).

It is necessary, in declaring on a deed, when the deed is the foundation of the action, to make a *profert* of it, in order that the court may judge of its sufficiency (10 Co. 92 b ; 4 T. R. 338) ; it is unnecessary when the deed is stated only as inducement (*Banfill v. Leigh*, 8 T. R. 573), or where the plt. has no right to the possession of it, or counterpart (1 Saund. 9 a, n. 1). If the instrument be not a specialty, a *profert* is unnecessary (2 Saund. 62 b, n. 5). A deed operating under the Statute of Uses need not be made *profert* of (8 T. R. 573 ; 1 Saund. 9, n. (b)) ; nor need a *profert* be made in the case of a feoffment (*lb.* ; 3 T. R. 156). The assignees of a bankrupt obligee need not make *profert* of the bond (*Cro. Car.* 209 ; and see other instances where a *profert* is necessary, *Com. Dig. Plead. O, 1 ; post*, “*PROFERT*”).

When the instrument cannot be made *profert* of, on account of its being lost, &c., or in deft.’s possession, &c., such fact should be stated as an excuse for not making *profert* (3 T. R. 151 ; 2 H. Bl. 259) ; for, if the plt. profess to produce the instrument when he cannot do so, the deft. is entitled to *oyer* ; and, if he plead *non est factum*, the plt. would be nonsuited at the trial (4 East, 585 ; 1 Esp. 337). The omission of a *profert* can only be taken advantage of by special demurrer (4 & 5 Anne, c. 16 ; *Com. Dig. Plead. S, 17*). Though a *profert* be made, if it was unnecessary, it will not entitle deft. to *oyer* (2 Salk. 497 ; 1 Saund. 9 b, n. 1 ; 1 T. R. 149).

On Records.] In declaring on a record, the circumstances or consideration on which the record was founded need not be stated (1 Ch. [*903] Pl. 384). Unless the record be stated as matter of inducement *only it is necessary to refer to it by the *prout patet per recordum* (Co. Lit. 303 a ; 1 Raym. 35 ; 3 Salk. 505 ; Gilb. 12 ; Willes, 127 ; 3 B. & C. 2). An omission of this, can only be taken advantage of by special demurrer (4 & 5 Anne, c. 16 ; *Powdick v. Lyon*, 11 East, 565). As to the mode of framing declarations on recognizances or judgments, see, *post*, those titles.

On Statutes.] The mode of framing a declaration on a statute will be found, *post*, “*STATUTE*.” A declaration in debt for a penalty stated that the deft., after the passing of a certain act for effecting improvements in the township of Blackburn, to wit, on, &c., acted as a commissioner in the execution of the act, although he was not at the time of his so acting duly qualified to act as a commissioner in the execution of the act, *contra formam statuti*, whereby, &c. On special demurrer, on the grounds that the particular disqualification should have been specified, and that it should have appeared that the offence was committed within the county in which the venue was laid ; held, that the declaration was good (*Cooke v. Swift*, 14 Law J. 361, Ex.). A statute requires the delivery of a certificate setting forth certain matters, and imposed a penalty upon the non-delivery of such a certificate. A subsequent statute directs that no action shall be brought to recover penalties in respect of the omission of some of the matters, and that no action already commenced in respect of such omission shall be prose-

cuted. An action is brought for the penalty incurred by delivering a certificate omitting all the matters required to be inserted by the first statute, and the declaration and plea are delivered before the passing of the second act. Upon the passing of the second act the plt. is bound to amend his declaration by striking out such omissions as are cured by that act; and if, instead of so doing, he deliver a replication and issue, such replication and issue will be set aside (*Grant v. Browne*, 6 M. & G. 774). The declaration should state the offence to be *contra formam statuti*; and it is not sufficient to allege facts which would bring the deft. within the statute, and that "by means thereof, and by force of the statute," an action hath accrued to the plt. (*Fife v. Bousfield*, 2 D. & L. 481; 6 Q. B. 100).

Breach.] There is nothing peculiar relating to the statement of the breach; and the usual conclusion, "yet the deft., although often requested, &c., hath not, &c.," will, in most cases, suffice.

Damages.] The amount of the damages inserted at the conclusion is immaterial; but it is advisable to insert a sum that will cover the principal, interest, and any sum a jury may give for the detention, and if the plt. seek to recover interest as damages, and there is no count for it as due upon a contract, it is essential to insert a sum sufficient to cover it, as otherwise there cannot be a verdict for it (*Watkins v. Morgan*, 6 C. & P. 661).

Plea.] The pleading rules of H. T. 4 Will. IV. r. 2, are as follow:—
"In Debt and Covenant.

"1. In debt on speciality or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

"2. The plea of *nil debet* shall not be allowed in any action.

"3. In actions of debt on a simple contract other than on bills of exchange and promissory notes, the deft. may plead that "*he never was indebted *in manner and form as in the declaration alleged,*" and [*904] such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*; and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of assumpsit.

"4. In other actions of debt, in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the deft. shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance."

Non est Factum.] The Plea of *non est factum* is proper when the specialty stated is the foundation of the action, and deft. contends that he did not execute it, or that it was not duly stamped (6 T. R. 317), or that it varies from the declaration (11 East, 633; 1 Camp. 70; Com. Dig. Pl. 2 W. 18; 6 Taunt. 394; 4 M. & S. 470; 5 Moo. 164; 1 Stark. 294; 2 D. & R. 662). It is also a good plea when the plt.'s profert cannot be proved as stated (4 East, 585). If the deed stated in the declaration vary from the original, the deft. may take advantage of it, merely by pleading *non est factum*, or may crave *oyer*, set it out, and demur. If he set it out on *oyer* without demurring, he cannot take advantage of a variance on craving *oyer* and setting it out, as the deed becomes part of the declaration (*Snell v. Snell*, 4 B. & C. 741; 7 D. & R. 249; *ante*, p. 869). To a declaration in debt for goods sold and delivered, and on an account stated, the deft. pleaded, that by certain indenture, bearing date, &c. (*profert*), the plt. released to the deft. the

debts and causes of action in the declaration mentioned. The plt. replied *non est factum*, on which issue was joined: held, that the plt., under this replication, could not give in evidence that the debt for which the action was brought was not included in the release, but should have new assigned (*Jubb v. Ellis*, 3 D. & L. 364, Q. B.). The deft. might formerly give in evidence under it that the deed was delivered as an escrow (4 Esp. 255), or was void at common law, *ab initio* (2 Stark. 35; 2 Camp. 272; 2 Stra. 1104), &c.; or become void after it was made, and before the commencement of the action (5 Co. 119); but not that it was voidable: as, by infancy (2 Salk. 675); duress (2 Inst. 482, 483); or that it was void by act of parliament (5 Rep. 119 a), as by the statutes of usury (1 Stra. 498), or gaming, &c. All these he must now plead specially; so he must plead payment at or after the day of performance, or any matter in excuse of performance; as, *non damnificatus* to a bond of indemnity, no award to an arbitration-bond, or, to a bail-bond, no process to arrest the deft. (Say. 116), &c. He must also plead specially, in discharge of the action, a tender or set-off: and see, further, the different titles throughout the work.

Nul tiel Record.] In debt on record, when it is the foundation of the action, *nul tiel record* is the proper plea, where there is either no record at all, or one different from that which the plt. has declared on (3 Mod. 41). But, as this plea only goes to the existence of the record, the deft. must plead payment, or any matter in discharge of the action; and, if an action of debt be brought here on a judgment in Ireland, the plea of *nul tiel record* must conclude to the country (*Collins v. Mathew* (Viscount), 5 East, 473. See further, "RECOGNIZANCE," "JUDGMENT," "NUL TIEL RECORD").

Plea in Debt on Simple Contract.] Before the new rules, in debt on simple contract or legal liabilities, or for an escape, or on a penal statute, or when a deed was mere inducement to an action, the general issue [*905] was *nil debet*, and was, in such cases, the proper plea. **Non assumpsit* was a nullity, and entitled the plt. to sign judgment (*Ford v. Bernard*, 4 Moo. & P. 303; *Brennan v. Egan*, 4 Taunt. 164; *King v. Myers*, 5 Dowl. P. C. 686; 1 Jur. 403). The language of the plea of *nil debet* put in issue the existence of the debt at the time of bringing the action; and, consequently, any matter might be given in evidence under this plea which showed that nothing was due at that time; as, performance, or a release, or other matter in discharge of the action (1 Ld. Raym. 566). A tender should be pleaded specially, and a set-off should, as in *assumpsit*, be pleaded (1 Ch. Pl. 601; R. G. H. T. 4 Will. IV.; *Graham v. Partridge*, 1 M. & W. 395; *Rowland v. Blakesley*, 2 Gal. & Dav. 734). If the instrument declared on were stated merely as *inducement* to the action, *nil debet* would suffice, as in an action on a simple contract or legal liability (1 Ch. Pl. 423); but it was, on the other hand, improper, when the specialty declared on was the foundation of the action (1 Saund. 38, n. 3; 2 Saund. 187, 2); and plt. should, in such case, demur to such plea: otherwise he would have to prove every allegation in his declaration; and the deft. might avail himself of any ground of defence which he might take advantage of under the plea of *nil debet* in other cases (5 Esp. 38; 2 Saund. 187 a). But now the only general issue is, with the exception noticed above, *nunquam indebitatus*, and it must follow the form given in the above rules, and therefore "never did owe" is bad on special demurrer (*Smedley v. Joyce*, 4 Dowl. P. C. 421; 2 C. M. & R. 721; 1 Gale, 327; 1 Tyrw. 84). The deft. may plead to the debt and not to the damages (*Henry v. Earl*, 8 M. & W. 228; 9 Dowl. P. C. 725; 5 Jur. 828), and a plea to the damages would be bad on

special demurrer, as being a departure from the form given under the new rules (Bailey v. Sweeting, 8 Jur. 625, Ex.). In debts for goods sold, a plea that the sum claimed was the residue of a larger sum agreed to be paid for a boat warranted by the plt., that the boat was unsound, and worth only a certain sum, which had been paid at the time of the sale, was held bad, as amounting to the general issue (Dicken v. Neale, 5 Dowl. P. C. 176; 1 M. & W. 556). So, in debt by the assignees of V., a bankrupt, against D. and E., a plea that as to 142*l.* V., before his bankruptcy, had retained and employed D. as his attorney, and was indebted to him, and thereupon it was agreed that he should retain D. and E. jointly, and that they should have a lien on all moneys received to his use, to the amount of all debts then, or thereafter to be due to them; that they received this sum in the course of such retainer and employment, and applied it to the payment of such debts, is bad on special demurrer, as amounting to the general issue (Williams v. Vines, 8 Jur. 907, Q. B.). To a count in debt upon an account stated, the deft. pleaded, as to 18*l.* parcel of the money in that count mentioned, an agreement between him and one E. E. that he should purchase of E. E. the goodwill, stock, and fixtures of a public-house, 20*l.* to be paid as a deposit, to be returned in case E. E. should not fulfil the agreement on her part; that the deft. paid to the plt. 2*l.* in part payment of the deposit, and gave him an I O U for 18*l.* "which said I O U was the account stated in the last count mentioned as to the said sum of 18*l.* parcel," &c., and that E. E. failed to perform the agreement on her part, and consequently became bound to return the deposit, of which the plt. had notice. Held bad on special demurrer as amounting to never indebted (Jacobs v. Fisher, 1 C. B. 178). We have seen that *nil debet* is abolished: if, however, it should be pleaded it is not a nullity, but it should seem it will let in any defence heretofore available under it (see Finlayson v. McKenzie, 3 B. N. C. 824). Therefore, where deft., on paying money into court in an action on a bill of exchange, pleaded *nil debet ultra*, upon which plt. took issue, the *def. was allowed to show any defence to the residue which he might under that plea before [*906] the new rules (Finlayson v. McKenzie, *supra*).

In actions on judgments of colonial, foreign, or inferior courts, not of record, the plea of never indebted is inapplicable, the deft. must plead specially.

As great precision is not required in the calculation of the amount laid in the *queritur*, so neither is it in the plea of the deft., and therefore a plea that the deft. "does not owe the said sum of 10*l.* above demanded" (the sum demanded being 1800*l.*), was held sufficient, as the amount might be rejected as surplusage (Atwood v. Bonachinch, 1 D. & R. 473; Edgington v. Town, 1 Moo. & P. 276). So, where the sum demanded was 60*l.*, and there were six counts, each for 10*l.* (Risdale v. Kelly, 1 C. & J. 410); but where the sum demanded was 2000*l.*, and there were several counts, each for 224*l.* 7*s.* 4½*d.*, and the deft., being under terms to plead issuably, pleaded that he did not owe the said sum of 224*l.* 7*s.* 4½*d.*, the plt. was allowed to sign judgment, as the plea was not a compliance with the judge's order (Mac Donnell v. Mac Donnell, 3 B. & P. 174). Where in debt for 150*l.*, the deft. pleaded that he had paid the plt. 50*l.*, and the plt. signed judgment of *nil dicet* for 100*l.*, it was held irregular (Wood v. Farr, 5 Bing. N. C. 247; see further, Arch. Pr. 264).

Where the declaration gives credit for payment of part of the debt, the allegation of payment is not traversable (Hodgkins v. Hancock, 14 M. & W. 120; 2 D. & L. 895). In debt for 100*l.*, for work, &c., the plt. in the count gave credit for 89*l.*, and demanded only 11*l.*; plea, *nunquam indebitatus*: held, that plt. must show a debt exceeding 89*l.* (Price v. Rees, 11 M. & W. 576).

Payment must be pleaded. Payment into court must cover debt as well as damages, or else plt. may sign judgment (*Lowe v. Stale*, 15 M. & W. 389).

A plea in confession and avoidance, pleaded alone, admits the whole amount of the debt stated in the declaration; and, therefore, though a set-off cover the debt specified in the particulars of demand, yet, if the sum in the declaration exceed the set-off, plt. will be entitled to a verdict (*Roche v. Champion*, 1 Exch. 10).

Plea in Debt on Statute.] *Nil debet* is the proper plea in debt on statute (1 T. R. 462; Bac. Abr. Pleas, L.; Com. Dig. Plead. 2, s. 11, 17). In some cases, the plea of "not guilty" will do (lb.). The Statute of Limitations may, in such action, be given in evidence under this plea (2 Saund. 63). Notwithstanding the new rules it is still a good plea to such an action of debt, the judges not having the power to take it away, as on the 2 & 3 Edw. VI. c. 13, for not setting out tithes (*Spencer (Earl) v. Swannell*, 3 M. & W. 154; 4 Dowl. P. C. 326); on the 11 Geo. II. c. 19, s. 4, for double the value of goods fraudulently removed from the premises of a tenant (*Jones v. Williams*, 4 M. & W. 375; 7 Dowl. P. C. 206; 3 Jur. 224); on the 22 Geo. II. c. 46, s. 14, for penalties against an attorney for practising as deputy clerk of the peace (*Faulkner v. Chevell*, 5 Ad. & E. 213; 6 Nev. & M. 704); and it puts in issue all the allegations of fact necessary to make out this offence (*Faulkner v. Chevell*, 3 Jur. 1148; 2 P. & D. 262; 10 Ad. & E. 76); but where to debt for goods sold, and on an account stated, the deft. pleaded *nil debet*, and on special demurrer suggested in argument that the general issue was given by the Highway Act (5 & 6 Will. IV. c. 50, s. 109), for anything done in pursuance of it, it was held, that as the count, on an account [*907] stated, could not be *brought within it, the plea was bad (*Calvert v. Moggs*, 2 P. & D. 543; 3 Jur. 1171; 10 Ad. & E. 632).

Statute of Limitations.] To debt on specialty less than twenty years is not now a bar (3 & 4 Will. IV. c. 42, s. 3, and see *Sims v. Thomas*, 12 Ad. & E. 536; and *post*, "STATUTE OF LIMITATIONS").

Replication.] In debt on simple contract, the replications are similar to those in assumpsit (*ante*, "ASSUMPSIT;" *post*, "REPLICATION"); *de injuriâ* is good (*Purchall v. Salter*, 1 Q. B. 197; *Cowper v. Garbett*, 8 Jur. 541; 1 D. & L. 969; 13 M. & W. 33). Plt. declared in debt on a bond conditioned for the payment of 1000*l.* on a day certain, in pursuance of the terms of an indenture of even date therewith; and for the performance of the covenants contained in that indenture. The defts. pleaded generally performance of all things mentioned in the condition. The replication denied the payment of the sum of 1000*l.* *modo et formâ*, and concluded to the 'country: held, upon special demurrer to the replication, that its conclusion was proper; since to make the plea good, it must be taken to allege that the money was paid on the day mentioned in condition; *semble*, that the plea would have been bad on special demurrer, if not on general demurrer (*Roakes v. Manser*, 3 D. & L. 17; 1 C. B. 531). In debt on a specialty, if fraud or duress be pleaded, the plt. may reply that it was duly or freely obtained (Com. Dig. Plead. 2 W, 19, 20). To a plea of usury, gaming, &c., he traverses the illegality of the contract; to a plea of set-off to debt on bond, the replication may either deny the subject-matter of the deft.'s set-off, or allege that more was due on the bond than the sum mentioned (*Symmons v. Kuox*, 3 T. R. 65). The only replication to a plea of *solvit ad* or *post diem* is a denial of the payment (*Turner v. Macnamara*, 5 Moo. 198; S. C. 2 Chit. Rep. 697). As to replications to debt on annuity, *ante*

"ANNUITY." As to replications assigning breaches under 8 & 9 Will. III. c. 11, s. 8 (*ante*, "BOND"). To a plea of *nul tiel record*, the replication must state there is such a record; and conclude, *prout patet per recordum*, with a prayer that it may be inspected, &c. (Com. Dig. Plead., 2 W, 13). Where a plea of *nul tiel record* concluded to the country, and the plt. replied, that there is such a *record*, concluding with a verification by the record, and gave notice of trial by the record, it was held, that as the plea tendered a perfect issue without the conclusion to the country, the plt. was entitled to treat those words as surplusage, and to reply over (Townsend v. Smith, 15 Law J 93, Q. B.; and see further, *post*, "JUDGMENT," "RECOGNIZANCE," "STATUTE").

**Precedents.*

Commencement of declaration in debt.

In the Q. B. (or C. P. or Ex. of P.). On the _____ day of _____, A. D. 1850.
London to wit. A. B. by E. F. his attorney (or "in his own proper person") complains of C. D. who has been summoned to answer the said A. B. (*here it is usual to insert in an action of debt*, and the plt. demands of the deft. the sum of £ _____ (*the aggregate amount of all the sums claimed in the declaration*) which he owes to and unjustly detains from him, (*but it is unnecessary and had better be omitted*) for that whereas (*here state the bond or other debt or cause of action fully, and the conclusion for which, see the various titles of actions throughout the work*).

Commencement and conclusion of the like in debt, *qui tam*.

In the Q. B. (C. P., or Ex. of P.). On the _____ day of _____ A. D. 1850.
[*Venue*] to wit. A. B. who sues as well for our sovereign lady the queen *(or for the poor of the parish of _____ in the county of _____) as for himself [*908] in this behalf by E. E. his attorney (or in his own proper person) complains of C. D. who has been summoned to answer the said A. B. who sues as aforesaid (*it is here usual but unnecessary to insert in an action of debt*), and the plt. demands of the deft. the sum of £ _____ (*the aggregate of the sums afterwards claimed*) which he owes to and unjustly detains from our said lady the queen (or the poor of the said parish) and the plt. who sues as aforesaid). For that whereas &c. (see *post*, "STATUTES"). And therefore as well for our said lady the queen (or for the poor of the parish of _____) as for himself in this behalf he brings his suit &c. Pledges &c.

Indebitatus count in debt.

For that whereas (or if this be not the first count say and whereas also) the deft. heretofore to wit on the _____ day of _____ A. D. _____ (or if a day has been already mentioned say, afterwards to wit on the day and year aforesaid) was indebted to the plt. in the sum of £ _____ for (*here state the subject-matter of the debt as in assumpsit—see the various forms under the different titles of actions throughout the work*) which said sum of money was to be paid by the deft. to the plt. on request. Whereby and by reason of the said (or said last-mentioned) sum of money being and remaining wholly unpaid an action hath accrued to the plt. to demand and have of and from the deft. the said last-mentioned sum of £ _____ (*add if you have inserted the queritur*) parcel (or other parcel) of the said sum above demanded.

[If the common counts (*ante* "ASSUMPSIT;" they are applicable to debt as well as assumpsit) are inserted to conclude] "which said several sums of money respectively were to be paid by the deft. to the plt. on request whereby and by reason of the non-payment thereof an action hath accrued to the plt. to demand and have the same of and from the deft. (or if the *queritur* has been used "to demand and have of and from the deft. the said sum of money above demanded") yet the deft. has not paid the same or any part thereof to the plt.'s damage of £ _____ and thereupon he brings suit" &c.

Plea of *nil debet*.

In the Q. B. (C. P. or Ex. of P.). On the _____ day of _____, A. D. 1850.

C. D. } The deft. by his attorney (or in person) says that he does not owe the
ats. } said sum of money (or the said sum of £) above demanded or any part
A. B. } thereof in manner and form as the plt. hath above thereof complained against him
and of this he puts himself upon the country &c.

Plea of nil debet in qui tam.

C. D. } The deft. by his attorney (or in person) says that he does not owe to
ats. } our said lady the queen (or to the poor of the parish of in the county
A. B. } aforesaid) and to the plt. who sues as aforesaid or to either of them the said sum
of money (or the said sum of £) above demanded or any part thereof in manner
and form as the plt. who sues as aforesaid hath above thereof complained against him and
of this he puts himself upon the country &c.

Plea of nunquam indebitatus.

C. D. } The deft. by his attorney (or in person) says that he never was in-
ats. } debted in manner and form as in the declaration alleged and of this he puts him-
A. B. } self upon the country &c.

Non est factum.

C. D. } The deft. by his attorney (or in person) says that the said supposed
ats. } writing obligatory (or indenture or articles of agreement) is not his deed and of
A. B. } this he puts himself upon the country &c.

Non est factum, craving oyer of the bond and condition.

C. D. } The deft. by E. F. his attorney craves oyer of the said supposed writing obliga-
ats. } tory in the said declaration mentioned and it is read to him &c. he also craves
A. B. } oyer of the condition of the said supposed writing obligatory and it is read to
him in these words Whereas &c. (*here set forth the condition with the recitals, if any, ver-
batim*) which being *read and heard the deft. says that the said supposed
[*909] writing obligatory is not his deed and of this he puts himself upon the country
&c.

Commencement of plea of onerari non.

C. D. } The deft. by his attorney (or in person) says that he ought not
ats. } to be charged with the said debt by virtue of the said supposed writing obligatory
A. B. } (or indenture according to declaration) because he says (*here insert the subject-
matter of the plea which will be found under the various titles of defences throughout the
work*) and this the deft. is ready to verify (*if the plea is not in bar of the whole action you
may add*) wherefore he prays judgment if he ought to be charged with the said debt by
virtue of the said supposed writing obligatory (or indenture according to fact) &c.

See a form of plea bad as amounting to argumentative denial of being indebted, *Aylesbury Railway Company v. Mount*, 3 Railw. Ca. 468.

Replications.

These will be found under "REPLICATION," and the various titles of defences throughout the work. See also for other forms of declarations, pleas, &c. 2 & 3 Ch. Pl.

Evidence for Plaintiff.

Debt on simple contract, in respect to the evidence, differs little from the action of assumpsit; and the rules for settling the evidence under that head will here apply (*ante* "ASSUMPSIT," and the titles of different actions in the work). It may, however, be useful to notice a few recent cases peculiarly bearing on this form of action.

If the plt. sue several defts. he must be prepared, on *nunquam indebitatus* pleaded by one, with evidence to fix all of them else he will be nonsuited, though all but that one suffer judgment by default, and there is proof of a contract between him and the plt. (*Robeson v. Ganderton*, 9 C. & P. 476, per Williams, J.), and the court will not amend by striking out the names of the defts. not affected by the evidence, (*Cooper v. Whitehouse*, 6 C. & P. 545, per Alderson, B.). It is doubtful whether, if the deft. pleads payment and

does not appear to support his plea, the plt. is bound to prove the amount of his debt (*M'Intosh v. Weller*, 1 Moo. & R. 505, per Littledale, J.). *Semble*; that if he pleaded a set-off, the only issue would be on him, and the plt. would have nothing to prove (*Newhall v. Holt*, 6 M. & W. 662), and if his proof did not cover all his set-off, the plt. would be entitled to a verdict for the residue (*Green v. Marsh*, 5 Dowl. P. C. 669; *W. W. & D.* 343). In an action on an attorney's bill it is competent for the plt., on *nunquam indebitatus* pleaded, to show that a greater amount is due than the master allowed on taxation, pursuant to an order for changing the attorney in the course of the cause in which the costs were incurred (*Beck v. Cleaver*, 9 Dowl. P. C. 111). If the plt. relies, in an action tried before a sheriff, on an admission that something is due, but is unable to fix the amount, and thereupon a verdict of 1s. is taken, the court above will not stay proceedings upon the payment of the 1s. or enter judgment for the plt. without costs (*Batchelor v. Dudley*, 9 Dowl. P. C. 384; 5 Jur. 82; 2 Sco. N. R. 444). A parol admission of a debt is evidence on an account stated, though it refer to a written instrument not produced (*Newhall v. Holt*, 6 M. & W. 662). In debt on a judgment, if the declaration state the judgment to have been recovered in such a term *prout patet*, &c., and it appears in evidence to have been recovered in another term, the variance is fatal (*Rastal v. Stratton*, 1 H. Bl. 49).

**Evidence for Defendant.*

[*910]

Under Plea of Nunquam Indebitatus.] By the above-cited rules *nunquam indebitatus* has the same operation as *non assumpsit* in actions of assumpsit, which, as we have seen, is to "operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." Under this plea it was held that the deft. could not, in an action for goods sold and delivered, prove that they were sold on a credit which had not expired (*Edmunds v. Harris*, 4 Nev. & M. 182; 2 Ad. & E. 414), but this decision has been overruled on the ground that there is no debt to maintain an action till the credit has expired (*Broomfield v. Smith*, 1 M. & W. 542; *Jones v. Read*, 5 Dowl. 218; *Haselden v. Stiff*, 6 Nev. & M. 695; 5 Ad. & E. 153); and recently it has been decided that where the goods sold for ready money were paid for within ten minutes after delivery the deft. could give the payment in evidence (*Bussey v. Barnett*, 9 M. & W. 312; 1 Dowl. N. S. 646); but if the jury find that there has been a sale, they cannot find a verdict for the deft. on the ground that it was a ready-money transaction (*Littlechild v. Banks*, 14 Law J., N. S., Q. B. 356; 9 Jur. 1096). Under this plea it is open to the deft. to show that the contract (for the sale of goods) is void by the 17th section of the Statute of Frauds (*Freeken v. Tomlinson*, 1 M. & G. 772); or in an action for an attorney's bill that the work was agreed to be done for the money out of pocket (*Jones v. Read*, 1 Nev. & P. 18; 5 Dowl. P. C. 216; 5 Ad. & E. 529); or, for use and occupation, that the tenancy had been determined by agreement (*Washington v. Warham*, 6 Jur. 127, Q. B.). Or that part of the work for which the action is brought was done by the deft. himself, though it was insisted that this should be the subject of a set-off (*Turner v. Draper*, 2 Sco. 447; 2 M. & G. 241); but not that the plt. admitted before action brought that the balance of accounts was in deft.'s favour (*Evans v. Downes*, 2 Jur. 1066, P. C.); nor that the goods, the cause of action, originally belonged to a third party, who had assigned his property for the benefit of his creditors, and had since given an authority to the plt. to sell the individual goods (*Poole v. Williams*, 4 Jur.

748, Ex.). Nor, in an action on an attorney's bill, can the Master's *allocatur* pursuant to an order for changing an attorney in the course of a cause, be relied on as conclusive against the plt.'s claim for a higher amount of costs (Beck v. Cleaver, 2 Dowl. P. C. 111). If the declaration give credit for payment of part of the debt, and allege, as a breach, the non-payment of the residue, the plt. must, under this plea, prove a debt greater than that for which credit is given (Price v. Rees, 1 D. & L. 361; 11 M. & W. 576).

As to the general evidence in debt on bond or deeds, see "BOND," "DEED." For the evidence under different defences, see the various titles of defences in the work.

DECEIT.

See "CASE," "FRAUD."

[*911]

*DECLARATION.

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Nature and Form of.

THE declaration in pleading is a statement in legal form by the plt. of his cause of complaint against defl. It would be extending this work beyond its intended limits, to enter into a detail of all the general requisites of a declaration; these will be found ably collected in 1 Ch. Pl. 64, *et seq.* The particular parts to be attended to are the title of the court and term; the names of the parties, the recital of the cause of action, the statement of such cause of action, and, lastly, the conclusion; and which points we shall consider in the above order.

Title of Court.] The R. G. M. T. 3 Will. IV. r. 1, 15, orders that every declaration shall in future be entitled of the proper court and of the day of the month and year on which it is filed or delivered. If the title be omitted

or merely indorsed, it is an irregularity, but not a ground of demurrer (see *Ripling v. Watts*, 2 Dowl. 290; and *ante*, p. 421). The name of the courts is mentioned at the commencement of the declaration, as, "In the Queen's Bench," "In the Common Pleas," "In the Exchequer of Pleas." If the name of the court be omitted it would seem to justify a demurrer, or an application to the judge to set it aside.

Title of Term or Time.] The R. G. H. T. 4 Will. IV. r. 1, orders that "every pleading as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record made up for trial, and on the judgment roll under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court *or a judge." Under this rule the declaration is now [*912] entitled of the day it is pleaded in all actions in the superior courts.

It is regular if it bear date on any other day (*Hodson v. Pennell*, 4 M. & W. 373; 7 Dowl. 208; *Mills v. Browne*, 9 Dowl. 151; *Newnham v. Han-nay*, 5 Dowl. 259); but cannot be demurred to (*Neal v. Richardson*, 2 Dowl. 89; *Harsant v. Busk*, 6 Jur. 1102; but see *Pugh v. Robinson*, 1 T. R. 116; *Wainwright v. Bland*, 5 Dowl. 318; *Panett v. Blower*, 8 Dowl. 405; 1 Arch. Pr. 193). So it is irregular to omit the "year of our Lord" (*Holland v. Tealde*, 3 Dowl. 320; 1 Arch. Pr. 193, n. (h)). In some recent works it is stated that the declaration can be entitled of the date it is delivered only in personal actions. But this seems to be a mistake which originated thus:—The rule of M. T. 3 Will. IV., founded on the Uniformity of Process Act, applied only to personal actions; and though the rule of H. T. 4 Will. IV. being founded on the 3 & 4 Will. IV. c. 42, s. 1, which applies to all actions, removes the limitation which applied to entitling under the rule of M. T. 3 Will. IV.; yet, in consequence of its commencement, "Every pleading, *as well as the declaration*," &c., it has been thought that the same limitation still applies, as applied before under the former rule. But this is too narrow a construction, not sanctioned by the most critical construction of the words, and altogether at variance with the spirit in which and the language of the statute on which the latter rule was framed, and the practice now is almost universally to entitle actions of replevin, ejectment, &c., in the same manner as personal actions. As, however, some doubt may be still entertained on the subject, we subjoin a few of the old authorities and forms.

In general, the declaration should be entitled of the term in which the writ was returnable (*Smith v. Muller*, 3 T. R. 624), or the deft. appeared (*Topping v. Fage*, 1 Marsh. 341; and see 3 T. R. 627; 8 T. R. 458; 1 Bing. 48; 1 East, 133, 2 Saund. 1, n. 1; 4 Moo. 425; 2 B. & P. 51; *Law v. Pugh*, 2 D. & R. 868). When the cause of action occurred on or before the first day of term, the declaration might be entitled of the term generally (*Pugh v. Robinson*, 1 T. R. 116; 1 Stark. 138); when subsequently to that day it should be entitled specially of the day of filing or delivering it, as "Wednesday next, after fifteen days of Easter," or on some other certain day after the cause of action accrued (1 Saund. 40, n.; 2 Saund. 1 c, d, n.; 171 c; 1 Burr. 1241; 1 Bla. 312; 2 Bla. 735; B. N. P. 137; B. & C. 152; 3 Wils. 154; 2 Lev. 13, 176; 1 Vent. 264; 2 East, 574; 1 B. & P. 263).

If the objection appeared on the face of the pleadings, the deft. might demur (*Pugh v. Robinson*, 1 T. R. 116; 1 Stra. 21); but, if it did not so appear, the deft. might in C. P. plead the fact in abatement (Com. Dig. Abatement, G, 6); or the plt. would be nonsuited at the trial (2 Saund. 1, n. 1;

Burr. 1241; 1 Bla. 312). The objection, however, appeared to be cured by a plea confessing and avoiding the cause of action as *son assault demesne* (2 Stra. 1271), or by verdict; and a judgment could not (at all events, if proper steps were taken by plt.) be arrested for it (1 Ch. Pl. 278; Andr. 13250; Cro. E. 325; Cro. Car. 272, 282; Carth. 113; B. N. P. 137; Tidd, Pr. 428). It is no ground for bringing a writ of error (1 M'Cle. & Yo. 202; S. C. 2 Bing. 469); even though the action was in an inferior court (3 B. & A. 605; 1 Wils. 180). By statute 39 & 40 Geo. III. c. 105, an objection of this nature is aided in the C. P. at Lancaster. Where the declaration was entitled generally of the term, or of a day before it was actually filed or delivered, so that thereby deft. might be put to some trouble or prejudice, the court would order plt. to entitle it of the day of such filing or delivery [*913] livery (Tidd, Pr. 428; 1 Ch. Pl. 239; *Ca. t. Hard. 141; 1 Wils. 39, 304; S. C. 1 Stra. 638); and the deft. might always, for the purposes of his defence or otherwise, plead, or show in evidence at the trial (3 Burr. 1241; 4 Esp. 72), when in fact the declaration was filed or delivered, as, by proving the writ, or the like (5 B. & C. 149; Tidd, Pr. 428; see "PROCESS"); the title of the declaration being mere *prima facie* evidence of the day of the filing or delivery of it (Ib.).

The plt. might at all times amend (Tidd, Pr. 428; 1 Wils. 78; 7 T. R. 474); except perhaps in a penal action (6 Taunt. 19; S. C. 1 Marsh. 419).

In the body of the declaration the time should be laid before the date of the writ; but if laid after, it is not a ground for arresting the judgment (Steward v. Layton, 3 Dowl. 430).

Under the former (and perhaps the present, see above) practice in ejectment the declaration should be entitled of the preceding term to that in which the deft. was to appear to it, even though the demise be laid on a day subsequent to such term (Runnington, Eject. 208, 209, 217; Ad. Ej. 181, 182); except in proceedings by landlord against tenant, under 1 Will. IV. c. 70, s. 36, where, if the right of entry accrued on or after Hilary or Trinity terms, the declaration might be specially entitled. No objection can be taken on the ground of the omission of the title of a term, or intituling of a wrong term (provided the tenant has sufficient notice to appear (2 Chit. Rep. 172; Tidd, Pr. 1204); for the nominal deft. cannot demur or move to set aside, and the real deft., if he appear, must, by the terms of the consent rule, accept a declaration against himself of the subsequent term, and plead only the general issue (Ib.; and see 1 Vent. 135).

Allegations of Time.] A date may be assumed to be material upon demurrer, when, if truly stated, it would support the pleading (Ryalls v. Bramall, 5 D. & L. 753; 1 Exch. 734).

The Court is presumed to have the writ of summons before them on demurrer (Ib.).

When the time at which an event occurred is material, the date, though laid under a *videlicet* in pleading, must be proved as laid (Nash v. Brown, 13 Jur. 126; 18 Law J. 62, C. P.).

Where a declaration or other pleading is susceptible of a construction that will make it good, it is not competent to the party pleading it to insist upon a construction that will make it bad (Moore v. Foster, 5 C. B. 220; 5 D. & L. 352).

Venue.] This should be the county or city wherein the trial of the action will take place. Formerly it used to be inserted in the margin and the body of the declaration, but is now inserted in the margin only, the R. G. H. T. 4 Will. IV. r. 8, having provided that "the name of a county shall in all cases

be stated in the margin of a declaration, and shall be taken to be the venue intended by the pit., and no venue shall be stated in the body of the declaration, or in any subsequent pleading. Provided, that in cases where local description is now required, such local description shall be given." The insertion of a venue in the body of the declaration contrary to this rule, is not a ground of demurrer, but of summons (*Farmer v. Champneys*, 1 C. M. & R. 369; 2 Dowl. P. C. 680; *Fisher v. Snow*, 3 Dowl. P. C. 37; *Townsend v. Gurney*, 1 C. M. & R. 590; Dowl. P. C. 168; 5 Tyrw. 214).

When Venue transitory.] Some actions are transitory, others local. Where the cause of action might have arisen in *any* county, the venue is *transitory*, and the action may be brought in any county; therefore, actions on *contracts*, as on a covenant between the original parties and their covenants to it, debt or assumpsit, for use and occupation, on bail-bonds, bills, and all other such contracts, detinuc, &c. (5 Taunt. 29; Com. Dig. N. 12; 1 Saund. 74, 241 b; Fort. 366; Stra. 727); or for injuries *ex delicto* to the person or personal property, as assaults, batteries, false imprisonment (Cowp. 161), slander, libel (1 T. R. 571), trover (Com. Dig. Action, N, 12), escapes, &c. (1 Wils. 336), are transitory, and may be laid in any county. And it makes no difference whether such contract were entered into (Com. Dig. Action, N, 12; 1 Saund. 74, 241 b; Cowp. 180), or such tort committed, out of the kingdom (Cowp. 161; Com. Dig. Action, N, 12; 2 Bla. 1058), or jurisdiction of the king's courts (Ib.); and *this, though [*914] the action be against a member of parliament (4 East, 162).

When local.] The venue is *local*, and must be laid in the county where the cause of action accrued, when such cause of action could only have arisen in a *particular* county; such as an action for injury to *real* property, actions of ejectment, and all real and mixed actions: therefore, an action of trespass to real property, or case for a nuisance to it (1 Taunt. 379), must be brought in the county where the property is situate. So must an action for waste, or injury to a watercourse, right of common, way, &c. (Ib.). And, if an injury be committed to land out of the jurisdiction of our courts, or out of the kingdom, the plt. has no remedy here, if there be a court of justice to resort to where the land is situate (4 T. R. 503; 1 Stra. 646). The venue is local in replevin (1 Saund. 347, n. 1). Where an injury has been committed in one county to real property situate in another, or wherever the action is founded upon two or more material facts, which took place in different counties, the venue may be laid in either (2 Taunt. 252; 2 T. R. 238). If there be a contract independent of the tort, whereon the plt. may found his action, the action thereon is transitory (see 1 Taunt. 379), and the parties may, by leave of the court, try a local action in another county, such consent appearing on the record (Co. Lit. 125 b, 126 a, n. 1; Tidd, 9th ed. 1 Ch. Pl. 281).

In an action upon a lease, forrent, not repairing, &c., when the action is founded on the privity of *estate*, and not upon the privity of *contract*, it is local, and the action must be brought in the county where the estate lies (1 Saund. 241 b, 6); as, if the action be against the executor of the lessee, *as assignee*, upon the privity of estate, it is local (2 Lev. 80); so in *debt*, by the assignee (Cro. Car. 183; 1 Wils. 165), or devisee (Jon. W. 43), of the lessor against the lessee, which is founded on the privity of estate, the action is local. So, in debt or covenant by the lessor (6 Mod. 194), or his personal representatives (Lat. 197), or by the grantee of the reversion (Carth. 182; 3 Mod. 336; 7 T. R. 583), against the assignee of the lessee, the venue is local. See further, as to the venue in actions on leases, *post*, "LEASE."

An action for breach of a custom or by-law is local; but an action of debt

on a charter is not (2 Bl. R. 1068). Debt for a copyhold fine is local (Entr. 177; 1 Ch. Pl. 281). Debt for arrears of a rent-charge against the pignor of the profits, is local (Hob. 37).

In an action on a record, the venue is local, and must be laid in the county where the record is (*post*, "RECOGNIZANCE," "JUDGMENT").

In all actions on penal *statutes*, the venue is local (31 Eliz. c. 5, s. 2; 21 Jac. I. c. 4, s. 2; 3 M. & S. 429; 5 M. & S. 427); but, in actions on statute by the party grieved, it is not so (1 Show. 354; B. N. P. 196; Fife v. Bousfield, 2 D. & L. 481). The venue, in an action on a penal statute, should be laid in the county where the offence was completed (Pearson v. McGowan, 3 B. & C. 700; 5 D. & R. 616; *post*, "STATUTE").

By various statutes, the venues in actions against particular persons are made local, as in actions against justices, constables, &c., and other public officers (*see post*, "OFFICER," "JUSTICE").

When a Venue should be stated.] Formerly a venue should be laid to every *material traversable* fact (14 East, 291, 306; 3 M. & S. 149; Com. Dig. Plead. C, 20); but it was unnecessary to lay it to matter of inducement, when not traversable, and which *could not be tried (Ib.; Plowd. 191); nor was it necessary so to do to a mere negative allegation (5 T. R. 616; 1 Taunt. 379).

Mode of stating Venue.] With respect to the mode of stating the venue, it is stated in the margin of the declaration, after the title of court and term. Though a wrong county be here stated, it will not be objectionable if a right one appear in the body of the declaration; and, on the other hand, if a right county be here stated, it will help a wrong one, stated in the body (1 Taunt. 379; 1 Saund. 309, n. 1). Where no local description is necessary, as in replevin, &c., though usual, it is not necessary to aver that the fact took place in any particular parish or place within the county; it suffices to allege it took place in the county only (3 M. & S. 148; Co. Lit. 125 b). As to describing the venue in penal actions, *see post*, "STATUTE." Even in local actions, unless in replevin, no precise local description is necessary (2 East, 503). When a transitory matter has occurred abroad, it may, in some cases, for the purpose of explaining a fact, be necessary to state it occurred abroad (Cowp. 170; 10 Mod. 255; 1 Ch. Pl. 284; 2 B. & A. 301; 1 B. & C. 16). A variance in the proof as to the parish or place stated as *venue* is, in general, immaterial (2 East, 503); but, if the parish or place be stated as matter of *description*, as, in the situation of premises, &c., then a variance would be fatal (1 Esp. 273; 2 B. & P. 281; *ante*, 914; and *see* "EJECTMENT," "TRESPASS"). Describing premises, as situated "at or near" a place, does not require strict proof (Pea. Ev. 199; 4 T. R. 558, 561). In an action on a penal statute, where part of a penalty is given to the poor of the parish, the name of such parish is matter of substance, and the offence must be necessarily laid and proved to have taken place therein (2 East, 503; 3 Esp. 319; 5 Bing. 449; 7 B. & C. 111). In actions in inferior courts in general, except the courts of the counties palatine and a few others, it is still necessary to aver that every *material fact* took place within the jurisdiction of the court (Salter v. Slade, 1 Ad. & E. 608; Williams v. Gibbs, 5 ib. 208); and an omission of such averment will render the declaration bad, even after verdict (1 Saund. 74, n. (h); 1 T. R. 151; 6 T. R. 764; 2 Stra. 827; 3 B. & B. 209); but, to averment of facts which are stated only in aggravation of damages, and which might be omitted, this is not necessary (Ib.). In an action on a judgment in an inferior court, the declaration must aver that the original cause of action occurred within the jurisdiction (Pope v. Read, 1 C.

M. & R. 302); *contra*, in an action upon a judgment in a foreign court (Robertson v. Strutt, 8 Jur. 404, Q. B.). In assumpsit, for work and labour in healing horses within the jurisdiction of a county court, and for potions, &c., administered *on those occasions*, it was held that this amounted to a sufficient averment that the potions were administered within the jurisdiction (3 B. & B. 309).

So an averment that deft. was "indebted to the plt. within the jurisdiction of the county court, for the wages of and due and owing to plt. within the jurisdiction," has been held sufficient (Chitty v. Dendy, 3 Ad. & E. 319).

Mode of taking advantage of Mistake in stating Venue.] With respect to the mode of taking advantage of a defect in stating the venue, if the action be *local*, and the venue be laid in a wrong county, and the objection appears on the pleadings, the deft. may demur (1 Saund. 241 c; Carth. 182; 1 Wils. 165); formerly, if it did not so appear it would be a ground of nonsuit under the general issue (7 T. R. 588; 2 East, 580; 1 Saund. 347, n. 1); but, not so now, unless there *has been an issue concerning the locality of the premises (Boyes v. Hewetson, 2 Bing. N. C. 575; 2 Sco. 831). [*916] But it affords no ground for writ of error (16 & 17 Car. II. c. 8; 4 Anne, c. 16, s. 2; 4 Geo. II. c. 26; 1 Saund. 347, n. 3; 7 T. R. 583). The neglect to state any venue either in the margin or body of the declaration is ground of demurrer (Remington v. Taylor, 1 Lut. 235). if a local description of venue, when necessary, be *omitted*, it is not matter of nonsuit, but of demurrer or arrest of judgment (2 East. 499; 2 Wils. 354). A mere formal defect in stating the venue is aided by pleading over (2 Ld. Raym. 1039; Dyer, 15 a), and can only be objected to by special demurrer (3 T. R. 387). If abutments are not described with sufficient certainty, the deft. should demur, or apply to a judge at chambers; by pleading over, he adopts them (Lempriere v. Humphrey, 3 Ad. & E. 181; 4 Nev. & M. 638). But the insertion of a special venue in transitory actions is not now a ground of demurrer but of summons to strike out (Farmer v. Champneys, 1 C. M. & R. 369; 2 Dowl. 680; Fisher v. Snow, 3 Dowl. 27; Townshend v. Gurney, 1 C. M. & R. 590; 5 Tyrw. 214). If the venue when local be laid in a wrong county deft. may demur if the objection appear upon the face of the record (Tremeere v. Morrison, 1 Moo. & S. 509); otherwise it seems the objection should be pleaded (Bayes v. Hewetson, 1 Bing. N. C. 575; 2 Sco. 831). In actions in inferior courts, as we have seen, the omission in stating a material fact to have accrued within the jurisdiction is bad, even after verdict or judgment (*supra*). A variance in description of local situation of property is sometimes fatal (*ante*, p. 915; *post*, "TRESPASS," "EJECTMENT").

Names and Character of Parties in Commencement of Declaration.] The names of the parties should, in general, be set forth as they appear in the process. All the parties suing or being sued must be named by their christian and surnames, even although they be a trading firm or company, unless they are incorporated or authorised to sue as a company or body by a given title. If however, there be a misnomer in the process, the mistake should be rectified by declaring the right name, and stating that plt. sued, or deft. was sued, by the wrong one (3 East, 187, see form, *post*). Formerly, if the misnomer was carried into the declaration, deft. might plead in abatement, but he could not take any other advantage; but by 3 & 4 Will. IV. c. 42, s. 11, it was enacted that no plea in abatement for a misnomer shall be allowed in any personal action, but in all cases in which a misnomer would, but for this act, have been by law pleadable in abatement in such actions, the deft. shall be at

liberty to cause the declaration to be amended at the costs of the plt., by inserting the right name upon a judge's summons, founded on an affidavit of the right name, and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit: and by sect. 12, that in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters, or the contraction of the christian or first name or names, instead of stating the christian or first name or names in full."

It would seem that these sections apply only to the misnomer of a deft. (Lindsey v. Wells, 4 Sco. 471; 3 Bing. N. C. 77; 3 Hodges, 97; 5 Dowl. P. C. 618). The misnomer of the plt. (though there be a person of the name wrongly used) is no ground of nonsuit if he *identify him- [*917] as the real creditor or claimant, and show that he is the party actually enforcing the proceedings, and the deft. be not deceived (Boughton v. Frere, 3 Camp. 629; Moody v. Aslet, 3 Dowl. 486; see Fisher v. Magney, 1 Dan. & Ll. 40). Describing a party to a suit not upon a written instrument, by the initials of his christian name, is a misnomer (Rust v. Kennedy, 4 M. & W. 586; 7 Dowl. P. C. 199; 3 Jur. 198). The remedy in such a case is a summons to amend (Ib.). So, in such a suit, the omission of the christian names of parties mentioned in the declaration, without an averment excusing or explaining it, is the ground of a special demurrer (Appelmans v. Blanche, 14 M. & W. 154; see *ante*, p. 171). But the plt. can amend the misnomer himself and declare against "Godfrey Bingley Wadsworth, sued as George B. Wadsworth" (Hobson v. Wadsworth, 8 Dowl. P. C. 601; 4 Jur. 745, B. C.). There is no material misnomer if the mistaken name be *idem sonans* (R. v. Shakespeare, 10 East, 83; Webb v. Laurence, 1 Cr. & M. 806; Abithol v. Beneditto, 2 Taunt. 401; Dickinson v. Bowes, 16 East, 110). A party who executes a deed by a wrong name should be sued by that name (Gould v. Barnes, 2 Taunt. 504; Crawford v. Shackwell, 2 Stra. 1218; Williams v. Bryant, 5 M. & W. 447). If the writ be against two, the declaration may be against one, if the cause of action be against him only, and no proceedings have been taken against the other (Evans v. Whitehead, 2 Moo. & R. 367; Bowles v. Bitton, 2 Cr. & J. 174). But, until the misnomer is amended, an affidavit by the deft. stating the title of the cause to be "Borthwick v. Humphrey Davies Ravenscroft, sued as Henry Ravenscroft," is wrongly entitled (5 M. & W. 31; 7 Dowl. P. C. 393; 3 Jur. 703). If the writ be at the suit of two parties, and the declaration be by one only, it will be set aside for irregularity (Rogers v. Jenkins, 1 B. & P. 383). In general, a name not mentioned in the writ cannot be added as plt. in the declaration. But the court allowed the name of an official assignee which was omitted in the writ and declaration, to be inserted in the latter (Baker v. Neaver, 1 Dowl. 616; and see Lakin v. Watson, 2 Dowl. 663). The deft.'s addition need not be stated (3 B. & P. 395; Com. Dig. Plead. G, 9). If plt. sues, or deft. is sued, in any particular character, it has been usual to describe them accordingly, though, perhaps, the omission would be cured by the body-part of the declaration stating it. The form prescribed by the rule of M. T. 3 Will. IV. r. 15, omits it altogether.

As to describing the plt.'s or deft.'s representative character, in actions relative thereto, see "BANKRUPT," "EXECUTORS," "PARTNERS." Infants are stated to sue by guardian or *prochein amy* (2 Saund. 117 f, n. 1). Where one of several plt.s. or defts. dies, after issuing the writ, and before

declaration, the commencement should suggest the death (8 & 9 Will. III. c. 11, s. 7; 1 Burr. 363). Where one of several defts. has been outlawed, upon an original writ in either of the courts, the declaration should, in the commencement, state the outlawry in the particular suit (3 East, 144; 1 Wils. 78; 1 East, 133). In actions removed from an inferior court into the Exchequer, it is still necessary to describe the plt. as debtor to the Queen (Dodd v. Grant, 4 Ad. & E. 483).

Actions removed from inferior Courts.] Formerly it was necessary to state the mode in which the deft. was brought into court (see Tidd, Pr. 8th ed. 342; 1 T. R. 342; 1 Wils. 119; 2 Ld. Raym. 1362; 1 Ch. Pl. 234); but the rule 15 of M. T. 3 Will. IV., which prescribed particular forms of commencements of declarations having rendered this unnecessary in personal actions commenced in the superior courts, the old mode of declaring is now used only in actions *removed from inferior courts in which the plt. declares *de novo*. The general practice has been in such cases [*918] to declare in the Queen's Bench against the deft. as in the custody of the keeper of the Queen's B. Prison (the office of *Marshal* was abolished by the 5 Vict. c. 22, s. 3); but great doubt has been thrown on this mode of declaring by the late case of *Keane v. White* (14 Law J., N. S., Q. B. 42).

In account, covenant, debt, annuity, detinue, and replevin, where the original is a summons, the declaration, by original writ in K. B. or C. P., begins by stating, that deft. was *summoned* to answer; in actions on the case, trespass, ejectment, &c., where the original is an attachment, it states, that he was *attached* to answer (Com. Dig. Plead. C, 12; 2 Saund, 1, n.; 1 Tidd, Pr. 435); a mistake, however, in this does not appear to be material (see 1 Ch. Pl. 292). It would, however, be bad to begin with a *queritur*, as in K. B. by bill (Com. Dig. Pleader, C, 11). In actions by original, and in C. P., it is stated, plt. complains by his attorney; stating he complained by more than one attorney would be bad (4 East, 195). An omission in stating plt. complains by his attorney is immaterial (1 B. & P. 366; see *ante*, "ABATEMENT").

Recital of Cause of Action.] It was formerly usual shortly to state what the plea was, as "in a plea of trespass on the case upon premises," &c., or the like. This was immaterial (11 East, 65; Plead. Ass. 292); but it is now unnecessary, and ought to be omitted.

Declaration by Attorney or in Person.] The omission to state by whom plt. declares is ground of summons, and it seems a demurrer might be sustained (*Butler v. Mapp*, 10 Bing. 391). Infants must sue by guardian or next friend. Idiots may sue in person, corporations by attorney under seal (see "COVERTURE;" Tidd, Pr. 9th ed. 92, 93; 1 Ch. Arch. 8th ed. 64; Co. Lit. 66 b).

Form of Action.] The form of action is usually inserted, but it seems it may be omitted (*Ball v. Hamlett*, 1 C. M. & R. 575; *Ferguson v. Mitchell*, 2 C. M. & R. 689). A variance in the statement of the form of action in the writ and declaration is ground of special demurrer (*Hudson v. Nicholson*, 5 M. & W. 444); or the declaration may be set aside (*Anderson v. Thomas*, 9 Bing. 678; cited in *Thompson v. Dicus*, 2 Dowl. 94; *Marshall v. Thomas*, 2 Dowl. 208; *Driver v. Harrison or Pemeller*, 1 D. & L. 72; see *Heyter v. Fayrer*, 1 Dowl. N. S. 256; see *Rotton v. Jeffery*, 2 Dowl. 687;

Jery v. Stevens, 6 Dowl. 275; Thompson v. Dicas, 1 Car. & M. 768; 2 Dowl. 93; Scrivener v. Wateling, 1 Harr. R. 8; Edwards v. Dignam, 2 Dowl. 240; Lyng. v. Sutton, 4 Moo. & S. 417; Ring v. Skeffington, 1 C. & M. 363; Gurney v. Hopkinson, 3 Dowl. 189; Ward v. Tummon, 1 Ad. & E. 619; Richards v. Stewart, 10 Bing. 319). The writ may describe it as "an action of slander," or "an action of libel" (Davies v. Parker, 2 Dowl. 537; Pell v. Jackson, 2 Dowl. 445). So, a writ in case will support a declaration in trover (Bate v. Bolton, 4 Dowl. 160; see also Barker v. Weedon, 1 C. M. & R. 396; Mills v. Gossett, 5 Moo. & S. 313).

Statement of Cause of Action.] The mode of stating the cause of action, in particular actions, will be found under the various titles of actions, throughout the work (see "ASSUMPSIT," "DEBT," "COVENANT," "DETINUE," "CASE," "TROVER," "REPLEVIN," "TRESPASS," &c.). The following is a summary of the general rule applicable *to the state-
[*919] ment of the cause of action, and, indeed, to all pleadings: they will be found more fully collected in 1 Ch. Pl. 276.

The declaration must allege all the circumstances necessary for the support of the action, and contain a full, regular, and methodical statement of the injury, which the plt. hath sustained, and the time and place, and other circumstances, with such precision, certainty, and clearness, that the deft., knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea, and that the jury may be enabled to give a complete verdict upon the issue; and that the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises (Cowp. 682; 6 East, 422; 5 T. R. 623). Facts only are to be stated, and not arguments or inferences, or matter of law (lb.); and the party can only succeed on the facts as they are alleged and substantially proved. But, though the general rule is, that facts only are to be stated, yet there are some instances in which the statement in the pleading is proper, though it does not accord with the real facts, the law allowing a fiction, as in ejectment, trover, detinue, &c. (2 Burr. 667; 1 N. R. 140). No fact that is not essential to substantiate the pleading should be stated. The statement of immaterial or irrelevant matter is not only censurable on the ground of expense, but frequently affords an advantage to the opposite party, either as the ground of variance, or as rendering it incumbent on the party pleading to adduce more evidence than would otherwise have been necessary, though, indeed, if the matter unnecessarily stated be wholly foreign and impertinent to the cause, so that no allegation whatever on the subject was necessary, it will be rejected as surplusage, it being a maxim, that *utile per inutile non vitiatur*. See cases, &c., in 1 Ch. Pl. 294. Besides this, the pleading must not state two or more facts, either of which would of itself, independently of the other, constitute a sufficient ground of action or defence (Co. Lit. 304 a; Com. Dig. Pleader, C, 33, E, 2; 1 Ch. Pl. 208).

The facts should be stated logically, in their natural order; as, on the part of the plt., his right, the injury, and consequent damage, and these with certainty, precision, and brevity. The facts, as stated, must not be insensible or repugnant, nor ambiguous or doubtful in meaning, nor argumentative, nor in the alternative, nor by way of recital, but positive, and according to their legal effect and operation (Doug. 666, 667; 1 Ch. Pl. 256—270; Steph. Pl. 378 to 405).

Certainty, what.] *Certainty* signifies a clear and distinct statement, so that it may be understood by the opposite party, by the jury who are to ascertain the truth of such statement, and by the court who are to give judg-

ment (Cowp. 682 ; Com. Dig. Pleader, C. 17). Less certainty is requisite when the law presumes that the knowledge of the facts is peculiarly in the opposite party, and so when it is to be presumed that the party pleading is not acquainted with minute circumstances (13 East, 112 ; Com. Dig. Pleader, C. 26 ; 8 East, 85). General statements of facts, admitting of almost any proof, are objectionable (1 M. & S. 441 ; 3 M. & S. 114) ; but, where a subject comprehends a multiplicity of matter, there, in order to avoid prolixity, general pleading is allowed (2 Saund. 411, n. 4 ; 8 T. R. 462). In the *construction* of facts stated in pleading, it is a general rule that everything shall be taken most strongly against the party pleading (1 Saund. 259, n. 8) ; or, rather, if the meaning *of the words be equivocal, they [*920] shall be construed most strongly against the party pleading them (2 H. Bl. 530), for it is to be intended that every person states his case as favourably to himself as possible (Co. Lit. 30, 36) ; but the language is to have a reasonable intendment and construction (Com. Dig. Pleader, C. 25) ; and, if the sense be clear, mere exceptions ought not to be regarded (5 East, 529). And, where an expression is *capable* of different meanings, that shall be taken which will support the averment, and not the other, which would defeat it (4 Taunt. 492 ; 5 East, 257). After verdict, an expression should be construed in such sense as would sustain the verdict (1 B. & C. 297).

With respect to the facts to be stated, there are some which the court will, *ex officio*, take notice of without being stated, and there are others which need not, though they should be established in evidence to entitle the party pleading to succeed. The court will take notice when the *king* came to the throne (2 Ld. Raym. 794) ; his prerogatives (Ib. 980) ; proclamations, &c. (1 Ld. Raym. 282 ; 4 M. & S. 532 ; but private orders of council, pardons, and declarations of war, &c., must be stated, or the court will not notice them (3 M. & S. 67 ; 3 Camp. 61, 67). The time and place of holding *parliaments*, and their course of proceedings, need not be stated (1 Ld. Raym. 210, 343 ; 1 Saund. 131) ; but their journals must (1 Ld. Raym. 15 ; Cowp. 17). *Public statutes*, and the facts they ascertain (1 T. R. 145 ; Com. Dig. Pleader, C. 76), need not be stated ; but *private* acts (1 Ld. Raym. 381 ; 2 Doug. 97) must. The ecclesiastical, civil, and marine laws are noticed (Bro. Abr. Quare Impedit. pl. 12 ; 1 Ld. Raym. 338) ; but foreign (2 Cart. 273 ; Cowp. 174), and plantation and forest (2 Leon. 209), laws must be pleaded. Common-law rights, duties, and *general* customs, customs of gavelkind and borough English (Doug. 150 ; Ld. Raym. 175 ; 2 Ld. Raym. 1542, 1025 ; Co. Lit. 175 ; Cro. Car. 561), need not be stated, but particular *local* customs must (1 Roll. 109 ; 9 East, 185 ; Stra. 187, 1187 ; Doug. 387). The Almanack is part of the law of the land, and the courts take notice thereof, and the days of the week, and of the moveable feasts and terms (Doug. 380 ; 1 Roll. Abr. 524, C. pl. 4 ; 2 Salk. 626). The division of *England* into *counties* will be, *ex officio*, noticed (2 Inst. 557 ; Marsh. 124) ; but not so of a less division (Ib.), nor of Ireland (Chit. Rep. 28, 32 ; S. C. 3 B. & A. 301 ; 2 D. & R. 15 ; S. C. 1 B. & C. 16). The court will take judicial notice of the incorporated towns, of the extent of ports, and the river Thames (Stra. 469 ; 1 H. Bl. 356). So, it will take notice of the meaning of English words and terms of art, according to their ordinary acceptation (1 Roll. Abr. 86, 525) ; also, of the names and quantities of legal weights and measures (1 Roll. Abr. 525). Courts will take notice of their own course of proceedings (1 T. R. 118 ; 2 Lev. 176), and of those of the superior courts (2 Rep. 18 ; Cro. Jac. 67) ; the privileges they confer on their officers (Ld. Raym. 869, 898) ; of courts of general jurisdiction, and the course of proceedings therein, as the Court of Exchequer in Wales, and the counties palatine (1 Ld. Raym. 154 ; 1 Saund. 73) ; but the courts are not bound, *ex*

officio, to take notice who were or are the judges of another court at Westminster (2 Andr. 74; Stra. 1226); nor are the superior courts, *ex officio*, bound to notice the customs, laws, or proceedings of inferior courts of limited jurisdiction (1 Roll. R. 105; 2 Ld. Raym. 1334; Cro. Eliz. 532); unless, indeed, in courts of error (Cro. Car. 179).

It is not necessary to state that which is a mere matter of *evidence* of a fact, though the fact itself should be stated (9 Rep. 9 b; Willes, 130; 2 Ld. Raym. 8).

*Where the law presumes a fact, as that a person is innocent of [*921] a fraud or crime, or that a transaction is illegal, it need not be stated (4 M. & S. 105; 2 Wils. 147; Co. Lit. 78 b; 1 B. & A. 463).

Matter which should come more properly from the other side, as it is presumed to lie more in the knowledge of the other party, or is an answer to the charge of the party pleading, need not be stated, unless in pleas of estoppel and alien enemy; but this rule must be acted upon with caution, for, if the fact in any way constitute a condition precedent, to enable the party to avail himself of the charge stated in his pleading, such fact should be stated (Com. Dig. Pleader, C. 81; 1 Leon. 18; 2 Saund. 62 b; 4 Camp. 20; 11 East, 638. And see cases 1 Ch. Pl. 258; Steph. Pl. 354).

Several Counts.] If there is one cause of action, the whole should be aptly stated in one count (see 2 Bing. 4; 3 Taunt. 157); but if it be requisite to add other counts, any unnecessary repetition of the same matter should be avoided. By an inducement in the first count, applying any matter to the following counts, and by referring concisely in the subsequent counts to such inducement, much unnecessary prolixity may be avoided (1 Ch. Pl. 428). See the observations of Lawrence, J., 7 East, 506; and 2 H. Bl. 131, 132; 2 Wils. 114, 115; 2 Bl. R. 1038). But, unless the second count expressly refers to the first, no defect therein will be aided by the preceding count; for, though both counts are in the same declaration, yet they are as distinct as if they were in separate declarations; and, consequently, they must independently contain all necessary allegations, or the latter count must expressly refer to the former (Bac. Abr. Pleas and Pleading, B, 1).

Before the new pleading rules it was usual to set forth the plt.'s cause of action in various shapes in different counts, so that if he failed in the proof of one count he might succeed on another (3 Bla. Com. 295; 3 Wils. 185); but by the R. G. H. T. 4 Will. IV. pl. 5, it was ordered that

"Whereas by the mode of pleading, hereafter prescribed, the several disputed facts relative to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore, and by the said act of the 3 & 4 Will. IV. c. 42, s. 23, the powers of amendment at the trial in cases of variance in particulars not material to the merits of the case are greatly enlarged, several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each, nor shall several pleas or avowries or cognizances be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

Therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed.

Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

So, counts for not giving or delivering or accepting a bill of exchange in payment, according to the contract of sale for goods sold and delivered, and for the price of the same goods, to be paid in money, are not to be allowed.

So, counts for not accepting and paying for goods sold, and for the price of the same goods, as goods bargained and sold, are not to be allowed.

*But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money or otherwise, [*922] are to be considered founded on distinct subject-matters of complaint, for the debt and the security are different contracts, and such counts are to be allowed.

Two counts upon the same policy of insurance are not to be allowed; as a count alleging the loss to have been occasioned by perils of the sea, and another by barratry (*Blyth v. Shepherd*, 9 M. & W. 763; 1 Dowl. N. S. 880; 6 Jur. 489). *Semble*, that acts of barratry could be given in evidence under the first count (*Ib.*).

But a count upon a policy of insurance, and a count for money had and received, to recover back the premium upon a contract implied by law, are to be allowed.

Two counts on the same charter-party are not to be allowed.

But a count for freight upon a charter-party, and for freight *pro rata itineris* upon a contract implied by law, are to be allowed.

Counts upon a demise, and for use and occupation of the same land for the same time, are not to be allowed (see *Arden v. Pullen*, 9 M. & W. 430; 1 Dowl. N. S. 612).

In action of tort for misfeasance, several counts for the same injury, varying the description of it, are not to be allowed.

In the like actions for nonfeasance, several counts founded on varied statements of the same duty, are not to be allowed.

Several counts in trespass for acts committed at the same time and place, are not to be allowed.

Where several debts are alleged, in *indebitatus assumpsit*, to be due in respect of several matters, *ex. gr.* for wages, work, and labour as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count, though one promise to pay only is alleged in consideration of all the debts.

Provided that a count for money due on an account stated may be joined with any other counts for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

The rule which forbids the use of several counts is not to be considered as precluding the plt. from alleging more breaches than one of the same contract in the same count."

Then follow analogous directions as to pleas, which see *post*, "PLEADING," after all which, it is stated that "the examples in this and other places specified are given as some instances only of the application of the rules to which they relate, but the principles contained in the rules are not considered as restricted by the examples specified."

Taken in connection with the examples given to illustrate it, the rule as to counts seem to mean that if there be a second and distinct contract or ground of action, the count on each may stand. The instances given show that a distinct subject-matter of complaint means, in cases of contract, a separate contract (*per Tindal, C. J., James v. Bourne*, 4 Bing. N. C. 420; see also *R. v. York*, (Archbishop of), 1 Ad. & E. 394; 3 N. & M. 453; *Wilkinson*

v. Small, 3 Dowl. 564). The following cases may assist the practitioner in the application of this rule.—

It was at one time doubted whether a count for debt on the statute for not setting out tithes, and also a count for a composition ought to be allowed (Lawrence v. Stevens, 3 Dowl. P. C. 778; 1 Gale, 164); but subsequently a count for double rent under the 11 Geo. II. c. 19, s. 18, *and a count [*923] for use and occupation were allowed (Thornton v. Whitehead, 1 M. & W. 14; 4 Dowl. 747). In action on a horse race the court refused to allow two counts, one founded on the New-market rules, and the other on the Ludlow rules (Lacey v. Ambrose, 3 Dowl. 778). So, two counts in an action for tolls on coals, one claiming them as metage, the other as port dues, unless a judge at chambers should allow them under R. G. H. 4 Will. pl. 7 (Jenkins v. Trelour, 1 Gale, 365; 1 M. & W. 16; 4 Dowl. 690). So also, two counts, one charging the debts. as liable with others, the other as liable by themselves (Cholmondeley v. Payne, 3 Bing. N. C. 708); so, *semble*, two counts, one charging the debt. with a promise that he was authorized to sell railway shares by a third person, and the other was a promise by him personally to sell them on his own account (Roy v. Bristow, 2 M. & W. 241; 5 Dowl. P. C. 452; Mur. & H. 39; 1 Jur. 168). So, two counts on a promissory note, one on a promise to the plts. and a deceased partner, the other on a promise to the plts. alone (Kinglelake v. Pickham, 1 W. W. & H. 301). So, *semble*, a count in case for disannexing and removing a boiler from plt.'s premises, and converting it to debt.'s use, to the injury of plt.'s reversion (this last part the court directed to be struck out), and a count in trover for the same boiler (Weeton v. Woodcock, 5 M. & W. 143; 7 Dowl. P. C. 384; 2 Horn. & Ib. 63). So, a special count on a charter-party, assigning as a breach the detention of the vessel beyond the period, allowing for laying and demurrage, and a general count for demurrage (Temperly v. Brown, 1 Dowl. N. S. 310; 6 Jur. 150). So, a count on a warranty that the horse was sound, and another on one that he was quiet (Deare v. Ivey, 3 G. & D. 470; and see Holford v. Bennett, 7 M. & W. 348; Ward v. Bell, 1 C. & M. 848). Where debt. entered under a demise for three years, from Christmas, 1839, and continued in possession until 27th July, 1841, and then quitted, paying rent up to the Midsummer previously: held, in an action for the rent which subsequently accrued due, that the plt. could not have a count on the demise and one for use and occupation (Arden v. Pullen, 9 M. & W. 430). A count on a policy of insurance alleging a loss by perils of the sea, and another a loss by barratry, cannot be joined (Blythe v. Shepherd, 9 M. & W. 763; 1 Dowl. 880). So, a count in ejectment on a demise of the churchwardens, &c., to recover parish property, specifying the names of the individuals, and another omitting to state them will not be allowed (Doe d. Llandesilio v. Roe, 4 Dowl. 222).

In the following cases two counts have been allowed as containing distinct subject-matters of complaint. A count in case for employing a vessel in an illegal manner, and a count charging an express breach of contract in detaining her (Bleaden v. Rafallo, 9 Dowl. P. C. 857; 3 Sc. N. R. 564; 3 M. & G. 116); a count on a promise to carry goods from Dublin to London, and a count on a promise to carry them from the wharf at which they should be landed in London to the plt.'s place of business (James v. Bourne, 4 Bing. N. C. 420; 4 Sco. 418; 5 Dowl. P. C. 638; 3 Hodg. 80). So, a count on a charter-party for not taking on board and delivering goods, and a second count for not taking due care of them till they were loaded on board the vessel (Vaughan v. Glean, 8 Dowl. P. C. 396; 5 M. & W. 577). So, a count in detinue for a bill or note, and another count for the amount

of it (*Kirkpatrick v. England* (Bank of), 8 Dowl. P. C. 881; 1 Wol. P. C. 56). So, a special count on the warranty of a horse, alleging as a breach that he was unsound and that the plt. was put to expense in curing, taking care of, and returning him, and a count for money had and received to recover the price of the horse (*Cahoon v. Burford*, *8 Jur. 499, Ex.; 2

D. & L. 234). Where a contract has been altered, a count on [*924] the original contract with one on the altered one may be joined.

So will a count on the 11 Geo. II. c. 19, s. 18, for double rent, and one for use and occupation (*Thornton v. Whitehead*, *supra*). So, a count against a sheriff for not taking the debt, when he had an opportunity, may be joined with one for suffering him to escape (*Guest v. Everest*, 1 Arch. Pr. 200); and a count for removing a steam-engine boiler from certain premises to the injury of plt.'s reversion, not alleging a conversion of the boiler, has been allowed with a count in trover for the same boiler (*Weeton v. Woodcock*, 5 M. & W. 143).

To guard against the insertion of unnecessary counts, pleas, &c., it is provided by pl. 6 of the above rule, that "Where more than one count, plea, avowry, or cognizance shall have been used, in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a judge for an order that all the counts, pleas, avowries, or cognizances, introduced in violation of the rule, be struck out at the cost of the party pleading; whereupon the judge shall order accordingly, unless he shall be satisfied, upon cause shown, that *some distinct subject-matter* of complaint or defence is *bona fide* intended to be established, in respect of each of such counts, pleas, &c., in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, &c., mentioned in such application, which shall be allowed." And pl. 7, "Upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, plea, &c., a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance, which he shall so have failed to establish; and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence as well as those of the pleadings; and further, in all cases in which an application to a judge has been made under the preceding rule, and any count, plea, avowry, or cognizance allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was *bona fide* intended to be established at the trial in respect of each count, or some distinct ground of answer, or if the court or judge, before whom the trial is had, shall be of opinion that no such distinct subject-matter of complaint or defence was *bona fide* intended to be established in respect of each count, plea, avowry, or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count, plea, avowry or cognizance with respect to which the judge shall so certify."

In *assumpsit*, a count for money paid was pleaded, with a special count, which stated in substance, that in consideration of the plt. having, at the debt's request, contracted to sell to a third party, on his own credit and responsibility, certain shares in a railway company, of which the debt. was the registered holder, the debt. promised to deliver to him all new shares allotted in respect of such shares while he continued the registered holder thereof, on payment to him of all payments made by him to the company in respect of such new shares, and to indemnify the plt. from a loss which might arise by reason of the non-performance of his said promise, alleging

the non-delivery to the plt. of certain new shares so allotted to the deft. and that, by reason thereof the plt. had necessarily expended a large sum of money in the purchase of other shares, in order to perform his said contract of sale: held not to be in violation of the pleading rules of Hilary Term, 4 Will. IV. r. 5, whereby several counts are not to be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each (*Simpson v. Rand*, 1 Exch. 688; 17 Law J. 146, Exch.).

The Court will not allow two counts upon the same agreement to avoid a difficulty in stating its legal effect (*Smith v. Thompson*, 5 D. & L. 524; 5 C. B. 486).

The first count set out an agreement, whereby the deft. undertook to receive the plt. into his service as clerk, for six months, and at the expiration of that period, should there be no just cause shown to the contrary, to enter into a further agreement with the plt. for a further engagement for two years; and assigned for breach, that at the expiration of the six months, although no just cause was then shown to the contrary, the deft. refused to enter into such further agreement as aforesaid. The second count stated that the plt. had been for six months, and then was, in the service of the deft., as clerk, and that the deft. promised to continue him in such service for two years, and assigned for breach, that the deft. did not continue the plt. in his service for the two years. A judge at chambers having made an order to strike out so much of the first count as related to the first breach: on the ground that the two counts were in apparent violation of the 5th rule of Hilary Term, 4 Will. IV.; the Court refused to disturb the order (lb.).

The first count of a declaration stated, that the defts. agreed to sell twenty tons of sal enixon, at 11*l.* per ton, and to deliver it at a certain time and place, &c. Breach, that the defts. did not deliver the sal enixon, or any part thereof, and that the plt. was obliged to purchase elsewhere, to the plt.'s damage, &c. The second count stated, that after the agreement as aforesaid, the defts. delivered, and were paid by the plt. for, a certain article which they warranted was sal enixon. Breach, that the said article was not sal enixon, but was nitrate of soda cake, whereby, &c. (special damage accrued to the plt.). On motion for a rule to show cause why the order of a judge, striking out one of the above counts, should not be rescinded: held, that the two counts were founded on the same subject-matter of complaint, and that one of them was properly disallowed (*Ramsden v. Gray*, 18 Law J. 277, C. P.).

A count in assumpsit set forth an agreement of 21st of October, between plt. and deft., that plt. should survey certain lands for an intended railway, and prepare and deposit the plans before the 30th November next, and forthwith commence the work; and that deft. should thereupon pay him 250*l.* on the 22nd October next, 300*l.* on the 15th November next, 250*l.* on the plans being deposited with the Board of Trade, and 300*l.* when it should have been adjudged that the Standing Orders of the House of Commons had been complied with. The count then averred that the plt. forthwith commenced the work, and continued it until after the said 15th November; but deft. did not pay the 250*l.* on the 22nd October, nor the 300*l.* on the 15th November: held, that a common count for work and materials might be added without "apparent violation" of the rule 4 Will. IV. (*Bulmer v. Bousfield*, 9 Q. B. 986).

A count in trover for a ship not allowed with a special count alleging a power of attorney under deed to the defts. to sell the ship, that the power was given to and held by them only as security for their acceptances of certain bills, and that although the defts. refused to accept or pay the bills, they sold the ship; nor with a special count alleging a power of attorney

under deed to the defts. to sell the ship, that the power was delivered to the defts., with a letter from the principal, instructing them not to sell, and that the defts. notwithstanding sold the ship (*Dearie v. Henderson*, 13 Jur. 305; 18 Law J. 149, C. P.).

In assumpsit by shipowner against charterer for not loading the ship with a homeward cargo, pursuant to charterparty, and detaining her over the running days thereby allowed, the first count, after setting out the charterparty, alleged that after it was made the parties signed an indorsement thereto, altering the terms of the delivery of the outward cargo, and adding to the number of running days. A second count was framed on the charterparty without the indorsement. A judge, on summons to show cause why one count should not be struck out, indorsed that no order should be made, he being satisfied that it was intended *bona fide* to establish a distinct subject-matter of complaint in respect of each count. On the plt. moving to strike out so much of the indorsement as stated that the judge was satisfied, &c., upon affidavit, that it had not been suggested that two distinct subject-matters of complaint were to be established, the Court refused to interfere with the discretion of the judge, but said that it was not to be considered as their opinion that the plt. might not declare on the contract, both as it originally stood, and as altered, or that he would lose his costs if he succeeded on one only, but satisfied the judge at nisi prius that he acted on a *bona fide* intention of establishing two subject-matters of complaint (*Hernod v. Wilkin*, 11 Q. B. 1).

A count in trespass for entering rooms, and taking goods, was not allowed to be joined with a count for taking goods of the like quantity, &c., as and for a distress for rent falsely pretended to be due (*Hoare v. Lee*, 5 C. B. 754).

A declaration in case for the infringement of a copyright, contained three counts, the first and second founded on the 5 & 6 Vict. c. 45, and the third on the common law, the copyright being the same in all. The Court compelled him to make his election between the two first counts and the last, as the cause of action contained in the last count might be given in evidence under either of the former (*Boozey v. Tolkien*, 5 D. & L. 549; 5 C. B. 476).

Joinder of Counts.] The forms of actions cannot in any case, except debt and detinue, be blended together in the same declaration (see *Lear v. Caldecott*, 4 Q. B. 123; *Esdaile v. Maclean*, *post*, p. 926). Care should be taken not to insert any counts that cannot be joined in the same action, a misjoinder being ground of a general demurrer, or an arrest of judgment, or a writ of error (*Brigden v. Parkes*, 2 B. & P. 424; *Jennings v. Newman*, 4 T. R. 347, *infra*; *Ringdon v. Nottle*, 1 Moo. & S. 355; *Turner v. Macnamara*, 2 Ch. Rep. 697; *Knightly v. Birch*, 2 Moo. & S. 533; see *Rose v. Bowler*, 1 H. Bl. 108); but not of a nonsuit at the trial (per *Pollock, C. B.*, *Lamb v. Newbiggen*, 1 C. & K. 549). The rule as to what forms of action may be joined together, is that, when the *same plea* *may be pleaded, and the *same judgment* given, on all the counts of the declaration, or when the *counts* are of the *same nature*, and [*925] the *same judgment* is to be given on them all, though the pleas be different, as the case of debt upon bond, and on simple contract, they may be joined (2 Saund. 117 c; 1 T. R. 276, 277; Bac. Ab. Actions in General; Com. Dig. tit. Action, G; 1 Ch. Pl. 180; Tidd, 11). Assumpsit and debt (2 Smith, 618; 3 Smith, 114), or assumpsit and an action on the case, as for a tort, cannot be joined (1 T. R. 276, 277; 1 Vent. 366; Carth. 189; 3 B. & A. 208; *Corbett v. Packington*, 6 B. & C. 268; 9 D. & R.

258); nor assumpsit with trover (2 Lev. 101; 3 Lev. 99; 1 Salk. 10; 3 Wils. 354; 6 East, 335; 2 Ch. Rep. 343); nor trover with detinue (Willes, 118); nor trespass and case (Howard v. Banks, 2 Burr. 1118; nor trespass and trover (Meeton v. Woodcock, 5 M. & W. 587; 7 Dowl. P. C. 853); but trover may be joined with case against a common carrier upon the custom of the realm (Brown v. Dixon, 1 T. R. 274); or with case for misfeasance and negligence (Dickson v. Clifton, 2 Wils. 319); or for obstructing a wharf contrary to agreement (Mart v. Goodson, 3 Wils. 348; 2 Bl. R. 848). A count charging the deft. with having preferred a charge of felony against the plt., and having under a warrant to search the plt.'s house for stolen goods, obtained upon such charge, entered the house, may be joined with counts in tort (Hensworth v. Fowkes, 1 Nev. & M. 321); and a count founded on 8 Anne, c. 7, may be joined to a count on the 6 Geo. III. c. 19, s. 1 (Attorney-General v. Saggars, 1 Pri. 182). As to what is substantially a count in trespass see Meeton v. Woodcock, *supra*; a count in assumpsit, Corbett v. Packington, *supra*; Orton v. Buller, 1 D. & R. 282; 5 B. & A. 652; 2 Chit. Rep. 343; a count in case, Samuel v. Judin, 6 East, 333; 1 N. R. 43; Lear v. Caldecott, 7 Jur. 277; 12 Law J., N. S. 109; and what is not a good count in debt, Brill v. Neele, 5 B. & A. 208; 1 Chit. Rep. 619.

Misjoinder.] A declaration, containing counts on bills of exchange by the indorsee against the indorser in the form described by the R. G. T. T. 1 Will. IV., stated that the deft. promised to pay the bills, and commenced and concluded in the form of a declaration in debt. It also contained the *indebitatus* counts in debt: held, that there was no misjoinder (Esdaile, &c. v. Maclean, 16 Law J. 71, Ex.).

With respect to what rights or liabilities may be joined in the same form of action, it is a rule that, where the same form may be adopted for several distinct injuries, the plt. may, in general, proceed for all in one action, though the several rights affected were derived from different titles; but a person cannot, in the same action, join a demand in his own right and a demand as representative of another, or *in autra droit*, nor demands against a person on his own liability and on his liability in his representative capacity (Bac. Abr. Actions in General, C.; 2 Vin. Abr. 62; Com. Dig. Actions, G; 1 Ch. Pl. 224, 228, &c. See "PARTNERS," "HUSBAND AND WIFE," "BANKRUPT," "EXECUTORS").

A demurrer for misjoinder must be to the whole declaration, and not merely to the defective count or breach (1 M. & S. 355, 366); and if one count be good, judgment will be for the plt. (Bedford v. Alcock, 1 Wils. 252). The plt. cannot, if the declaration be demurred to, aid the mistake by entering a *nolle prosequi*, so as to prevent the operation of the demurrer (1 H. Bl. 110, 111, 113, 114; 4 T. R. 360; Tidd, Pr. 8th ed. 735; 1 Saund. 207 c);

though the court will, in general, give the plt. leave to amend by [*926] striking *out some of the counts on payment of costs (4 T. R. 348).

In some cases, however, a misjoinder may be aided by intendment after verdict (2 Lev. 110; Com. Dig. Actions, G; 2 Vin. Abr. 47, pl. 7). The jury may assess entire or distinct damages on each of the counts (2 M. & S. 533; 11 Mod. 196). If *distinct* damages be assessed, judgment will be arrested upon the defective counts only (Hayter v. Moat, 5 Dowl. P. C. 298; 2 M. & W. 36); but, if the jury find *entire* damages on all the counts, the judgment must be entire: in which case, if one of the counts be insufficient, judgment will be arrested, or a writ of error be sustainable (Cowp. 276; 3 Wils. 185; 2 Saund. 171 b; Doug. 722, 730; 3 M. & S. 110).

But where several breaches are assigned, and some are bad, and the jury give general damages, the court will not arrest the judgment, but award a *venire de novo* (Hayter v. Moat, 5 Dowl. P. C. 298; 2 Gale, 188; 2 M. & W. 56). Where a general verdict has been taken, but evidence has been given only on the good counts, the court will permit the verdict to be *amended* by the judge's notes, &c. &c., and if it appear that the jury calculated the damages on evidence applicable to the good counts only, the judge will amend the *postea* by directing that the verdict be entered on those counts, though evidence was given applicable to the bad count also (2 Saund. 171 b; Grant v. Astle, Doug. 730; Barratt v. Collins, 10 Moo. 446, 452 a; Tidd, Pr. 9th ed. 713, 901). And where judgment has been given on demurrer, or by *nil dicit* in favour of the plt., he may, after entering judgment for himself upon the whole declaration, upon discovering any error in one of the counts, waive his judgment on that count, and enter it for the deft. (Spicer v. Teasdale, 2 B. & P. 49).

It is an established rule that where one count contains two claims or complaints for one of which the action is maintainable, and for the other not, all the damages may be applied to the good cause of action (Doe d. Dycball, 8 B. & C. 70; 2 M. & R. 184).

Where a count for work and labour and money paid for the testator, and on an account stated, was joined with a count for work and labour done for the defts., as executors, and an account stated with them as executors, the Court arrested the judgment. Where all the counts in a declaration are good, but are misjoined, and the jury find general damages, the judgment will be arrested (Kitchingman v. Skeel, 3 Exch. 49; 18 Law J. 23, Exch.).

Where general damages are found on counts, one of which is good, and the other bad, the Court will not arrest the judgment, but will grant a *venire de novo*. But where the jury find damages on a single count, containing two demands, for one of which an action lies, but not for the other, the Court will not arrest the judgment, or grant a *venire de novo* (Ib.).

Conclusion, as to Damage.] When damages are the principal object of the action, the declaration should *conclude*, "to the *damage* of the plt." of a sum sufficient to cover the real damages sustained (Com. Dig. Pleader, C, 84; 10 Rep. 116 b, 117 a, b; 2 Lev. 57). In general, the plt. cannot recover greater damages than he has declared for, and laid in the conclusion of his declaration (10 Rep. 117 a, b; Vin. Abr. Damages, R.; Com. Dig. Pleader, C, 84; 4 M. & S. 100). It is usual, in practice, to state a sum sufficient to cover the real demand, with interest, when recoverable, up to the time of final judgment, taking care not to lay the damages unnecessarily high: the declaration ought not, in strictness, to vary from the writ in the amount of the damages; but a variance in the amount of the damages is not material (5 T. R. 102; 5 Moo. 209). That the damage is too generally stated in the declaration is no ground of arresting the judgment (Rogers v. Nowill, 17 Law J. 52, C. P.). An omission in stating damages, when necessary, would be bad on demurrer, and, perhaps, after judgment. The omission of the *ad damnum* clause from the conclusion of a declaration is a cause of special demurrer (O'Connor v. Deehan, 9 Ir. Law R. 506). A declaration concluding "to the damage of the plt. in one hundred," omitting the word "pounds," held bad on special demurrer (Paxton v. Martin, 9 Ir. Law R. 508).

The R. G. M. T. 3 Will. IV. r. 1, which applies only to personal actions, orders, "that the entry of pledges to prosecute at the conclusion *of the declaration, shall in future be discontinued." In other [*927] actions they may be still inserted; but the omission is quite immaterial (3 T. R. 157, 158; 2 H. Bl. 161).

A deviation from the prescribed forms of commencing or concluding a declaration, is not demurrable, but, at most, an irregularity (*Neale v. Richardson*, 2 Dowl. 89; *Hart v. Dally*, 2 Dowl. 257; *Alderson v. Johnson*, 2 M. & W. 70; *Turner v. Denman*, 4 Tyrw. 313).

Precedents.

Beginning and conclusion of a declaration.

In the Q. B. (C. P. or Ex. of P.) On the _____ day of _____ A. D. 1850.

Middlesex to wit. J. N. by E. F. his attorney (or in his own proper person) complains of J. S. who has been summoned to answer the said J. N. for that whereas &c. (*here state the cause of action, describing the parties as the plt., and the deft., and conclude thus :*) to the damage of the plt. of £ _____ and thereupon he brings his suit &c.

The like against a deft. sued by a wrong name.

[*Commence as above.*] Middlesex to wit. J. N. (&c., as above) complains of John Atkins who has been summoned by a writ of summons by the name of James Atkins to answer the said J. N. but who has thereupon duly appeared in this action at the suit of the said J. N. in the said name of John Atkins sued by the name of James Atkins for that whereas &c.

The like by a plt. who has sued in a wrong name.

[*Commence as above.*] Middlesex to wit. A. B. at whose suit a writ of summons was issued in this cause by the name of E. B. by E. F. his attorney (or in his own proper person) complains of C. D. who has been summoned to answer the said A. B. for that &c.

The like where one of the plts. died after the issuing of the writ, and before declaration

[*Commence as ante*, p. 927.] Middlesex to wit. A. B. by E. F. his attorney (or in his own proper person) complains of C. D. who has been summoned to answer the said A. B. and Y. Z. since deceased and now on this day that is to say on the _____ day of _____ A. D. the said A. B. by his attorney aforesaid comes and gives the court here to understand and be informed that the said C. D. was so summoned by virtue of a writ of summons issued out of the said court on the _____ day of _____ last against the said C. D. at the suit of the said A. B. and the said Y. Z. and that since the issuing of the said writ and before this day to wit on the _____ day of _____ A. D. the said Y. Z. died and the said A. B. then survived him and thereupon the said A. B. by his attorney aforesaid complains for that &c. (*laying all the promises to have been made and causes of action to have accrued to the plt. and the deceased party, and concluding*), that the deft. still refuses to pay the same to the plt. to his damage of £ _____ and thereupon he brings suit &c.

The like where one of the defts. died after the issuing of the writ, and before the declaration.

[*Commence as above.*] Middlesex to wit. A. B. by E. F. his attorney, (or in his own proper person) complains of C. D. who together with G. H. has been summoned to answer the said C. D. and which said G. H. since the issuing of the writ of summons in this suit against the said C. D. and G. H. and before this day to wit on the _____ day of _____ A. D. died and the said C. D. then survived him and thereupon the said A. B. by his attorney aforesaid complains against the said C. D. for that &c.

The like where one of several defts. is outlawed.

[*Commence as above.*] _____ to wit. A. B. by E. F. his attorney (or in his own proper person) complains of C. D. who has been summoned to answer the said A. B. and thereupon the said A. B. by his said attorney complains for that whereas the said C. D. and one G. H. which said G. H. by due course of law has been outlawed (or if [*928] a woman, say waived) at the *suit of the said A. B. in this action and still remains so outlawed (or waived) on &c. were indebted &c. (*state the promises and breach by both the defts., and conclude, stating*) that the said C. D. and G. H. wholly refused and the said C. D. still doth refuse to the damage of the said A. B. of £ _____ and thereupon he brings suit &c.

The like in a second action after a plea in abatement of non-joinder of a deft.

[*Commence as above.*] Middlesex to wit. A. B. by E. F. his attorney (or in his own

proper person) complains of C. D. and G. H. who have been summoned to answer the said A. B. and which said C. D. has heretofore pleaded in abatement the nonjoinder of the said G. H. for that &c.

Declaration in Q. B. in an action removed from an inferior court.

In the Q. B. Easter Term, Vict.

Middlesex to wit. A. B. by E. F. his attorney complains of C. D. being in the custody of the keeper of the Queen's prison for that &c. (*set out cause of action, and conclude*) to the damage of the said A. B. of £ and therefore he brings his suit.

Declaration in assumpsit, case, trover, trespass, or ejectment removed from an inferior court into the C. B.

In the C. P. Easter Term, Vict.

Middlesex to wit. J. S. was attached to answer J. N. of a plea of (*as the plea is*) and thereupon the said J. N. by his attorney complains for that whereas &c. (*here state the cause of action, and conclude as follows:*) Wherefore the said plt. saith that he is injured and hath sustained damage to the amount of £ and therefore he brings his suit &c.

Declaration in an action removed from an inferior court into the Exchequer.

In the Exchequer of Pleas.

— Term, Vict.

Middlesex (*venue*) to wit. J. N. a debtor to our sovereign lady the queen cometh before the baron's of her majesty's Exchequer on the day of in this term by his attorney and complaineth by bill against J. S. present here in court the same day of a plea of trespass on the case &c. for that &c. (*state cause of action, and conclude thus:*) to the damage of the said plt. of £ whereby he is the less able to satisfy our said lady the queen the debts which he owes to her majesty at her said Exchequer and therefore he brings his suit &c.

Pledges to prosecute, { John Doe
and
Richard Roc.

See other forms of commencements and conclusions of declarations, 2 Ch. Pl. 10 to 12. For such forms relative to the plt.'s or deft.'s character in which he is sued, see "ATTORNEY," "BANKRUPT," "HUSBAND AND WIFE," "PARTNER," "EXECUTORS."

DECREE.

See "CHANCERY."

*DEED.(a)

[*929]

PROOF OF, p. 929.

Production of, p. 929.

When strict Proof of, necessary or not, p. 930.

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Proof of Execution, where no subscribing Witness, p. 937.

Proof of, by subscribing Witness, p. 937.

Excuse for not producing subscribing Witness, p. 938.

(a) 2 U. S. Dig. Tit. "Deed," p. 27; 1 Supp. U. S. Dig. p. 520; 1 Ann. Dig. p. 153; 2 Id. p. 91; 3 Id. p. 127.

Proof of.—Production of.] In order to prove the execution of a deed, it must be produced, or the non-production accounted for by showing that it has been lost or destroyed, and if two or more parts have been executed, the loss or destruction of all the parts should it seems be proved before other evidence can be received (B. N. P. 254; but see *Doe v. Wainright*, 5 Ad. & E. 523). So its non-production may be accounted for by showing that it is in the possession of the opposite party, in which case it must also appear in evidence that he has had notice to produce it; for the best evidence of a written instrument consists in its actual production, and secondary evidence of it cannot be admitted, until the impossibility of producing it has been shown. Thus it must be shown that the person having the legal custody of the deed was applied to for its production (*R. v. Stoke Golding*, 1 B. & A. 173). An instrument lost or not produced upon notice given to the opposite party will be presumed to be duly stamped (*R. v. Buckby*, 7 East, 45; *Crisp v. Anderson*, 1 Stark. 35). Where the deed has been pleaded with a profert, the production cannot be supplied by proof of the party's inability to produce the deed, as the averment of profert precludes him from that resource (*Smith v. Woodward*, 4 East, 583; 1 Esp. 337; 1 Saund. 9 a. See, further, as to when secondary evidence is admissible, *post*, "SECONDARY EVIDENCE"). The degree of diligence used in searching for a deed must depend upon the importance of the deed and the particular circumstances of the case (*per curiam*, in *Gully v. Exeter* (Bishop of), 4 Bing. 298; and see *infra*, as to the effect of production by the opposite party.) After proof of notice, and other essentials to entitle the party to give secondary evidence, a counterpart of a deed may be admitted (*R. v. Castleton* (Inhabitants of) 6 T. R. 236). The counterpart of a deed is admissible against the party executing it and those claiming under him, though no notice to produce the other part has been given (*Burleigh v. Stibbs*, 5 T. R. 465; *Paul v. Meek*, 2 Y. & J. 116). Where there is no counterpart, an examined copy; if no examined copy, parol evidence is admissible (B. N. P. 254).

*In covenant on a lost deed, with *non est factum* pleaded, it was [*930] proved that, on search, the deed, which, by the date, was sixty years old, could not be found in the muniment-room of the plt., but that there was found there a paper which purported to be an attested copy of it. It was proved that both the persons whose signatures were to it, as attesting the copy, were dead; and the handwriting of one of them was proved; and it was also proved that persons of the same names as those who had attested the original deed were also dead. Held, that upon this proof, the paper was not receivable as secondary evidence of the deed (*Brindley v. Woodhouse*, 1 C. & K. 647).

When strict Proof of Execution necessary or not.] When a party asserts the execution and existence of a deed, he must prove the same, and all the requisites attending the execution of it. In some cases, this strict proof of execution is unnecessary, as where the opposite party in a suit enters into an admission of the execution (*ante*, "ADMISSIONS"), or pays money into court on the count on which the deed is stated (*Randall v. Lynch*, 2 Camp. 356, 357; *ante*, "ADMISSIONS;" *post*, "PAYMENT INTO COURT"). A deed may be given in evidence under a rule of court, or judge's order, made by consent, without proof of execution (B. N. P. 256; 1 Sid. 269). Where a party to a suit, in pursuance of a notice to which he is a party, produces the deed under which he claims a beneficial interest, it will not be incumbent upon the adversary, even though a stranger to the instrument, to call the attesting witness, or otherwise to prove its execution, as in other cases (*Peace v. Hooper*, 3 Taunt. 60; *Gordon v. Secretan*, 8 East, 548; 2 Camp.

94; see *Orr v. Morrice*, 3 B. & B. 139; *Burnett v. Lynch*, 5 B. & C. 587; *Bradshaw v. Bennett*, 1 Moo. & R. 143; *Doe v. Hemming*, 6 B. & C. 28; *Carr v. Burdiss*, 1 C. M. & R. 782). It was formerly held, that the production of a deed by the adverse party, in compliance with a notice for that purpose, superseded the necessity of calling the subscribing witness, in order to prove its execution (*R. v. Middlesex (Inhabitants of)*, 2 T. R. 41; 5 T. R. 366; these cases, however, were denied in *Gordon v. Secretan*, 8 East, 548; *Gow*, 26). The rule does not apply to instruments testifying contracts under which no permanent interest passes (*Collins v. Baynton*, 1 Q. B. 117). And, where the party producing the deed, does not claim an interest under it, the party calling for it must prove it in the regular manner (*Gordon v. Secretan supra*; *Doe v. Cleveland (Marquis of)*, 9 B. & C. 864). It must also be proved where the party producing it claims an interest under it, but one that is unconnected with the cause (*Reardon v. Minton*, 5 Man. & G. 204, per cur.). And the party producing a deed at the trial, which had been some months in his possession, must nevertheless prove the deed, although he received it from the adverse party, who formerly claimed a beneficial interest in it (*Vacher v. Cocks*, 1 B. & Ad. 145). If a deed be in the possession of a third person as mortgagee, and he, having the deed in court, though not subpoenaed in the cause, decline to produce it, secondary evidence may be given of its contents; but if the deed is not in court, and he has not been subpoenaed to produce it, it is otherwise (*Doe d. Loscombe v. Clifford*, 2 C. & R. 448). The person thus declining to produce a deed must not state the contents, but he must state the date of the deed and the names of the parties, in order to identify it (*Ib.*). An examined copy of a memorial of a purchase-deed registered in Middlesex under the stat. 7 Anne, c. 20, is only receivable as secondary evidence of the deed *against the parties to the deed, and all persons claiming under them; and the fact that A. mortgaged the property to B, and delivered this deed to B. as mortgagee, is not sufficient to make it secondary evidence against A. (*Doe d. Loscombe v. Clifford*, 2 C. & R. 448, *Alderson*). In an action against the sheriff, for taking insufficient pledges in replevin, the replevin-bond produced in evidence by the deft. dispenses with proof by plt. of the execution (*Scott v. Waithman*, 3 Stark. 169; *Barnes v. Lucas*, R. & M. 264).

When the party *refuses to produce* the instrument, it is to be presumed *omnia rite acta*; it will therefore be presumed that an agreement was stamped, unless the contrary appear (*Crisp v. Anderson*, 1 Stark. 35; *R. v. Buckley*, *ante*, p. 929).

The *recital* of a deed, in another deed, is evidence against the party who executes the reciting deed, or against any person claiming under him (*ante*, p. 64; *Ford v. Grey*, 1 Salk. 285; *Com. Dig. Ev. B.*, 5; *Rees v. Lloyd*, Wight. 123; *Crease v. Barrett*, 1 C. M. & R. 919): thus, where a party claims by virtue of an assignment of a deed, it is sufficient to prove the assignment (*Nash v. Turner*, 1 Esp. 218). Where the recital in a deed is used as an admission, the deed must be proved in the ordinary way (*Breton v. Cope*, *Pea*, 44).

The recitals in a deed may confine the effect of admissions in the same instrument (*Lampon v. Corke*, 5 B. & A. 607). But where the recital was that the parties had agreed to execute the bond in the sum of 500*l.*, this does not confine the bond to that sum if it be executed in the penal sum of 1000*l.* (*Ingleby v. Swift*, 10 Bing. 84): and where a deed reciting the bankruptcy of A., conveys an estate to B., who is no party to the deed, and he conveys the estate to another by deed in which there is no such recital, these deeds are no evidence of the bankruptcy as against B., in an action concerning

other land (*Doe v. Shelton*, 3 Ad. & E. 265; see "*ESTOPPEL*"). But if other parts than the recital are to be proved the deed must be produced, and its execution proved in the usual way (*Gillett v. Abbott*, 7 Ad. & E. 785). Mere words of description in a deed not operating by way of estoppel may be contradicted by parol: thus the lessee of land described as "meadow" may show it to have been arable in an action by the lessor for ploughing it up (*Skipwith v. Green*, 1 Stra. 610); or he may show that land described as containing 500 acres, either does not contain so many or contains more (1b.; *Bac. Ab. Pleas*, T, 11; *Jack v. McIntyre*, 12 Cl. & Fin. 151). Such recital operates as an estoppel if properly pleaded and relied upon, but not if the parties pleading voluntarily submit the fact recited to a jury (*Bowman v. Taylor*, 2 Ad. & E. 278; *Bowman v. Rostron*, 2 Ad. & E. 295).

Ancient Deed.] Where a deed is thirty years old, it proves itself, and is admissible without evidence of its execution, or of the handwriting of the obligor (*Chelsea Waterworks Company v. Cowper*, 1 Esp. 275). But, it is said (*B. N. P.* 255), some account ought to be given of its custody, as (*Gilb. Ev.* 97) it should be shown that possession has accompanied it; but it has been held sufficient to produce a certificate of settlement, thirty years old, without showing that it had been kept in the parish chest (*R. v. Rigton* (Inhabitants of), 5 T. R. 259; and see *R. v. Netherthong*, 2 M. & S. 337; but see *Evans v. Rees*, 10 Ad. & E. 151). It is not necessary that deeds should be produced from the strict legal custody: it is sufficient if they come from a place where they might reasonably and naturally be expected to [*932] be found. A term of years in lands *was assigned, in 1767, to S. H. and G. H., in trust to attend the inheritance. The lands were subsequently devised to E. for life, with remainder to her children. The administrator of G. H. brought ejectment, in 1843, on behalf of J. B. claiming to be a child of E. T. The defts. claimed as the only children of E. T. The clerk to the attorney for the lessor of the plt. produced the deeds of 1767, from his master's office, and stated that he believed his master to be the attorney of J. B. Held, that this was proper and reasonable custody, and the deed receivable in evidence (*Doe d. Jacobs v. Phillips*, 1 Dowl. N. P. C. 346; 10 Jur. 34; 15 Law J. 47, Q. B.). A deed, more than thirty years old, creating a term to attend the inheritance, was produced from the custody of the plt.'s attorney. Plt. was administrator to the trustee of the term. There was evidence that the attorney had acted for the family of the defts., who were beneficially interested in the premises to which the deed related, and it was not shown for whom the attorney held the deeds. Held, that there was sufficient *prima facie* evidence of proper custody (*Doe d. Jacobs v. Phillips*, 8 Q. B. 159). A deed more than thirty years old creating a lease for lives, which had expired, was produced from the custody of W., a land-agent of plt., in the following manner: W. was expected by the attorney of plt. to have been at the trial, but left the assize town the evening before, and the deed was taken out of his carpet-bag and produced by the attorney for plt.: held, that there was sufficient *prima facie* evidence of proper custody (*Doe d. Shrewsbury* (Earl of) *v. Keeling*, 12 Jur. 432, Q. B.). Even if it appear that the attesting witness is alive, and capable of being produced, it seems unnecessary to call him, where the deed is thirty years old (*Marsh v. Collnett*, 2 Esp. 665; *Doe v. Wolley*, 8 B. & C. 22). If there is any erasure or interlineation in an old deed, giving an appearance of fraud, it ought to be proved in the regular manner by the subscribing witness; or, if he be dead, by proof of such death, his handwriting, and the handwriting of the party executing (*B. N. P.* 255). But in those cases, as it is impossible to furnish some evidence, it in practice generally forms the subject of com-

ment to the jury, unless indeed the alteration, &c., be such as call for its rejection altogether (*Roe v. Kimmis*, 9 Cl. & Fin. 774). It is not settled whether a corporation deed proves itself after thirty years (*R. v. Bathwick*, 2 B. & Ad. 648; see further, as to proof of execution of ancient writing, *post*, "HANDWRITING").

A deed must be taken to speak from the time of its execution, and not from the date apparent on the face of it (*Browne v. Burton*, 5 D. & L. 289; 2 B. C. 220; 17 Law J. 49, Q. B., per Patteson).

Ancient Documents.] A deed more than thirty years old, creating a lease for lives, which had expired, was produced from the custody of W., a land agent of plt., in the following manner: W. was expected by the attorney of plt. to have been at the trial, but left the assize town the evening before, and the deed was taken out of his carpet bag and produced by the attorney for plt.: held, that there was sufficient *prima facie* evidence of proper custody (*Doe d. Shrewsbury (Earl) v. Keeling*, 12 Jur. 433; 17 Law J. 199, Q. B.).

On the trial of an issue, a bond to indemnify parish officers against the charge of a bastard was offered in evidence. It was dated in 1716, and was brought from a chest kept in the workhouse of a union comprehending the parish, in which chest were kept muniments belonging to the union. There was no direct evidence how it was placed in the chest; but it was proved that in 1842 several documents were brought in a cart to the workhouse by a pauper, and placed in the chest: held, that enough appeared to satisfy the rule of proving deeds to be brought from a proper depository, and that the evidence was admissible (*Slater v. Hodgson*, 9 Q. B. 727).

Mode of proving Execution.] The sealing and the delivery of the deed, which are essential to its validity as a deed, must be proved, which must be done by a third person, if there was no attesting witness, and by such attesting witness, if there was one.

Sealing is essential to a deed, and must be proved; but it is immaterial with what seal it is sealed. One piece of wax will suffice for several obligors (*Shep. Touch*, 55); and it is sufficient if the obligor acknowledge any impression already made to be his seal (*Com. Dig. Fait*). Thus, where one of two defts., in the presence of the other, and by his authority, executed a bill of sale for them both, the two defts. being partners in the transaction, but there was only one seal, and it did not appear whether the seal had been put twice upon the wax, it was held, that no particular mode of delivery was necessary; and that it was sufficient if the party treated it as his own (*Ball v. Dunsterville*, 4 T. R. 315).

But it would be otherwise when the deed is executed under a power directing it to be under the *hands* and *seals* of the parties * (see *R. v. Austrey*, 6 M. & S. 319; 1 Ph. Ev. 453). The writing the name [*933] opposite to the seal on an instrument purporting to be sealed and delivered by the party so writing it, is evidence to go to the jury of its execution (*Talbot v. Hodson*, 7 Taunt. 251). It is not necessary that the sealing should take place in the presence of the witness; if the party acknowledge an impression already made to be his seal it suffices. The witness did not recollect at the time the bond was executed whether it had any seal, and he swore he did not read the attestation; but there being a seal at the time of the trial, and the bond itself saying "sealed with our seal," held to be sufficient proof; but not if the seal were not on the bond at the trial (*Ball v. Taylor*, 1 C. & P. 417). Where the attestation was in the usual form, and the witness recollected seeing the party sign the deed, but did not recollect any

other form being gone through, it will be for the jury to say on the evidence whether the deed was signed, sealed, and delivered, as all that is very likely to have occurred although the witness did not remember it (*Burling v. Paterson*, 9 C. & P. 570). A deed is well executed by an illiterate person if it be signed by a third person at his request, and in his presence (*R. v. Longnor*, 1 Nev. & M. 576); and it need not have been previously read over to him unless he required it (*Ib.*). It seems that words at the end of the deed following the "*in cujus rei testimonium, &c.*," form no part of the deed (*Pearse v. Morrice*, 4 Nev. & M. 48; 2 Ad. & E. 84).

In the case of a deed executed by a corporation the seal must be proved by some one who knows it, but it is not necessary to call a witness, not being an attesting witness, who saw it affixed (*Moises v. Thornton*, 8 T. R. 307; *Brownker v. Atkins*, Show. 2); the seals of the Bank of England (*Doe v. Chambers*, 4 Ad. & E. 410), and Apothecaries' Hall (*Chadwick v. Benning*, R. & M. 303), require no proof. It need not appear in the first instance that the seal was affixed by the proper person, although if shown to be done by a stranger, or one without authority, the deed will be invalid (*Anon.* 12 Mod. 423; *Clark v. Imperial Gas Company*, 4 B. & Ad. 315; *R. v. Haughley*, *ib.* 650). The seal of London need not be proved (*Doe v. Mason*, 1 Esp. 53); nor of the ecclesiastical courts (see tit. "EXECUTOR," "PROBATE"). The seal of a colonial court must be proved (*Henry v. Adey*, 3 East, 221). It is not settled whether the attesting witness of a corporation need be called (*Doe v. Chambers*, *supra*).

Delivery.] This must be proved (Co. Lit. 35 b; 2 Rol. 23 l, 40, 45); no particular form or ceremony is essential: it will be sufficient if a party testifies his intention in any manner, whether by action or by word, to deliver or put the deed into the possession of the other, as by throwing it down upon the table for the other to take up (Com. Dig. Fait, A, 3). An instrument, purporting to be a deed, was executed in the presence of an attesting witness, but had never been out of the possession of the grantor: held, in an action against the executor of the grantor, that the jury might properly find that it was delivered (*Hope v. Harman*, 11 Jur. 1097, Q. B.). The deed need not show on its face that it was delivered (*Goodright v. Gregory*, Lofft, 339). If the deed be made by a corporation, actual delivery is not requisite, and the affixing of the corporate seal, or any other used for the occasion, is tantamount to a delivery (Ph. Ev. 449; Com. Dig. Fait, A, 3); but, if the corporate body has given a letter of attorney to deliver, the deed is not theirs until delivered (Co. Lit. 36 a). If the deed be executed by virtue of a *power of attorney from the obligor, the power of attorney must [*934] be produced (*Johnson v. Mason*, 1 Esp. 89) and proved (1 Ph. Ev. 505). A general agent has been presumed to have such authority, but generally speaking the agent must derive his authority by deed (*Doe v. East London Waterworks Company*, M. & M. 149; *Berkeley v. Hardy*, 8 D. & R. 102; *Hibblewhite v. M'Morine*, 6 M. & W. 200). A valid delivery may also be effected by words, unaccompanied by an actual delivery; as where the deed lies on the table, and the obligor desires the obligee to take it up, and says it is his deed (Co. Lit. 36 a). If once the obligor deliver it as his deed, with intent that it shall be so, it will take effect, and he cannot, by any subsequent words, explain or show his intent to be otherwise (Com. Dig. Fait, A, 3). A person executing a deed, by virtue of a power of attorney, for another, must do it in the name of the principal, but no particular form of words is essential (*Wilks v. Back*, 2 East, 142).

A condition previously expressed, though not introduced into the act of

delivery, is sufficient to make the delivery of the deed operate as an escrow (Johnson v. Baker, 4 B. & Ad. 441; and see Murray v. Stair (Earl), 2 B. & C. 82). Where a party to an instrument seals it, and declares in the presence of a witness that he delivers it as his deed, but retains it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it will take effect as a deed, and not as an escrow, and the delivery to the party who is to take by the deed or to any person for his use, is not essential; and the deed may be delivered to a third party for the use of the person in whose favour it was executed, though that party be not his agent (Doe v. Knight, 5 B. & C. 671; see Hope v. Harmer, *ante*, p. 933). Where a debtor executed a mortgage to his creditor, of which he was ignorant, and the former kept it twelve years in his custody, until his death: held, valid from its date, even against creditors, it not appearing to be an escrow (Exton v. Scott, 6 Sim. 31); and where a deed executed by A. is delivered to B., as an escrow for C., to be delivered to him on the happening of a certain event, C.'s possession is *prima facie* evidence against A. of the performance of the condition (Hare v. Horton, 3 B. & Ad. 715).

A bond executed with the usual formalities may operate as a deed *in presenti*, though at the time of its execution it was expressly agreed that it should not take effect until a certain event had happened, and the intention of the parties at the time of execution is a question of fact for the jury on the whole evidence (Murray v. Stair (Earl), 2 B. & C. 82; 3 D. & R. 278). A person made a deed of gift of all his property to his daughter, he signed it, and sealed it, and said in the presence of the attesting witness "I deliver this as my last act and deed," and then gave it to a third party to keep, and not to deliver it to his daughter until his death: held, that the delivery was complete; but *semble*, that if the direction to keep it had been given before he said, "I deliver this," the deed would not have operated as an escrow (Doe v. Bennett, 8 C. & P. 124). A. being indebted to his bankers, executed a deed purporting to be a mortgage to them for securing the debt; after executing it he delivered it to his attorney, who retained it in his possession until A.'s bankruptcy, which happened about a month afterwards; the attorney then delivered it to the mortgagees: held, that this was a good delivery by A. to the mortgagees (Grugion v. Gerrard, 4 Y. & C. 119).

*Proof that a party signed a deed which bears on the face of it [*935] a declaration that the deed was sealed by the party, is evidence to be left to a jury, that the party sealed and delivered the deed (Talbot v. Hodson, 7 Taunt. 257; 2 Mar. 527).

A deed takes effect from the delivery and not from the date, therefore parol evidence was allowed to show that a lease dated on Lady-day, 1783, and purporting to commence on *Lady-day last past*, was in fact executed after the date, and the term therefore commenced on Lady-day, 1783, and not 1782 (Steele v. Mart, 4 B. & C. 272).

Signing is not an essential part of a deed at common law (but see Cooch v. Goodman, 2 Gal. & Dav. 159; 6 Jur. 779); but it has been required, in some cases, by act of parliament, and is often requisite for the due execution of powers. In such cases, therefore, signing is as necessary as sealing (1 Ph. Ev. 448).

It is not absolutely necessary the witness should see the party actually sign or seal; proof that he saw him deliver it signed or sealed will suffice (1 Ph. Ev. 448). Thus, where the attesting witness said that he was not present when the deed was executed, but was afterwards requested, by one of several parties, to sign the attestation, it is sufficient evidence of the execution of such

deed by such party (Grellier v. Neale, Pea. 146); and witnesses may be called to prove the handwriting of the other parties, as to whom the deed must be considered as unattested, in which case sealing and delivery may be presumed (Ib.). Where a bond was executed by the deft., and attested by a witness in one room, and was then taken to an adjoining room, and, at the request of the deft.'s attorney, and in the deft.'s hearing, was attested by another witness, who knew the deft.'s handwriting, it was held, that the execution might be proved by the latter witness, and the whole be considered as one entire transaction (Park v. Mears, 2 B. & P. 17; and see Anon. cited Arch. Pl. and Ev. 378). An acknowledgment by an obligor to the attesting witness, that the instrument is his deed, is in all cases sufficient (Powell v. Blacket, 1 Esp. 97).

It is not necessary for the witness to prove that certain blanks, which existed in the deed, were filled up at the time of the execution (England v. Roper, 1 Stark. 304). The filling up of a blank, with the assent and in the presence of the party who has executed the deed, which he afterwards recognises as a valid one, will not vitiate the deed, for it is incomplete and *in fieri*, until the blank be filled up (Hall v. Chandless, 4 Bing. 123; Hudson v. Revett, 5 Bing. 368; Bevitt v. Brown, ib. 7; but see Hibblewhite v. M'Morine, 6 M. & W. 600; 4 Jur. 769, overruling Texira v. Evans, 1 Anstr. 228). Whilst the deed is in the hands of the party executing it, another name may be inserted, and it may be re-executed without avoiding it or requiring a new stamp (Spicer v. Burgess, 1 C. M. & R. 129; Jones v. Jones, 1 C. & M. 721). Where indentures of lease and release of 1806 were produced, and the deed of release bore traces of a stamp having been impressed, and purported to be signed, sealed, and delivered, having been first duly stamped, though there was nothing to denote the amount of the stamp imposed: held, that there was sufficient to justify the judge in presuming that the deed had been duly stamped, and receiving it in evidence (Doe v. Coombs, 6 Jur. 930).

Identity.] Some evidence is necessary to connect the deft. with the instrument, which the subscribing witness is often unable to furnish. [*936] Slight evidence will suffice, but bare identity of name will not *(Whitelock v. Musgrove, 1 Crompt. & M. 511; 3 Tyrw. 541; but *contra*, Sewell v. Evans, 4 Q. B. 626): but evidence that the party sued resided at the place mentioned as his residence in the attestation would be *prima facie* evidence of identity (Ib.; see *ante*, "CHANCERY;" Jones v. Jones, 9 M. & W. 75; and "BILLS OF EXCHANGE"). So, that the deft. had spoken of the contents of the deed (Doe v. Paul, 3 C. & P. 613). The witness to a bond stated that he saw it executed by a person who was introduced under the name of Hawkshaw (deft.'s name), but as he could not identify him with the deft., the plt. was nonsuited (Parkins v. Hawkshaw, 2 Stark. 239; Middleton v. Sandford, 4 Camp. 34).

Enrolment of Deeds.] It seems that deeds enrolled may be admitted in evidence, without proof of execution. Thus, a deed of bargain and sale, acknowledged by the bargainee and enrolled, by which a term for years was assigned, was given in evidence without any proof made of the bargainor's sealing and delivery thereof: Holt, C. J., and the rest of the court, held, that the acknowledgment of the party in a court of record, or before a master extraordinary in the country, is good evidence of its being sealed and delivered (Smarth v. Williams, 1 Salk. 280; 3 Lev. 387; Thurle v. Maddison, Sty. 462). Gilbert, C. B., draws a distinction between deeds which require and which do not require enrolment, and considers the rule applicable in the former but not in the latter case (Gilb. Ev. 86). Buller, J. however dissents from this doctrine, and says, that the case of Smarth v. Williams is wrongly

reported; as it appears, from the report in *Lev.*, that the acknowledgment was by the bargainor, and that it was only a term that passed, and, consequently, was not an enrolment within the statute 10 Anne, c. 18, s. 3; and adds, "It is absurd to say that a release, which has been enrolled upon the acknowledgment of the releasor, shall not be admitted in evidence against him, without being proved to be executed, because such release does not need enrolment, and that was the case in *Smarth v. Williams*; the deed there did not need enrolment; yet, being enrolled, on the acknowledgment of the bargainor, it was read against him without being proved (*B. N. P.* 256). In the case of *Lady Holcroft v. Smith* (2 *Freem.* 259), a distinction was made between deeds of bargain and sale (enrolled in pursuance of the statute 27 Hen. VIII.) and other deeds enrolled; and it was held, that a copy of a deed, enrolled for safe custody, would not be evidence otherwise than as against the party who executed it, and all claiming under him. So, the indorsement by the proper officer, on a deed of bargain and sale, enrolled according to 27 Hen. VIII. c. 16, is evidence of the enrolment (*Kinnersley v. Orpe*, 1 *Doug.* 56); and the date of enrolment, indorsed by the clerk of the enrolments, is conclusive evidence of the date (*R. v. Hopper*, 3 *Pri.* 495). But it should seem that if the enrolment be not a record, or be not made evidence by act of parliament, the deed must be proved in the usual way (*Gomersall v. Serle*, 2 *Y. & J.* 5; *Giles v. Smith*, 1 *C. M. & R.* 470): as in the case of an assignment under the bankrupt act, 6 Geo. IV. c. 16 (*Ib.*), now the 12 & 13 Vict. c. 106. So, of a lease of crown land enrolled in the office of the auditor of the land revenue (*Jenkins v. Biddulph*, *R. & M.* 339; but see *Rowe v. Brenton*, 3 *M. & R.* 218).

A. being entitled as *quasi* tenant in tail to a sum of stock, executed a disentailing deed, which was duly enrolled in Chancery, and presented a petition for the transfer of the stock. This deed was produced at the hearing of the petition, with the certificate of the clerk *of enrolments [*937] indorsed, but no evidence was given of the execution of the deed: held, that the petitioner's title was not made out by the production of the deed, and that evidence of his execution of the deed ought to be given (*Bishop v. De Burgh*, 15 *Law J.* 35, Ch.).

Proof of Execution where no subscribing Witness.] In this case the party's handwriting and execution of the deed must be proved, as in other cases (*supra*, and *post*, "HANDWRITING").

Proof of, by subscribing Witness.] If there have been a subscribing witness to the execution of the deed, he ought to be subpoenaed to prove it (*ante*, "ASSUMPSIT," p. 236). He alone is competent to prove the execution, as he may be able to state the circumstances of the transaction, which may be material, and unknown to others; and his testimony cannot be dispensed with, though the deft. has admitted his execution of the deed (*Abbott v. Plumbe*, 2 *Doug.* 205; 2 *East*, 187; 7 *T. R.* 267); even in an answer to a bill in Chancery (*Call v. Dunning*, 4 *East*, 53; 5 *T. R.* 366; but see *Bowles v. Langworthy*, 5 *T. R.* 366); and this rule applies, whether the deed be the foundation of the action or but collateral (*Breton v. Cope*, *Pea.* 30); or whether the question be between the parties to the deed or strangers (*Call v. Dunning*, *supra*).

It is sufficient to call one attesting witness, though there are several (*B. N. P.* 264; 1 *P. Wms.* 471), unless a suspicion attaches to the execution of the deed, when it is more prudent to call them all (4 *Burr.* 2224).

Evidence of the handwriting of an attesting witness will not, however, be sufficient to prove a deed; if there are two of them, and the absence of one only be accounted for, the other must be called (*Cunliffe v. Sefton*, 2 *East*,

183). But, though there be two attesting witnesses, and one be dead, and the other in a foreign country, the handwriting of the witness that is dead will be sufficient (*Adam v. Kerr*, 1 B. & P. 360). So, where one cannot be found, and the other is interested (*Cunliffe v. Seston*, *supra*), proof of the handwriting of either would seem to be sufficient. It will not be assumed that a name subscribed to a deed is that of an attesting witness: thus, where a deed purported to be "sealed by order of the Governor and Company of the Bank, J. Knight, secretary," held unnecessary to call him (*Doe v. Chambers*, 4 Ad. & E. 410). It is not settled whether the attesting witness of a corporation deed need be called (*Doe v. Chambers*, 4 Ad. & E. 410). It is sufficient if the witness state that although he has no recollection of the deed, yet that seeing his signature to it he has no doubt that he saw it executed (*Maugham v. Hubbard*, 8 B. & C. 16; *R. v. St. Martin's*, Leicester, 2 Ad. & E. 213).

It has been said to be sufficient to prove the executing signature where the attesting witness was interested, as well at the time of subscribing, as also at the trial. But there the signature was proved by the subscribing witness personally, and also by evidence of his handwriting (*Swire v. Bell*, 5 T. R. 371). If the interest arise after the attestation, proof of the handwriting will be admitted (*Godfrey v. Norris*, 1 Stra. 34; *Cunliffe v. Seston*, 2 East, 183; *Buckley v. Smith*, 2 Esp. 697). And where a man enters into a general partnership, by reason of which he takes an interest in instruments which he attested, his handwriting may be proved (see *Hovill v. Stephenson*, 5 Bing.

496). But, where the party, knowing the witness to be interested, [*938] asks him to attest an instrument, he *cannot afterwards object to his competency (*Honeywood v. Peacock*, 3 Camp. 196; but see 6 & 7 Vict. c. 85; *post*, "WITNESS").

Excuse for not producing attesting Witness.] It is always necessary, where a deed has been attested, to prove the execution of the instrument by the evidence of the attesting witness. But his absence will be sufficiently accounted for, so as to admit evidence of his handwriting by proof of his death (*Barnes v. Trompowsky*, 7 T. R. 265; *Anon.* 12 Mod. 607; *ante*, "ASSUMPSIT," p. 236); or his insanity (*Currie v. Child*, 3 Camp. 283; *Barnett v. Taylor*, 9 Ves. 381); or his being blind (*Wood v. Drury*, 1 Ld. Raym. 734; but see *Crank v. Frith*, 2 M. & R. 262, per Abinger, C. B.; on the authority of *Wood v. Drury*, Parke, J., with great hesitation admitted proof of the handwriting of a blind witness in *Pedlar v. Page*, 1 M. & R. 258); or from infamy of character, as to having been convicted of forgery (*Jones v. Mason*, 2 Stra. 833), to substantiate which, the conviction must be proved (*Ib.*; see "CONVICTION"); or plt. may show that he was interested at the time of the attestation (*Swire v. Bell*, 5 T. R. 371); in which case it must appear that the plt. did not know of his being interested at the time, or he will not be allowed to object to his competency (*Honeywood v. Peacock*, 3 Camp. 196; *ante*, p. 937); or that he has become interested since he attested (*Swire v. Bell*, 5 T. R. 371); as, by being appointed executor of the obligee (*Godfrey v. Morris*, Stra. 34; *Buckley v. Smith*, 2 Esp. 697; *Cunliffe v. Seston*, 2 East, 183; *Goss v. Tracey*, 1 P. Wms. 287); or where he is absent in a foreign country, or out of the jurisdiction of the court, as in Ireland (*Hodnett v. Forman*, 1 Stark. 90); or in America (*Prince v. Blackburn*, 2 East, 250; *Wallis v. Delancey*, 7 T. R. 266, n.); or India (*Coglan v. Williamson*, Doug. 93); or France (*Holmes v. Pontier*, Pea. 135; *Adams v. Kerr*, 1 B. & P. 360); although he might have been examined on interrogatories (*Glubb v. Edwards*, 2 M. & R. 300); or where it appears that the attesting witness cannot be found, after a fair, serious, and diligent inquiry made for him (*Cunliffe v.*

Sefton, 2 East, 183); as, where inquiry had been made at the residence of the obligor and obligee, but no information could be obtained concerning the attesting witness (Ib.); or where it was ascertained he had absconded, to avoid his creditors (Crosby v. Percy, 1 Taunt. 365; S. C. 1 Camp. 303, though the contrary was held in Pytt v. Griffith, 6 Moo. 538); or, where it was proved that, twelve months previously the attesting witness had had a commission of bankruptcy sued out against him, and had not appeared at the time fixed for his surrender, Lord Ellenborough observing, "As the party did not appear to his commission, I must presume he is out of the kingdom; had he been at his residence at the time fixed for his surrender, I must suppose that he would have surrendered, to save himself from a capital felony" (Wardell v. Farmer, 2 Camp. 284); or where inquiry had been made for the subscribing witness at the Admiralty, whence it appeared, by the last report, that he was serving in his Majesty's navy, but on board of what ship it was not known (Parker v. Hoskins, 2 Taunt. 223); or where he had gone abroad twenty years before the trial of the cause, and had not been heard of since; and, per Lord Ellenborough, "proof of the fact of the subscribing witness going abroad twenty years ago (so large a portion of the life of man), and never having been heard of since, would of itself be sufficient" (Doe d. Johnson v. Johnson, 1 Ph. Ev. 455, n.; Doe v. Jesson, 6 East, 84); or where, on a witness being subpœnaed, he said he would not attend, and, on being sought for at the residence of the deft., it *was ascertained he had gone to Margate, where an unsuccessful [*939] inquiry was made, evidence of his handwriting was admitted (Burt v. Walker, 4 B. & A. 697). To dispense with calling the attesting witness (who was the son of the deft.), to an indenture of submission to arbitration, the plt. proved that repeated attempts had been made to find him, in order to serve him with a subpœna, by calling at his father's house, and at several other places where he had resided, and a hospital at which he was, as a student, in the habit of attending lectures; and that these attempts failing, a summons had been taken out, calling on the deft. to admit the execution of the indenture, on which the judge-indorsed, "No order; the deft. refusing to give any information:" held, that enough had been done to justify the reception of the indenture, upon proof of the handwriting of the subscribing witness (Spooner v. Payne, 4 C.B. 328). Where diligent inquiry had been made unsuccessfully for a witness, evidence of his handwriting was admitted, although a letter from him, concealing his retreat, had been received before the trial (Morgan v. Morgan, 9 Bing. 359). So, where a solicitor's clerk was the witness, and the solicitor could give no account of him, although afterwards at the trial he recollected where he might probably be heard of (Miller v. Miller, 2 Sco. 123; 2 Bing. N.C. 76). What is a sufficient search for witnesses to prove handwriting to allow secondary evidence to be given, must depend on the circumstances of each case (Ib.), and is for the determination of the judge. When the court is satisfied that due diligence has been used to find the witness, then it is sufficient to prove his handwriting, without proving that of the party, unless for the purpose of establishing his identity (Nelson v. Whittall, 1 B. & A. 19; Gough v. Cecil, Selw. N. P. 516, n). But proof of the witness' being unable to attend from illness, and no hopes entertained of his recovery, will not be a sufficient excuse for his non-attendance (Harrison v. Blades, 3 Camp. 457; and, per Lord Ellenborough, "I cannot dispense with the attendance of a witness who is still alive, and within the jurisdiction of the court; if such a relaxation from the rules of evidence were permitted, there would be very sudden indispositions and recoveries" (Ib.). The party interested in his testimony must get a judge's order to examine him out of court. "But, in all these cases, it ought to be satisfac-

torily proved, that a reasonable, diligent, and honest inquiry has been made, without any evasion, and without any design to overlook the witness" (1 Ph. Ev. 450, n.).

If the subscribing witness is unable, or refuses, to declare the truth, the party is not precluded from calling other witnesses to establish the validity of the instrument (Burr. 2224; *Blurton v. Toon*, Skin. 637); and thus, where one of the witnesses to a will would not swear to the sealing and publication, Holt, C. J., allowed the attestation of the witness to be proved (*Dagwell v. Glasscock*, Skin. 413). Proof of the handwriting of the obligor will be sufficient, where the witness admits his signature as attesting witness, but does not, in fact, see the deed executed (*Grellier v. Neale*, Pea. 147). Where the witness denies the due execution of the deed, other witnesses may be called to contradict him, and the contrary proved by circumstantial evidence (*Talbot v. Hodson*, 7 Taunt. 251; *Doug.* 206; *Digg's case*, Skin. 79; *Fitzgerald v. Elsee*, 2 Camp. 635; *Boxer v. Rabath*, Gow, 175). And, where two witnesses to a will of real property denied the publishing of the will, and said that the testator was incapable of doing so, witnesses were admitted to contradict them (Skin. 79).

The handwriting of the party executing must also be proved by other evidence than the testimony of the subscribing witness, where *the [*940] name of a fictitious person is inserted as a witness (*Fasset v. Brawn*, Pea. 23); or where he became a witness without the knowledge or consent of the parties (*M'Craw v. Gentry*, 3 Camp. 232).

Where the plt. declared on a deed which he stated was in deft.'s possession, who pleaded *non est factum*, and at the trial plt. proved the deed to be in deft.'s hands, who had also been served with a notice to produce it, it was decided that, on non-production of the deed, the plt. might give secondary evidence of it, without calling the subscribing witness, though he was in court (*Cooke v. Tanswell*, 8 Taunt. 450). So, where the plt. declared on a lost bond, and a witness stated that there were subscribing witnesses' names to the bond, but that he did not know them, it was held the plt. need not call the attesting witnesses, or either of them (*Keeling v. Ball*, Pea. Ev. 82, Appendix); and Lord Kenyon said, had it appeared who they were they must have been called (*Ib.*). Where notice was given to produce a deed in deft.'s possession, and the deft. at the trial refused to do so, the plt. was allowed to prove it by a copy, without calling any attesting witness; and the deft. cannot afterwards call for strict proof by producing the attested original (*Jackson v. Allen*, 3 Stark. 74). Where a marksman executes a deed, a person who has seen him make his mark, and can speak to its peculiarities, may prove the execution (*George v. Surrey*, M. & M. 516).

DEMURRAGE.

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Form of Remedy.

WHERE there is a contract for demurrage not under seal, the action may be brought in *assumpsit* (*Lear v. Yate*, 3 Taunt. 389). But where the contract is under seal, the action must be in covenant, or in debt on the deed (1 N. R. 104). Debt lies upon a charter-party, if the sum demanded be ascertained thereby, or it sufficiently appears how much is due (*Hooper v. Shepherd*, 2 Stra. 1089; Andr. 156). The advantage of debt is, that the common counts may be inserted, and the plt. has his option of proceeding for the penalty, or on the covenant which the deft. has broken (*Harrison v. Wright*, 13 East, 343); and, if there be no express contract for the demurrage, the declaration should be special on the implied contract to ship or unship the goods within a reasonable time (see *ante*, "CHARTER-PARTY;" 2 Ch. Pl. 51, n. (g); *Howe v. Benson*, 2 M. & Rob. 326; 9 C. & P. 709; *Harper v. McCarthy*, 2 D. & R. 285; 4 Camp. 131; **Randall v. Lynch*, [*941] 12 East, 179; 6 Moo. 415, 425). The usual clauses, purporting that it is covenanted and agreed by and between the parties, that a specified number of days shall be allowed for loading and unloading, and that it shall be lawful for the freighter to detain the vessel for those purposes a further specified time, on payment of a daily sum, constitute a contract on the part of the freighter, that he will not detain the ship for those purposes beyond the two designated periods; and, if he does so detain her, he is liable to an action on the contract in the form adapted to the nature of the instrument (*Randall v. Lynch*, 12 East, 179; *Abbott*, by *Shea*, Serjt. 263); see generally, 3 Ch. Com. L. 426). The charterer of a ship is not liable to the owner for the unavoidable detention of the ship by frost after the completion of the loading (*Pringle v. Mollett*, 6 M. & W. 80). The captain of a ship cannot maintain an action in his own name upon an *implied* promise to pay demurrage, although he may, on an *express* promise with him to pay it (*Brouncher v. Scott*, 4 Taunt. 1; *Jesson v. Solly*, *ib.* 52; *Evans v. Foster*, 1 B. & Ad. 118; *Howe v. Benson*, *supra*).

The payment of demurrage, stipulated to be made whilst a ship is waiting for *convoy*, ceases as soon as the convoy is ready to start (*Lannoy v. Werry*, 2 Bro. Par. C. 60). So, where it is stipulated that the payment is to be made whilst the ship is waiting to receive a cargo, the liability ceases when the ship is fully laden, and the necessary clearances are obtained (*Jamieson v. Laurie*, 6 Bro. Par. C. 472), although the ship may in either case happen to be detained by adverse wind and tempestuous weather; and if once set sail and departed, but the ship is afterwards driven into port, the claim of demurrage is not thereby revived (*Ib.*; *Abbott*, Demurrage). The owner covenanted that a ship should take a cargo at a port, and proceed with the first convoy for England within fourteen working days after she was ready to load, and the merchant to load and despatch her within fourteen days after notice that she was ready to load, with liberty to detain her fifteen running days after the expiration of the fourteen, at four guineas a day demurrage; the first convoy sailed after the expiration of the fourteen, but before the end of the additional fifteen days; no other convoy sailed for two months: held, that the merchant was not liable for the detention beyond the

fifteen days, and that the parties were in the same condition at the end of that time as they would otherwise have been in at the end of the fourteen days (*Cannon v. Smythe*, 5 Taunt. 654).

Upon the following clause in a charter-party, "The vessel to lie her regular time for loading her cargo and one day per keel, running days; demurrage, 3*l*. per day for any working day's detention over and above the days allowed as aforesaid," it was held that demurrage could be claimed only in respect of loading, and not in respect of the time spent in the delivery of the cargo (*Alcock v. Taylor*, 2 H. & W. 58; 6 Nev. & M. 296; 1 Jur. 513). The deft., who was agent to the consignees of a cargo, wrote to the plt., the owner, agreeing to pay freight, demurrage, &c., and to place himself in every respect in the place of the charterer; the ship was detained beyond the time allowed in the charter-party to load and unload, and the demurrage days and several besides elapsed after the date of the deft.'s agreement: held, liable for detention beyond demurrage days, as well as for demurrage on his agreement, there being a sufficient consideration moving from the plt. to deft., for deft. could not sell the cargo without plt.'s consent (*Benson v. Hippus*, 4 Bing. 455; 3 C. & P. 186).

[*942]

**Form of Pleadings.*

Declaration.] The common count in assumpsit will suffice (see forms, 2 Ch. Pl. 51; Ch. jun. by Pearson, 111), where there is a contract, but not under seal, for demurrage (*Lear v. Yates*, *supra*). When the contract is under seal, the declaration must in general be framed upon it, and state the terms of the deed (*Atty v. Parish*, 1 N. R. 104; *Shack v. Anthony*, 1 M. & S. 573; 2 M. & W. 303). When unnecessary, *ante*, p. 780. But *quare*, whether, in an action brought by and against the parties to the deed, the declaration may not be framed in debt generally, and the deed given in evidence (see per Bayley, J., in *Tilson v. Warwick Gas-light Company*; but see *Edmunds v. Bates*, *ante*, p. 780; 4 B. & C. 968). As to how the declaration should be framed for detaining the ship beyond demurrage days, see *Benson v. Blunt*, 1 G. & D. 449. If there be no contract as to demurrage, a shipowner cannot on a common count for demurrage recover for the detaining of the ship for an unreasonable time in loading and unloading, but must declare specially (*Horn v. Bensusan*, 9 C. & P. 709; 2 M. & Rob. 326). Under a charter-party to load coals and iron at C., and proceed with them to A., the running days to commence on 16th Dec.; plt. having, with the deft.'s consent, loaded at P. in ten days ensuing 16th Dec., and not having sailed from C. until the 27th: held, that the running days were to be reckoned from 16th Dec., and that no proof of the deft.'s consent satisfied an allegation in the declaration that the coals had been laden at P. at his request (*Jackson v. Galloway*, 5 Bing. N. C. 71; 6 Sc. 786; 2 Jur. 990).

The declaration stated that the vessel was ready to be unloaded on a certain day at W., and had received pratique, and issue thereon. It appeared that there was no custom-house at W., and no sanitary regulations were adopted, and that a license to unload was never granted; the jury found that the vessel was ready to be unloaded on the said day, but that she had not received pratique, and found for deft.: held, that what took place was equivalent to pratique, and that in substance the issue was found for the plt. (*Bulley v. D'Arrogave*, 3 N. & P. 114; 7 Ad. & E. 919; 2 Jur. 275).

A declaration contained a special count on a charter-party, stating that a certain number of days were allowed in demurrage, with breach for detention beyond lay and demurrage days; no breach for non-payment of demurrage was assigned, but there was a general count for demurrage: held, that

the two counts must be considered as substantially for the same cause of action, and therefore ought not to be allowed (*Temperley v. Brown*, 1 Dowl. N. S. 310; 6 Jur. 150). If there be a condition precedent, it must be averred. As to what is *condition precedent*, and what need not be averred, see *Hall v. Cazenove*, 4 East, 477; 3 Ch. Com. L. 391; 2 Ch. R. 705; *Glaholm v. Hays*, 2 Man. & G. 257; *Galloway v. Jackson*, 2 Sc. N. R. 753; *ante*, "ASSUMPSIT"). The declaration must show by distinct averment or by necessary implication that the plts. were owners of the ship or parties to the charter party, and a defect in this will not be aided by admission in the pleas, whether found for or against the deft., though it seems it would have been otherwise had the plea containing such admission been the only plea upon the record (*Galloway v. Jackson*, 2 Sc. N. R. 753). The breach in a declaration on a covenant to pay demurrage should not exceed the limited number of stated days mentioned in the covenant (*Stevenson v. York*, 2 Ch. R. 570). As to the form of breach see *Haggett v. *Exley*, 6 Bing. N. C. 207). A tortious detention will not support a [*943] count for demurrage (*Harrison v. Wilson*, 2 Esp. 709).

In charter-parties there is usually inserted a clause covenanting that a specified number of days shall be allowed for loading and unloading, and that it shall be lawful for the freighter to detain the vessel for these purposes a further specified time, on the payment of a daily sum, and any detention beyond the days thus specified will be a loss, for which the freighter will be liable in damages. The word "days" used alone in a clause of demurrage for unloading in the river Thames, is said to be understood of working days only, and not to comprehend Sundays or holidays by the usage among merchants in London (*Cochran v. Retbergh*, 3 Esp. 121). These days are, in the absence of express stipulation, to be reckoned from the time of the ship's arrival at the usual place of discharge in the port, not *at the port*, although, for the purposes of navigation, some of her cargo may have been discharged at the entrance (*Brereton v. Chapman*, 7 Bing. 562; *Kell v. Anderson*, 10 M. & W. 498); and, unless there be some custom to the contrary, Sundays are to be computed in the calculation of lay days at the port of discharge, and the lay days to commence from the period of the ship's arrival *in dock*, and not at the place of unloading (*Brown v. Johnson*, 10 M. & W. 498); in the absence of any custom, the words "days," and "running days," mean consecutive days (*ib.*). If a new port, for that mentioned in the charter-party be substituted by consent of the parties, this will not affect the lay days mentioned in the original contract (*Jackson v. Galloway*, 5 Bing. N. C. 71). The merchant must pay demurrage for any delay beyond the specified time, even though the delay be not attributable to his fault, but to some unforeseen impediment in loading and unloading (*Barker v. Hodgson*, 3 M. & S. 267; *Barrett v. Dutton*, 4 Camp. 333; *Harman v. Clarke*, *ib.* 159; *Jesson v. Solly*, 4 Taunt. 52; but see *Stringer v. Gummell*, Ex. 7 June, 1843). The delay must be for the purpose of loading and unloading (*Pringle v. Mollett*, *supra*; see these cases collected in Ab. 6th ed. 267). Where the parties to the contract have fixed a particular place for the discharge of the cargo other than the usual place at the destined port, or where the place of discharge is left to the discretion of the master, the lay days will of course run from the ship's arrival at the place so fixed upon, or from her arrival at the place selected by the master (Ab. Sh. "Demurrage").

*Precedents.**Indebitatus assumpsit* for demurrage.

The *indebitatus* count, is as *ante*, p. 225, inserting these words, "for the use of a certain ship or vessel (whereof the plt. was master, (according to the fact, see *ante*, p. 941), by the said deft. before that time retained and kept on demurrage with certain goods chattels and merchandise on board thereof for a long time before then elapsed and at his request," &c. (*Conclusion as ante, ib.*)

See precedent in debt for demurrage, 2 Ch. Pl. 308; covenant for, 376.

Pleas.

General Issue and other Pleas.] The pleas to an action on a charter-party for demurrage will entirely depend upon the nature of *the [*944] defence which the deft. means to set up to the action. The 3 & 4 Will. IV. c. 52, s. 108, requires that previously to the unloading of goods carried coastwise, a written notice of the ship's arrival, signed by the master, shall be given to the collector or comptroller of customs by the master, owner, wharfinger, or agent of the ship, and that certain documents should be obtained. In an action of *assumpsit* for demurrage, held, that noncompliance by the plt. with the above provisions could not be given in evidence under the general issue (*Alcock v. Taylor*, 6 Nev. & M. 296; 1 Jur. 513). A statutory objection of this description should be specially pleaded (*Ib.*).

Where the owners of a ship agreed that the ship should have eighty-five running days for loading and unloading, with fourteen additional running days, at a fixed rate of demurrage per diem; when the ship arrived she had five running days due to her, but the plts. refused to permit her to unload until after the expiration of the running days, so that she was not discharged until after the expiration of fourteen days beyond the running days; the deft. pleaded amongst other things to an action of *assumpsit*, charging a detention on demurrage for fourteen days, and a general detention beyond, that at the time the ship was unloading the plts. wrongfully stopped the unloading, and prevented the defts. from unloading: held, that the plea was bad, for although the owners cannot exercise an arbitrary power of selecting on what days the unloading shall take place, or interrupting capriciously that operation, yet any interference by the plts. to prevent an unloading, as was stated in the general terms of the allegation of that plea, would not put an end to the obligation of the charter-party (*Benson v. Blunt*, 1 Q. B. 870; 1 G. & D. 449.). The declaration stated that the charter-party was made between certain persons trading, &c., on behalf of the owners of the vessel and deft., and that it was agreed that the ship (then at P.), should with all convenient speed sail to C., and then load, &c., and should proceed therewith to A., and then deliver, &c., forty running days to load at C. and unload at A., to commence on 16th Dec., 1834; averring mutual promises, and that the ship then being at P., by and with the consent of the plts. and deft., and at the deft.'s request, remained at P. for the purpose of receiving part of her cargo, in lieu of loading such at C., as in the charter-party mentioned; that the ship was without any default or neglect of the plts. kept and detained for that purpose at Pembroke until the 17th Dec.; that the deft. dispensed with and discharged the plts. from performing that part of the charter-party which related to the sailing of the vessel with all convenient speed from P. to C., up to and until she finished and completed the loading of her cargo at P.; that being so loaded, she proceeded with all convenient speed to C., and arrived there on the 16th of January following, and took in the remainder

of her cargo. Four breaches were assigned: 1st. That the deft. detained the ship at C. twenty days over and above the lay days and days of demurrage in the charter-party mentioned, whereby, &c.; 2ndly. That the deft. further detained the ship at A. whereby, &c.; 4thly. That the deft. neglected to pay a certain sum of money for demurrage: there were also counts for freight, for demurrage, and money paid. The deft. pleaded amongst other things, secondly, as to so much of the first count as claimed demurrage, that the deft. did not consent and request that the vessel should remain at P. for the purpose in the first count mentioned, upon which issue was joined, and the jury found that the plts. requested and the deft. consented that the ship should remain at P. for the purpose, &c.: held, that the allegation of consent was the only material allegation in the second plea, [*945] and consequently that being found by the jury, the verdict on that issue was for the plts. (*Galloway v. Jackson*, 3 Sco. N. R. 753; 3 Man. & Gr. 960).

As to pleas to an action of debt, on charter-parties, see Ch. Pl. 199; *Beatson v. Schank*, 3 East, 233; *Crozier v. Smith*, 1 M. & G. 407. In covenant, 3 Ch. Pl. 226, 228. In assumpsit to unsealed memorandum of charter-party, *Galloway v. Jackson*, *ante*, p. 944; *Pringle v. Mollett*, 6 M. & W. 80; see also *Glaholm v. Hays*, 2 Man. & G. 257; *Cockburn v. Wright*, 6 B. N. C. 228; 8 Dowl. 260. To an action by the owner against the charterer for not discharging the cargo within the time mentioned, and detaining the vessel, whereby a demand arose for demurrage, see pleas denying the detention, and that the deft. was prevented from unloading by the wrongful act of the plt., his servants, and agents (*Brown v. Johnson*, 11 M. & W. 331).

General Issue by Statute.] A non-compliance with the rule of T. T. 1 Vict., deprives the deft. of all benefit he might otherwise be entitled to under any statute giving protection to parties for acts done in pursuance or execution thereof (*Bartholomew v. Carter*, 3 Sco. N. R. 5, 29; 3 Man. & G. 125). Where a deft. is entitled to plead not guilty, "by statute," he may under that plea go into any defence that could be specially pleaded, whether such defence be founded entirely on the statute, or partly on the statute, or partly not, or be a defence wholly independent of the statute (*Maud v. Monmouth Canal Company*, 1 C. & M. 606).

Evidence for Plaintiff.

In an action for demurrage, the plt. must prove how long he was detained beyond the days allowed by the charter-party, and the days must be working, not running days (*Cochran v. Retby*, 3 Esp. Ca. 121; *ante*, p. 942). It is usual for the master to produce a protest in evidence; and this, though not directly necessary, is the more prudent course (*Beawes*, 142). To entitle the owner to demurrage, it does not appear necessary that the master should give notice of the ship's arrival to the consignee (*Harman v. Mant*, 4 Camp. 161); especially when the consignees have indorsed the bill of lading (*Harman v. Clarke*, 4 Camp. 159; see "CHARTER PARTY").

Damages.] If a ship be detained, the daily rate of demurrage mentioned in the charter-party will, in general, be the measure of the damages to be paid, but it is not the absolute or necessary measure; more or less may be payable, as justice may require, regard being had to the expense and loss incurred by the owner; and the amount must be settled by a jury (*Ab. Sh.*

304; *Moorson v. Bell*, 2 Camp. 616). Where, by a charter-party under seal, the freighter was at liberty to keep the ship on demurrage at her loading and delivery ports, ten days each, besides a certain number of days limited for her stay at the same, or as many of them as need should require, the ship having been compelled to put into an intermediate port of her ports of loading and discharge, and the freighter having detained the vessel ten days there, and also fourteen days more than ten days at the port of delivery, in an action on the charter-party, it was held, that the master [*946] could not recover on this covenant for *more than the ten days' demurrage, at 5*l.* per day, at the port or London, the covenant not extending to the payment of demurrage beyond ten days at each of the ports of loading and discharge; and a breach, averring that the plt. did not pay 5*l.* per day for demurrage for the extra delay beyond the ten days at the port of delivery, and for the delay at Bristol, as well as for the demurrage for ten days' delay at the port of delivery, was held bad (*Stevenson v. York*, 2 Chit. Rep. 570).

The plts., owners of a ship, agreed by charter-party, that the ship should have eighty-five running days for loading and unloading her cargo, with fourteen additional running days, at so much a day demurrage. The ship arrived in port with five running days due to her: the plts. refused to permit her to unload until after the expiration of the running days, and the cargo was therefore not discharged until the expiration of fourteen days after the running days. The declaration charged a detention for fourteen days' demurrage, and a general detention beyond. Pleas: 1st, *non assumpsit*; 2ndly, he did not stop or detain the ship *modo et formâ*; 3rdly, that at the time she was unloading, the plts. wrongfully stopped her, and prevented the defts. from unloading. The jury found that the plts.' refusal was wrongful: held, on motion for a new trial and for judgment *non obstante veredicto* on the third plea, that the plea denying the detention of the ship was sufficiently made out by the finding of the jury, and that the plts. could not under this declaration on the charter-party recover for the use of the ship during so much of the absolute unloading as exceeded five days (*Benson v. Blunt*, 1 Q. B. 870; 1 Gal. & Dav. 449).

The price or rate of demurrage may be regulated by the burden of the ship, or, quantity of goods she is freighted to carry, or the damage she is likely to sustain by remaining in the port where she is detained; or the loss sustained by not being able to employ her on another service, &c.

Evidence for Defendant.

If there be a limited time for unloading, deft. will not be allowed to show, in evidence, that the delay was unavoidable, from the crowded state of the docks (*Lear v. Yates*, 3 Taunt. 387; *Randall v. Lynch*, 12 East, 179); or that it was occasioned by port regulations, or custom-house restrictions, even though it be unlawful on the part of the custom-house to make them (*Bessey v. Evans*, 4 Camp. 131; *Hill v. Idle*, ib. 137) or that the cargo was detained under a prohibition by a foreign government (*Blight v. Page*, 3 B. & P. 295); nor will he be allowed to show, that the delay was caused by the goods being placed under other goods (*Harman v. Gaudolph*, Holt, 35; *Lear v. Yates*, 3 Taunt. 387; but see *Rogers v. Hunter*, 2 C. & P. 601; *Dobson v. Droop*, 4 C. & P. 112); or the impossibility of loading the vessel, from the roughness of the weather, or the port's being frozen up (*Thompson v. Wagner*, 4 Camp. 335, n.; *Barrett v. Dutton*, 4 Camp. 335); or from the neglect of the consignee in not obtaining a proper license (*Hill v. Idle*, 4

Camp. 327); or by a prohibition of intercourse with the shore on account of an infectious disease (*Barker v. Hodgson*, 3 M. & S. 267); or that he did not receive notice of the arrival of the ship within the time stipulated by the bill of lading for the discharge of the cargo, or that he did not receive the bill of lading in time, and the master insisted on its being produced, or an indemnity (*Harman v. Clarke*, 4 Camp. 159; *Harman v. Mant*, ib. 234; *Jesson v. Solly*, *4 Taunt. 52). But the deft. will not be liable to demurrage if the words of the covenant be "to unload in the usual and customary time," and the delay proceed from the vessel being unloaded in her turn in the bonded warehouses (*Rodgers v. Forresters*, 2 Camp. 483); or, if there be no stipulated time to unload, deft. may show the state of the docks prevented him (*Burmester v. Hodgson*, 2 Camp. 489); or deft. may show the delay to have occurred from the want of the ship's clearances, which it was the business of the owner to procure (*Barrett v. Dutton*, 4 Camp. 335), unless indeed he omitted to apply for them at the request of the freighter or consignee (*Furnell v. Thomas*, 5 Bing. 188).

By the 7 & 8 Geo. IV. c. 56, s. 15, it is enacted, that if certain goods brought coastwise into the port of London, and which are liable to dues to the corporation, shall be landed or unshipped before a certificate of the payment of the dues shall be obtained, the goods shall be forfeited: held, that although it was the duty of the master of a vessel to obtain such certificate, yet if he were prevented from so doing by the act of the consignee, the latter was liable for demurrage in the mean time (*Farnell v. Thomas*, *supra*, nom. *Palmer v. Thomas*, 2 Moo. & P. 296).

No demurrage can be claimed in the case of a hostile detention of the ship, or, what is equivalent to it, the hostile occupation of the intended port, or in case of accidents by winds or sea, even although after such delay it may be found expedient entirely to abandon the voyage, and thereby the whole employment of the ship becomes unprofitable (*Liddard v. Lopes*, 10 East, 526; *Holt*, Sh. 337).

Where it is impossible to perform the Contract.] The general rule appears to be, that, if the merchant covenant to do a particular act, which it becomes impracticable for him to do, he must answer for his default, unless the act be or become contrary to the law of his country, such as a trading with an enemy (*Rundall v. Lynch*, 2 Camp. 356; 12 East, 179; *Lear v. Yates*, 3 Taunt. 387; *Harman v. Godolphi*, *Holt*, N. P. 35; but see *Rogers v. Hunter*, 2 C. & P. 601; *Dobson v. Droop*, 4 C. & P. 112). "The merchant (according to the language of Lord Ellenborough, *Barker v. Hodgson*, 3 M. & S. 267), is the adventurer, who chalks out the voyage, and is to furnish, at all events, the subject-matter out of which the freight is to accrue;" and, upon this principle, it was held, that a merchant was liable who had covenanted to furnish a cargo at Gibraltar within a limited time, but was prevented from doing so, by a prohibition of intercourse with that shore, on account of the owner (*Ab. Sh.* 182).

*DEMURRER TO PLEADINGS.

[*948]

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General or Special, p. 950.

EFFECT OF, p. 953.

PRECEDENTS, *ib.* p. 954.

Nature of, and when it lies in general.

A demurrer is an objection made by one party to his opponent's pleading, alleging he ought not to answer it, for some defect in law in such pleading. It admits the facts, if well pleaded, and refers the law arising thereon to the courts (Co. Lit. 71 *b*; 5 Mod. 132; Com. Dig. Pleader, Q, 6; 1 Saund. 337, n. 3; Steph. Pl. 155; 11 Pri. 235). But a demurrer to a declaration in slander does not admit the particular words spoken with the intent attributed to them by the innuendo (*Wheeler v. Haynes*, 1 P. & D. 55). The opposite party may demur when his opponent's pleading is defective, in substance or form; but there can be no demurrer for a defect not apparent on the pleadings. As to the expediency of demurring or pleading in general, see Steph. Pl. 165. Where the cause can be tried on the merits it is more liberal practice not to demur specially. It is however material sometimes to demur for a mere technical mistake if the party will not amend his pleading, as where the defective pleading would impose the necessity of adducing more evidence than if the pleading had been properly framed. Thus, if *nil debet* be pleaded to a declaration on a deed, or *de injuriâ* be replied, when the replication should have been confined to the traverse of one only of the matters alleged in the plea. The non-compliance with some rule of practice not affecting the substance of pleading cannot form the ground of demurrer (*Vere v. Goldsborough*, 1 Bing. N. C. 353, 354; *Tyndall v. Ulleshorne*, 3 Dowl. 2; *Darling v. Gurney*, 2 Dowl. 235). Thus where there is an accuracy in the form of the commencement of a declaration (*Marshall v. Thomas*, 4 Moo. & S. 98; *Strachan v. Buckle*, 1 H. & W. 519; *Turner v. Denman*, 4 Tyrw. 313). So where the venue is repeated in the body of the declaration contrary to R. G. H. T. 4 Will. IV. r. 8 (*Farmer v. Champneys*, 1 C. M. & R. 369; *Fisher v. Snow*, 3 Dowl. 27; *Townsend v. Gurney*, *ib.* 29).

Form of.

A demurrer is either to the whole or to part of a pleading. When a deft. demurs only, and does not plead to a declaration, his demurrer must cover the whole declaration; otherwise it will be a discontinuance of the whole: so, if he demur to part only, he must plead to the residue; otherwise it will be a discontinuance of the whole. Thus, where, in trespass for taking and carrying away goods, if the deft., *quoad* the taking, demur, but say nothing as to the carrying away, it is a discontinuance (*Johnson v. Turner*, Yelv. R. 5). So, if the plt. demur only, and do not reply to the deft.'s plea or pleas, the demurrer must cover the whole, otherwise it will be a discontinuance of the whole (per Chambers, J., 3 Rol. 390); and, therefore, if the deft. plead three pleas, and the plt., in his demurrer, say, *quod placitum prædictum est minus sufficiens*, it is a discontinuance (Yelv. R. 65, and see 1 Brownl. 192; *Johnson v. Turner*, Yelv. 5); and the same as to demurrers to replications, rejoinders, &c. *As to the right of [*949] a deft. to demur to part of an entire replication and to join issue upon the residue thereof, *quare* (*Francis v. Dodsworth*, 4 C. B. 202). But, if the deft. demur to the whole declaration, where there are several counts, or in covenant several breaches, some of which are suffi-

cient, and others not, or one count which may be bad in part, the plt. will have judgment on those counts, &c., which are sufficient (1 Saund. 286; Amory v. Brodrick, 5 B. & A. 715; Webb v. Baker, 7 Ad. & E. 841; Ferguson v. Mitchell, 2 C. M. & R. 687; 4 Dowl. 513; Spyer v. Thelwell, ib. 692; ib. 509; Price v. Williams, 1 M. & W. 6; 1 Gale, 362). If deft. demur generally to all the counts in a declaration, judgment must be entered for the plt. on such of them as are good (Powell v. Graham, 1 Moo. 367; 7 Taunt. 580; Cumming v. Hartnell, 1 Al. & Nap. (Irish), 140). A demurrer commencing "and the deft. says that the said declaration is insufficient in law," and then proceeding to assign separate causes of demurrer to the whole declaration is in form a demurrer to the whole declaration, and if any count be good the plt. is entitled to judgment, the demurrer being too large (Parrell Navigation Company v. Stower, 6 M. & W. 564; 8 Dowl. 405). And the above rule applies, also, where there is one count, part of which is sufficient, and the residue is not; when the matters are divisible in their nature, as if a plt. declare for taking his money, and also certain goods, without showing that the goods were his property, the count will be good as to the money; and, if the deft. demur generally to the whole, the plt. will have judgment (2 Saund. 374, 379; n. 1; 5 Rep. 34 (6); Benbridge v. Day, 1 Salk. 218; 2 Saund. 171 *a*, n. 1; Com. Dig. Pleader, c. 82; 1 Saund. 108). So, where the plt. declared in *sci. fa.* upon a judgment in the Queen's Bench with a *prout patet*, &c., and also an affirmance of that judgment in error, without a *prout patet*; demurrer to the whole: held too large, as the plt.'s claim was divisible, and judgment was given for the plt. (Powdick v. Lyon, 11 East, 565).

The plt. declared in trespass for breaking and entering his close, and also his house, and seizing and taking his goods, to wit, two articles of furniture, without describing them; the deft. demurred generally to the whole declaration although he was under terms to plead issuably: held, that plt. could not sign judgment as for want of a plea, for the declaration was substantially defective as regarded the goods (8 Moo. 379); *semble*, the case cannot be considered as an authority that the whole of the declaration should be demurred to (1 Ch. Pl. 697, n. (d)). The rule will not apply to a count in assumpsit where the contract is considered entire (Ib.). As to where a demurrer to a declaration is too large, see Bedford (Duke of) v. Alcock, 1 Wils. 248; Judin v. Samuel, 6 East, 333; Exeter (Mayor of) v. Trimlet, 3 Wils. 95; Davies v. London and Blackwall Railway Company, 1 M. & G. 801; per Tyndal, C. J. Where the demurrer to a declaration is too large the court will give judgment for the plt. *Semble*, in such a case the plt. should not enter judgment on the good and bad counts, but should enter a *nolle prosequi* as to the counts which are bad, or the deft. may bring a writ of error (Wainwright v. Johnson, 5 Dowl. 317; see Webb v. Baker, 7 Ad. & E. 841). So, if part of a breach be good, it is no cause of demurrer to the whole, that special damage is laid, which is not recoverable (Amory v. Brodrick, 1 D. & R. 361; 5 B. & A. 712; Duffield v. Scott, 3 T. R. 374; but, where there is a misjoinder, either of parties or causes of action, or breaches, the demurrer must be to the whole (Kingston v. Nottle, 1 M. & S. 355; Jennings v. Newman, 4 T. R. 347; 2 Saund. 210 *a*). If a plea or replication, which is entire, be bad in part, it is in general bad for the *whole, and a demurrer to the whole should be adopted [*950] (1 Saund. 28 (2), 37 (1); 2 Saund. 124; Com. Dig. Pleader, Q. 3; Parker v. Atfield, 1 Salk. 312; Trueman v. Hurst, 1 T. R. 40; Duffield v. Scott, p. 949); except in the case of a plea of set-off containing a statement that distinct debts are due from the plt., these averments being similar to separate counts, and if one part be good, a general demurrer to the whole

will be bad (*Dorosland v. Thompson*, 2 Bla. R. 910). Where a deft. demurs to a replication and new assignment "for that they are not, nor is either of them sufficient in law," and shows for causes that the replication is bad in itself, and both together bad for duplicity, the demurrer is divisible, and judgment may be given for the deft. on the replication, and for the plt. on the new assignment (*Monkman v. Shepherson*, 11 Ad. & E. 411; see also *Calvert v. Moggs*, 10 Ad. & E. 632).

General or Special.] A demurrer is either general or special. A general demurrer lies only for defects in substance, and excepts to the sufficiency in general terms, without showing specially the nature of the objection. A special demurrer is only for defects in form, and adds to the terms of a general demurrer a specification of the particular ground of exception (*Co. Lit.* 72 a; *Steph. Pl.* 159; *Heard v. Baskerville*, Hob. 232; *Morgan v. Sergeant*, 1 B. & P. 59; *Bac. Abr.* N, 5). Thus, if a defective title be alleged, it is a fault in substance for which the party may demur generally; but, if a title be defectively stated, it is only a fault in form, which must be specially assigned for cause of demurrer (1 *Saund.* 337).

At common law a special demurrer was not necessary except in case of duplicity (*Powdick v. Lyon*, 11 East, 565), and the party was permitted to take advantage of the most trifling objection on general demurrer (*Anon.* 3 *Salk.* 122). But by 27 Eliz. c. 5, after reciting "that excessive charges and expenses, and great delay and hindrance of justice have grown in actions and suits between the subjects of this realm, by reason that upon some small mistaking or want of form in pleading, judgments are often reversed by writs of error, and often-times, upon demurrers in law, given otherwise than the matter in law and the very right of the cause doth require, whereby the parties are constrained either utterly to lose their right, or else, after long time and great trouble and expenses, to renew again their suits; it is enacted that from thenceforth, after demurrer joined and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, defect, or want of form, in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring, and shall specially and particularly set down, and express together with his demurrer, and that no judgment to be given shall be reversed by any writ of error for any such imperfection, defect, or want of form, as is aforesaid; except such only as is before excepted;" and by 4 & 5 Anne, c. 16, where issue is joined on any demurrer in any court of record, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission or defect, in any writ, return, plaint, declaration, and other pleading, process, or cause of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same, notwithstanding that such imperfection, omission, or defect, might have theretofore been taken to be

[*951] *matter of substance, and not aided by 27 Eliz. c. 5, so as sufficient matter appear in the said pleadings, upon which the court may give judgment according to the very right of the cause, and therefore no advantage or exception shall be taken of or for an immaterial traverse, or of or for the default of entering pledges upon any bill or declaration, or of or for the default of alleging the bringing into court any bond, bill, indenture, or other deed whatsoever, mentioned in the declaration or other pleadings, or of or for the default of alleging of the bringing into court letters testamentary, or letters

of administration, or of or for the omission of *vi et armis, et contra pacem*, or either of them, or of or for the want of averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*, or of or for not alleging *prout patet per recordum*, but the court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down, and shown for cause of demurrer. The act does not extend to any proceedings upon any penal statute (sect. 7; but see 4 Geo. II. c. 26, s. 4; Myddleton v. Wynn, Willes, 601).

No defects in form can, since these statutes, be taken advantage of on general demurrer. If therefore the defect be not clearly one of substance, it is safer to demur specially, for then the party may take advantage of those particularly specified, as well as any substantial defect though not specified (1 Saund. 337 *b*, n. 3; Tidd, Pr. 9th ed. 695; Anon. 2 Wils. 10).

In point of form no precise words are necessary in a demurrer, and a plea which is in substance a demurrer, though very informal, will be considered as such (5 Mod. 131; King v. Butler, 3 Lev. 222; 2 Saund. 129, n. 6; Plow. 400). There cannot be a demurrer to a demurrer (Bac. Abr. Pleas, N, 2; Lamplough v. Shortridge, Salk. 219; Steph. Pl. 2nd ed. 281).

A general demurrer to a plea in *abatement* will in all cases suffice (Lloyd v. Williams, 2 M. & S. 485). By R. G. H. T. 4 Will. IV. r. 14, a prescribed form of demurrer and joinder is given (see *post*, "*Precedents*"), and as these rules prescribe one uniform precedent for a demurrer or joinder whatever may be the form of action, it will be observed that the ancient variations in commencements and conclusions of demurrers and rejoinders are abolished, and r. 2 orders that in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated, and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the court or judge, and leave may be given to sign judgment as for want of a plea, provided that the party demurring may at the time of the argument insist upon any further matters of law of which notice shall have been given to the court in the usual way. Special demurrers are within this rule, and the rule in such case will be complied with by a statement that the points intended to be argued are those stated in the demurrer itself (Verbecke v. Pearse, 6 Sco. 406; Linnus v. Pound, 2 M. & W. 240; Berridge v. Priestley, 5 Dowl. 306); and where several grounds are stated in the margin those on which the party means to rely need not be stated (Whitmore v. Nichols, 5 Dowl. 521). A demurrer to a plea stated in the body of it, and also in the margin, "that the plea was insufficient for the like grounds of objection as those taken to a former plea," held, a sufficient statement of the special causes of demurrer (Braham v. Watkins, 4 D. & L. 42, Ex.). A statement in the margin that the matters disclosed in the plea contain no answer to the declaration is insufficient (Ross v. Robinson, 3 Dowl. 779). The deft. after having *had time to plead demurred to the declaration, which was in debt [*952] on a bill of exchange, with the common counts, thus: that the declaration is not sufficient in law, and also that an action of debt will not lie, and that the bill should have been stated to be for value received: held, that plt. was not justified in signing judgment as upon a sham demurrer (Lyons v. Cohen, 3 Dowl. 243). A special demurrer for duplicity must point out expressly, and not by way of description, in what the duplicity consists, in pursuance of 27 Eliz., and R. G. M. T. 1664 (Smith v. Clinch, 2 Gal. & Dav. 225; 6 Jur. 150). And r. 3 orders that no rule for joinder in demurrer shall be required, but the party demurring may demand a joinder in

demurrer, and the opposite party shall be bound within four days after such demand, to deliver the same, otherwise judgment. This rule does not dispense with the *demand* of a joinder in demurrer (Billing v. Knightly, 7 Sco. 844; 5 Bing. N. C. 629; 3 Jur. 980); and it must be demanded before the issue can be made up by the party demurring (lb.). The plt. having demurred to the deft.'s plea cannot add the joinder for him, but he has the four days in which he is bound to deliver the joinder (Mullins v. Cox, 7 Dowl. 660). R. 4: To a joinder in demurrer no signature of a serjeant or counsel shall be necessary. In order to entitle a party to demur the defect must appear on the face of the previous pleadings (Helyer v. Whiteacre, Moo. 551). But where a defective deed is partially stated in the declaration, or contains matter which qualifies the part stated, the deft. may crave oyer of the deed, and set it out in full, and then demur: for by thus setting out the deed he makes it part of the declaration (see 2 Saund. 60, *in notis*; and see also 1 Saund. 295 *b*). If, however, the variance between the deed as described, and as set out on oyer, be in some part immaterial to the action, the demurrer will not be supported, not even if the variance be such as would be available on a plea of *non est factum* (Ross v. Parker, 1 B. & C. 358; 2 D. & R. 662). The same practice may be adopted where a deed is untruly stated in a plea, and the plt. instead of replying may demur (1 Saund. 316, 317). As to the old forms of demurrers and joinders, see 1 Ch. Pl. 698.

With respect to the degree of particularity with which, under these statutes, the special demurrer must assign the ground of objection, it is insufficient to object in general terms, that the pleading is uncertain, defective, &c., but it must be shown specially in what particular the form is defective (Com. Dig. Pleader, Q, 9; Lambert v. Stroother, Willes, 220; 1 Saund. 160, n. 1; Cheasley v. Barnes, 10 East, 79; Ryley v. Parkhurst, 1 Wils. 219; Bowles v. Lusty, 1 Moo. & P. 102; 4 Bing. 428; Smith v. Clinch, 2 Gal. & Dav. 225).

If the deft. is under terms of pleading issuably, he cannot demur specially for a mere defect in form, though he may for a defect in substance (Berry v. Anderson, 7 T. R. 530; Cuming v. Sharland, 1 East, 411; Devey v. Sopp, Stra. 1185; Gray v. Ashton, 3 Burr. 1788; Bell v. Da Costa, 2 B. & P. 446; Tidd, Pr. 9th ed. 472; Holmes v. Hodgson, 8 Moo. 379; Newnham v. Dowding, 1 Chit. Rep. 711). Where the deft. was advised he had a substantial ground of demurrer, the court set aside the judgment signed for want of plea, upon terms (Bing v. Anderson, 7 T. R. 530). As to when a demurrer is an issuable plea, see Barker v. Gleadon, 5 Dowl. 135, per Coleridge, J.

In the Queen's Bench, it is said, such terms preclude a special demurrer for form by deft. to any other subsequent pleadings (2 B. & P. 446; 2 Stra.

1185; 7 T. R. 530); but, in Common Pleas, it is otherwise (Betts [*953] v. Applegarth, T. T. 1817). It is said, *def., when under such terms, cannot demur specially, though for a defect in substance (Tidd, Pr. 478; Blich v. Dymoke, 1 Bing. 379; *sed quære*, and see Newnham v. Dowding, 1 Chit. Rep. 711). If plt. amend his declaration after the deft. has obtained time to plead on the usual terms of pleading issuably, &c., the latter may demur specially to the declaration (Children v. Mannering, 8 Dowl. 120; 2 Jur. 858).

Effect of.

With respect to the effect of a demurrer, it is a rule that a demurrer admits all such matters of fact as are sufficiently pleaded (Gundry v. Feltham, 1 T. R. 334; Com. Dig. Q, 6; 1 Saund. 337 *b*, n. 3; Steph. Pl. 155; 11 Pri.

235). The meaning of which rule is, that the party, having had his option whether to plead or demur, shall be taken, in adopting the latter alternative, to admit that he has no ground for denial or traverse (Steph. Pl. 161). Thus, in assumpsit, stating a grant of a thousand trees, to be cut down in three years, and that, having cut down eight hundred, the deft. promised to allow him to cut down the remaining two hundred if he would not cut them down then; to which the deft. pleads that he had cut down the thousand trees before the promise, the plt. demurs, the demurrer is a confession that he had cut down the thousand trees before the promise (Yelv. R. 195). So, in covenant, if the deft. plead covenants performed, and the plt. reply, assigning a breach, to which the deft. demurs, the deft. by his demurrer, confesses the breach and contradicts his own plea (Specott v. Shères, Cro. Eliz. 829). In debt on a bond, conditioned to pay if A. died without issue living, the deft. pleads that A. died having issue living, at B., and the plt. demurs for want of a good venue, the demurrer admits that A. had issue living at the time of his death (Dy. R. 15 a). So, in debt on bond conditioned to pay within twenty days after the return of a ship, or at the end of eighteen months, the deft. pleads that the ship returned within eighteen months, and that he paid within twenty days after, and the plt. replies, traversing the payment, to which the deft. demurs, the demurrer admits the breach, and it was therefore holden that the plt. should recover (6 Moo. 349; Com. Dig. Pleader, Q, 5).

But a demurrer to a declaration in slander does not admit the particular words spoken to have been spoken with the intent attributed to them by the innuendo (Wheeler v. Haynes, 1 P. & D. 55); and the admission made by the demurrer can only be used upon the argument; the statements in a special plea are not therefore evidence for the plt. on the general issue, although the jury are to assess the damages as well as try the case on the general issue (Montgomery v. Richardson, 5 C. & P. 247; Firmin v. Crucifix, ib.). If there be a reason for denying the facts it is better not to demur, especially if the defect in the opposite pleading be of so substantial a nature that, after verdict the judgment might be arrested, or a writ of error could be sustained (4 Rep. 14 a).

The party should not demur unless he is certain that his own previous pleading is substantially correct; for it is a rule, that, on demurrer, the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it (Le Bret v. Papillon, 4 East, 502). Thus, if a plea which is demurred to be bad, the deft. may avail himself of a substantial defect in the declaration unless aided by pleading over (1 Saund. 119, n. 2; ib. 285, n. 5; Hob. 56; Bullythorpe v. Turner, Wills. 476; Darling v. Gurney, 2 Cr. & M. 226; and if the first fault would constitute *error, the court will decide upon it though it be not noticed in the margin of the demurrer-book (Darling v. Gurney, 2 Dowl. [*954] 104; Scott v. Chappelow, 4 Man. & G. 336; but see Parker v. Riley, 3 M. & W. 230; Bayly v. Harman, 3 Sco. 384). So, on demurrer to the replication, if the court think the replication bad, but perceive a substantial fault in the plea, they will give judgment, not for the deft., but the plt. (Anon. 2 Wils. 150), provided the declaration be good; but if the declaration also be bad in substance, then upon the same principle, judgment would be given for the deft. (5 Rep. 29 a; Steph. Pl. 162).

When on a special demurrer to a plea the deft. objects that the declaration is bad, if it appear that there is any matter in the declaration which is good on general demurrer, and is sufficient to sustain the action, the plt. is entitled to judgment, since the case must be considered as if there were a general demurrer to the whole declaration, which would in such case be too large

(*Boydell v. Jones*, 4 M. & W. 446; 7 Dowl. 210); but this rule will not enable the parties to rely upon other parts of the pleading in the cause which are not under the consideration of the court on the demurrer; but are the subject of an issue in fact, for the court can only look to that part of the record upon which the demurrer arises, and not to collateral parts of the record not connected with it (*Davies v. Penton*, 6 B. & C. 216); but in order to enable the court to adjudge in favour of such right, the plt. must put his action upon that ground; and, therefore, where on a covenant to perform an award, and not to prevent the arbitrators from making an award, the plt. assigned as a breach in his declaration, that the deft. would not pay the sum awarded only, to which the deft. pleaded that before the award was made, he revoked by deed the authority of the arbitrators, to which plt. demurred, and the plea was held good as being a sufficient answer to the breach alleged, although the matter stated in the declaration would have enabled the plt. to have maintained his action, if he alleged as a breach that the deft. prevented the arbitrators from making their award (*Marsh v. Bulteel*, 5 B. & A. 507). But the rule does not apply where the objection to the previous pleading is a defect in form, and which would be aided on a general demurrer by the stat. Eliz. and Anne (*ante*, p. 950, 951; *Humphreys v. Bethily*, 2 Vent. 222; *Steph. Pl.* 177). Upon a demurrer to a plea in abatement no objection can be taken to the form of declaration (*Bellasyre v. Hester*, *Lutw.* 1592; *Routh v. Weddell*, *ib.* 1667; *Powis v. Williams*, *ib.* 1604; *Hartrop v. Hastings*, *Salk.* 212; *Steph. Pl.* 5th ed. 157); and pleading over will cure many defects in form (see 1 Ch. Pl. 7th ed. 701).

Precedents.

General demurrer to a declaration.—Special demurrer to a declaration.

In the Q. B. (C. P. or Ex. of P.). On the day of , A. D. 1850.
 C. D. ats. } The deft. by — his attorney (or *in person*) says that the declaration is
 A. B. } not sufficient in law. (Signature.)
 The deft. or plt. intends to argue } (*A special demurrer is the same as the above form to*
 that (*here state some one matter of* } *the end, concluding thus:*) And the deft. according to
law intended to be argued). } the form of the statute in such case made and provided
 states and shows to the court here the following causes
 (*State the points to be relied on:* } of demurrer to the said declaration (or the said —
or, if the points are specified in } count of the said declaration or plea) that is to say
the body of the demurrer, then say, } that (*here set forth the cause of demurrer, and con-*
 the points of law intended to be } *clude thus:*) and also that the said declaration (or
 argued are those specified in the } said — count of the said declaration or plea) is in
 body of the demurrer.) } other respects uncertain informal and insufficient, &c.
 (Signature.)

[*955] *For other forms of demurrer, see 3 Ch. Pl. 534—546; Ch. Pl. by Pearson, Demurrer.

Joinder in demurrer to a declaration.

In the Q. B. (C. P., or Ex. of P.). On the day of A. D. 1850.
 A. B. } And the plt. saith, that the said declaration (or said — count or plea), is suffi-
 v. } cient in law.
 C. D. } (No signature required.)

DEPOSITIONS.

The depositions of a witness taken in a judicial proceeding in the presence of the party there charged is not admissible in another proceeding against that party, on the ground that he was present, and had the opportunity of cross-examining (*Melen v. Andrews*, Moo. & M. 336). The evidence of a witness since dead, on a trial between the same parties, may be proved either by the judge's notes, or by those taken by any other party who will swear to their accuracy, or by any person who can swear from memory to the very words of the former witness (*Doncaster (Mayor) v. Day*, 3 Taunt. 262; *Strutt v. Bovingdon*, 5 Esp. 57; *Ennis v. Donnisthorpe*, 1 Ph. Ev. 6th edit. 219; *R. v. Jolliffe*, 4 T. R. 290). An examined copy of an affidavit of a third person filed at chambers, and used by the deft. on a motion, is evidence against him on a subsequent trial (*Doe v. Wood*, Manning's Index, 122; *Rosc. Ev.* 86).

Before the 1 Will. IV. c. 22, depositions taken on interrogatories under a commission were not receivable in evidence without producing the commission (*Bayly v. Wylie*, 6 Esp. 85; *Rowe v. Brenton*, 8 B. & C. 765), unless the depositions were of long standing (*lb.*). But when the affidavits were taken before a commissioner of the Queen's Bench, it was held sufficient to show that he acted as such without proof of the commission (*R. v. Howard*, 1 M. & Rob. 187); and where the depositions were taken before a judge by consent in a cause, it seems they may be proved by production of a copy signed by the judge and delivered by his clerk without verifying the copy (*Duncan v. Scott*, 1 Camp. 103). But, in order to admit the depositions, it must be proved, by one who knows the fact of his knowledge, that the witness is abroad, absent, dead, or not to be found (*B. N. P.* 239; *Anon.* 2 Salk. 691; *Benson v. Olive*, 2 Stra. 920; *Robinson v. Markiss*, 2 M. & Rob. 375). Where the witness had sailed, but was driven back to port by contrary winds at the time of the trial, this is a sufficient absence to admit the depositions (*Fonsick v. Agar*, 6 Esp. 92); but it must be proved that some effort has been recently made to procure the witness's attendance (*Falconer v. Hanson*, 1 Camp. 172); and evidence that he is a sea-faring man, and that he lately belonged to a vessel lying at a certain place, will not suffice (*lb.*). If the commission direct the depositions to be returned, certified copies returned are not admissible (*Clay v. Stephenson*, 7 Ad. & E. 185). If the depositions are read on the part of the plt., the whole, including the answers to the cross interrogatories, must be read as part of his case (*Temperly v. Scott*, 5 C. & P. 341).

An examined copy of an affidavit filed in chancery is admissible in evidence (*R. v. James*, 1 Show. 397; *Crook v. Dowling*, 3 Doug. 75; *Rees v. Bowen*, M'Cle. & Yo. 383) without proof of the handwriting of the party making it; but it must appear that it has been used or acted upon by the deft. (*lb.*). But it is requisite to prove the handwriting in an indictment for perjury (*lb.*).

*The powers of 33 Geo. III. c. 63, s. 40, with reference to depositions in India, have been extended by 1 Will. IV. c. 22, to all [*956] her majesty's dominions, and to all actions at Westminster and the courts of law there; and the judges have power to order the examination of witnesses by certain officers or other persons named in the order, or to issue commissions for the examination of them in places out of their jurisdiction. Sect. 10 enacts, no examination or deposition to be taken by virtue of that act shall be read in evidence at any trial, without the consent of the party against whom the same may be offered, unless it shall appear, to the satisfaction of the judge, that the examinant or deponent is beyond the juris-

diction of the court, or dead, or unable, from permanent sickness or other permanent infirmity, to attend the trial; in all or any of which cases the examination and depositions certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions. See "ADMISSIONS," "AFFIDAVIT," "BANKRUPT," "CHANCERY."

DESCENT.

See "EJECTMENT BY HEIR," "PEDIGREE."

DETINUE.(a)

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Nature and Form of Remedy.

Detinue lies upon a purchase, bailment, or finding for the recovery of goods in specie, or damages for detaining them; and this action is the only remedy by suit at law for the recovery of a personal chattel *in specie*, unless in those cases where the party can regain possession by replevin (3 Bla. Com. 146, 152; *Kettle v. Bromsall*, Willes, 120; Com. Dig. Detinue, A; F. N. B. 138; see "REPLEVIN"). It has been supposed it does not lie for goods *tortiously* obtained by theft. (see 3 Bla. Com. 152; *sed vide* Jon. W. 173; Mod. 122; 1 Ch. Pl. 136). The gist of the action is the wrongful detainer, and not the original taking (3 Bla. Com. 132; Co. Lit. 286 b; *Isaac v. Clark*, 2 Bulst. 308; *Gladstone v. Hewitt*, 1 Cr. & J. 565; *Clossman v. White*, 18 L. J. 151, C. P.). The goods sought to be recovered must be capable of being identified by some means. Thus, it lies for a horse or cow, or money in a bag; but for money or corn not in a bag or chest, it *cannot be supported (3 Bla. Com. 152; *Isaac v. Clark*, [*957] 2 Bulst. 308; *Banks v. Whitstone*, Moo. 394; Co. Lit. 286 b; Com. Dig. Detinue, A; *Atkinson v. Baker*, 4 T. R. 229, 231). It lies for title-deeds and charters (2 Saund. 47 a; Com. Dig. Detinue, A; *Atkinson v. Baker*, 4 T. R. 229, 231). It lies upon a contract for not delivering a specific chattel in pursuance of a bailment or other contract (F. N. B. 138; *Kettle v. Bromsall*, *supra*; 3 Bla. Com. 152). To support the action, property in some particular chattel must be vested in the plt. (1 Ch.

(a) 2 U. S. Dig. Tit. "Detinue," p. 65; 1 Supp. U. S. Dig. p. 554; 1 Ann. Dig. p. 165; 2 Ann. Dig. p. 100; 3 Id. p. 135.

Pl. 136, citing 3 Wood, 104; 1 Dy. 24 *b*). It does not lie for real property (Coupledike v. Coupledike, Cro. Jac. 39). The plt. must have the therefore an absolute or general property in certain specific goods, and the same title in the property to support this action as he needs have in trover; and right to the immediate possession thereof, will support the action, although the plt. has never had the actual possession; if, therefore, goods be delivered to A. for the purpose of delivery to B., B. may maintain detinue for the goods (2 Saund. 47 *a*, n.; 1 Bro. Abr. Detinue, pl. 30, 45; 1 Rol. Abr. 606; Com. Dig. Detinue, A; Phillips v. Robinson, 4 Bing. 111); and an heir may maintain detinue for an heir-loom; but a reversionary interest will not support the action (Gordon v. Harper, 7 T. R. 9); and the plt. must have the property in the goods at the time the action was commenced (Phillips v. Robinson, *supra*).

A bailee may maintain the action (Bro. Abr. Detinue; 1 Saund. 47 *b, c, d*; Phillips v. Robinson, *supra*). Where the owner delivered title-deeds to a bailee, and then conveyed away the estate, the new proprietor must bring the action for the title-deeds (Phillips v. Robinson, *supra*). As a general rule the owner of the estate has a right to the title-deeds (Harrington v. Price, 1 B. & Ad. 170); unless a valid lien be created by some person having at the time a right to do so (Ogle v. Storey, 4 B. & Ad. 735); and an heir who is entitled to an estate *pur autre vie*, as special occupant, may bring detinue for the recovery of the title-deeds relating to the estate (Atkinson v. Baker, 4 T. R. 229, 231); and it seems that the husband alone must bring the action for the recovery of the goods of his wife which came to the defts. hands before her marriage (B. N. P. 50); but see Bern v. Mattaire, Rep. tem. Hardw. 120).

The action lies against the person who has the actual possession of the chattel, and who acquired it by lawful means, as by bailment, delivery, or finding (Kettle v. Bromsall, Willes, 118; Co. Lit. 286; F. N. B. 138, E.; Bac. Abr. Detinue). If goods taken away continue in specie in the hands of the wrongdoer's executor, the executor is liable in replevin or detinue (Bro. Abr. Detinue, pl. 19). The action does not lie against an executor on a bailment to the testator, unless the goods came to the possession of the former (Bro. Abr. Detinue, 19; Isaac v. Clark, 2 Bulst. 308; 1 Ch. Pl. 138); nor does it lie against a bailee who, before demand, has lost the goods by accident. But if he wrongfully deliver them to another his liability continues (Bro. Abr. Detinue, pl. 1, 33, 34, 40; Devereux v. Barclay, 2 B. & A. 703; Mertens v. Adcock, 4 Esp. 251). So, if he have *bona fide* sold the chattel before action brought (Jones v. Dowle, 1 Dowl. N. S. 391); and if the deft. by his conduct induce the plt. to bring the action against him, although it does not appear that he had the general controlling power over the goods, he is liable (Dyer v. Pearson, 3 B. & C. 38; Hall v. White, 3 C. & P. 136). If the bailment were to the husband and wife after marriage, the husband alone must be sued; but if to the wife before marriage the action must lie it seems against both (Isaac v. Clark, *supra*; Co. Lit. 351 *b*; 1 Ch. Pl. 138). If goods bought by an infant remain *in specie*, and he refuse to pay *for them, the plt. ought to demand them, and if refused sue [*958] in detinue, in which a count may be joined in debt, and if he plead infancy to the latter the plt. will recover on the former count (1 Ch. Pl. 138); if it be doubtful whether a contract by deft. can be proved for the purchase of goods of the plt. in his possession, it is advisable to insert a count in debt for goods sold, and another, in detinue, for the chattel; for debt and detinue may be joined (see 2 Saund. 117 *b*; Bro. Abr. Joinder in Actions, 97). If A., without authority of B., pledge his goods with C., B. may maintain an

action of detinue against A. and C. jointly (Garth v. Howard, 5 C. & P. 346; 1 Moo. & S. 628; see *post*, "TROVER").

Where cattle are distrained as damage feasant, if sufficient tender is made after distress and before impounding, detinue will lie (Gulliver v. Cousens, 7 Man. & G. 788); and in some cases this renders detinue a very advantageous form of remedy. Thus, where a deft. has in his possession personal property formerly of the plt., and it be doubtful whether a contract by the deft. for the purchase thereof can be proved, it is advisable to insert a count in debt for goods sold, and another count in detinue, that the plt. may recover on one ground or the other (see 2 Ch. Pl. 594, n. (a), *supra*).

A. left a picture, which was his property, in the rooms of C., who was an auctioneer; B. was in company with A. when he went to C.'s rooms with the picture; B. owed C. 8*l.*, and had advanced A. some money on the picture, when A. wanted his picture back again, and offered to pay for the warehouse room; C. said that the cost of keeping the picture was 5*s.*, and demanded B.'s debt in addition: held, a waiver of the demand for warehouse room, and that detinue would lie by A. against C. for the value of the picture without any further offer to pay for the cost of keeping of it (Dicks v. Richards, 1 Car. & M. 626).

Since the abolition of wager of law by 3 & 4 Will. IV. c. 42, s. 13, this action has become more frequent.

Form of Pleadings.

Declaration.] The venue is transitory (Com. Dig. Action, n. 6), unless against a justice of the peace. By R. H. T. 4 Will. IV. venue shall not be repeated in the body of the declaration. The day stating the delivery to deft. is immaterial. Much certainty and accuracy are necessary in the description of the things demanded, and greater than in trover or replevin (2 Saund. 74 a, b; Co. Lit. 286 b; Bac. Abr. Detinue, B; Com. Dig. Pleader, 2 X, 2; Kettle v. Bromsall, Willes, 120). It is unnecessary, however, to state the date of the deed (Ulwin v. Westbrooke, 1 Wils. 116). Where the action is for several articles, the value of each need not be stated separately in the declaration, though the jury should sever the value of each by their verdict (Pawley v. Holly, 2 Bla. R. 853; Selw. N. P. 670; Com. Dig. Pleader, 2 X, 2). The contract of bailment, if any, should be truly stated (2 Ch. Pl. 428, n. (e); but see Gladstone v. Hewitt, 1 Cr. & J. 565). Where there has been a special bailment, it is proper to declare in one count, at least, on the bailment (Mills v. Graham, 1 N. R. 146), and to state a special request to re-deliver (Kettle v. Bromsall, Willes, 120; see Back v. Owen, 5 T. R. 409). In other cases, it is sufficient, however, to declare upon the supposed finding, which is not traversable (Doc. Pl. 124; Mills v. Graham, *supra*; Atkinson v. Baker, 4 T. R. 229; Kettle v. Bromsall, *supra*; Walker v. Jones, 2 Car. & M. 672); and the plt. may declare on a bailment to re-deliver on request, yet in his replication rely on a different one (Gladstone v. Hewitt, [*959] *infra*). It seems an averment of a special request to re-deliver is necessary (Willes, 118; 5 T. R. 409). Sufficient damages should be inserted to cover the real value of the goods (Cro. Jac. 628; Com. Dig. Pleader, 2 X, 12).

A declaration for deeds alleged that one T. F., being seised for his own life of a certain freehold estate, conveyed it by lease and release to H. W., his heirs and assigns, that H. W., by a memorandum in writing, and signed by him according to the form of the statute, acknowledged the consideration-money in the above conveyance to be the proper money of W. A., the plt.'s intestate, and that H. W.'s name was made use of in

the conveyance, in trust, for W. A., his heirs, executors, administrators, and assigns; that H. W. delivered the deed and memorandum to W. A., who thereby became possessed of them, and who afterwards died intestate, on which administration was granted to the plt. who thereby became lawfully possessed of the deeds, &c., and being so possessed, afterwards lost them, and that they came into the possession of the deft., who was heir at law of W. A., and who still detained them: held bad on general demurrer, as the deft. held the estate as special occupant (*Atkinson v. Baker*, 4 T. R. 229).

A count in detinue for a bill or note is allowable together with a count for the amount of the bill or note (*Kirkpatrick v. England* (Bank of), 8 Dowl. P. C. 881; see "DECLARATION").

Plea.] The general issue in detinue is *non detinet*; and the R. G. H. T. 4 Will. IV. r. 3, orders that this plea shall operate as a denial of the detention of the goods by the deft., but not of the plt.'s property therein; and that no other defence than such denial shall be admissible under the plea. *Non detinet* merely puts in issue the fact of detention, if the defence be that the plt. was not in possession of the goods, or that the defendant was justified in detaining them, such a defence ought to be specially pleaded (*Richards v. Frankum*, 6 M. & W. 420; 8 Dowl. P. C. 346; 4 Jur. 682; see *Mason v. Farnell*, 1 D. & L. 580); and under this plea the plt. will recover on proof that the deft. has not returned the chattel on demand, having previously delivered it under a supposed contract of sale to a third party (*Jones v. Dowle*, 9 M. & W. 19).

Under the above rule the plt.'s property in or possession of the goods must be traversed, and any special ground of defence must be specially pleaded; but a plea denying the alleged bailment would be demurrable, for that is not traversable, the detainer being the gist of the action (*Walker v. Jones*, 2 C. & M. 672; *Gladstone v. Hewett*, 1 Cr. & J. 565). The plea of not possessed puts only the property of the plt. in issue; and if the deft. have any right to detain arising out of a joint interest, or out of a lien or pledge, he must plead such right specially (*Mason v. Farnell*, 1 D. & L. 576; overruling *Lane v. Jewson*, 12 Ad. & E. 116. For other forms of pleas, see 3 Ch. Pl. 241). In an action of detinue for 1000 yards of broad cloth, and two pieces of other cloth, the deft. claimed a lien for fulling the cloth mentioned in the declaration, and it appeared at the trial that originally eight pieces of cloth had been delivered at the same time to the deft. to be fulled, and that six out of the eight pieces had afterwards been re-delivered; held, that the plea only extended to the two pieces actually detained, and that deft., could not, under that plea, set up a claim of lien for fulling more than two pieces, but should have asserted specifically his claim for the eight (*Coombes v. Noad*, 10 M. & W. 127).

If one joint tenant bring an action of detinue, the objection of nonjoinder of the others can only be taken by plea in abatement (*Broadbent v. Ledward*, 3 P. & D. 45; 11 Ad. & E. 209).

*To a declaration in *detinue*, alleging the delivery, by the plt., [*960] of scrip shares to the deft., to be re-delivered by him to the plt., on request, after the payment to the deft. of a certain sum of money, averring the payment and subsequent request, and complaining that the deft. nevertheless detained the scrip, the deft. pleaded that the scrip were deposited with him as a pledge and security for a sum of money advanced by him to the plt., and that, on repayment thereof to him, he, the deft., tendered and offered to deliver up and return to the plt. the scrip shares, which the plt. then refused to accept and receive from the deft.: held, that the word "detain,"

in a declaration in *detinue*, means that the deft. withholds the goods, and prevents the plt. from having the possession of them; and therefore that the plea was bad, as being an argumentative denial of the detention.

Not only the common bailment, but any special bailment, in a declaration in *detinue*, is surplusage, and not traversable, the gist of the action being the detainer of the plt.'s goods, which the deft. must answer (*Clements v. Flight*, 16 Law J. 11, Exch.; 1 N. P. C. 567; 16 M. & W. 42; 4 D. & L. 261).

Replication.] Although a declaration in *detinue* has stated a bailment to the deft. and his engagement to re-deliver on request, and the deft. has pleaded that the bailment was a security for a loan, the plt. may, without being guilty of a departure, reply that he tendered the debt, and that the deft. afterwards wrongfully withheld the goods (*Gladstone v. Hewitt*, 1 Cr. & J. 565; 1 Tyrw. 450).

The nature of the replication will depend upon the defence set up by the deft.

Precedents.

In the Q. B. (C. P. or Ex. of P.). On the day of A. D. 1850.
Venue to wit. A. B. by his attorney complains of C. D. who has been
summoned to answer the plt. in an action of *detinue* for certain goods and chattels (or
deeds and writings *as the fact is*) of the plt. of great value to wit of the value £
which he unjustly detains from him.

Declaration in *detinue* on a bailment to redeliver on request.

For that whereas the plt. heretofore to wit on &c. (*any day*) delivered to the deft. certain goods and chattels to wit &c. (*describe the property fully*) of the plt. of great value to wit of the value of £ (*insert enough*) to be re-delivered by the deft. to the plt. when he the deft. should be thereunto afterwards requested. Yet the said deft. although he was afterwards to wit on the day and year aforesaid requested by the plt. so to do hath not as yet delivered the said goods and chattels or any or either of them or any part thereof to the plt. but hath hitherto wholly neglected and refused and still doth neglect and refuse so to do and still unjustly detains the same from the plt. to the damage of the plt. of £ and thereupon he brings suit &c.

Declaration on a supposed finding.

For that whereas also the said plt. heretofore to wit on &c. was lawfully possessed as of his own property of certain other goods and chattels to wit (*enumerate them*) of great value to wit of the value of £ and being so possessed thereof he the plt. afterwards to wit on &c. aforesaid casually lost the said goods and chattels out of his possession and the same afterwards to wit on &c. came to the possession of the deft. by finding. Yet the deft. well knowing the said goods and chattels to be the property of him the plt. and of right to belong and appertain to him hath not as yet delivered the said goods and chattels or any or either of them or any part thereof to the plt. although afterwards to wit on &c. requested by the plt. so to do but hath hitherto wholly refused so to do and hath unjustly detained and still doth unjustly detain the same from the plt. to the damage of the said plt. of £ and thereupon he brings suit &c.

[*961] *The like of debt and *detinue* in the same declaration.

[*Commence as ante*, p. 960.] — to wit. A. B. by Y. Z. his attorney complains of C. D. who has been summoned to answer the plt. in an action of debt and *detinue* for that whereas (*here insert the counts in debt, and the conclusion, omitting the words to the damage, &c.; and then insert the counts in detinue for the chattels, &c., as in the last form, to the end, and conclude, to the damage, &c.*).

General issue, *non detinet*.

In the Q. B. (or C. P. or Ex. of P.). On the day of A. D. 1850.
C. D. } And the deft. by his attorney saith that he doth not detain the said
ats. } goods and chattels (*according to the fact*) in the said declaration specified or any
A. B. } or either of them or any part thereof in manner and form as the plt. hath above
thereof complained against him and of this he the deft. puts himself upon the country &c.

Evidence.

The plt. must prove, 1st, his property in the goods; 2ndly, the detainer by the deft.

As to the Proof of Property in the Goods.] The evidence is similar to that in trover; and any person, who has the absolute or general property in goods, and the right to immediate possession, may support this action (see *post*, "TROVER"). It is enough to show that the plt. is entitled to possession of the goods wrongfully withheld by the deft. (*Gladstone v. Hewitt, ante*, p. 960); and in proof of this he may show a different bailment from that stated in the declaration (*Ib.*). An heir may support this action for an heirloom (*Bro. Abr. Detinue*, pl. 30); and, where A. delivers goods to B., to deliver them to C., the latter may support detinue against B.; for the property is vested in him, by the delivering to B. for his use (1 *Rol. Abr.* 606). But, if there be no immediate right of possession, and plt.'s interest be in reversion, he cannot support detinue (*Gordon v. Harper*, 7 *T. R.* 9; *Pain v. Whittaker*, *R. & M.* 100). So, it may be supported by one who had the special property; as, a bailee, &c. The plea of not possessed puts only the property of the plt. in issue (*Mason v. Farnell*, 1 *D. & L.* 570, overruling *Lane v. Jewson*, 12 *Ad. & E.* 116; 1 *Gal. & Dav.* 584). Title-deeds go with the estate; and, if the plt., having deposited them with deft., assign his interest or estate, he cannot sue (4 *Bing.* 106). If a person detain the goods of a *feme covert*, which came to his hands before the marriage, the husband alone may maintain detinue, because the law transfers the property to him, and the detainer is the cause of action (*B. N. P.* 50). Where A. delivers goods to B., who loses them, and D. finds them, and delivers them to J. S., who has a right to them, A. cannot maintain detinue against D., for he is not privy to the delivery by A. (2 *Danv.* 511; *B. N. P.* 51). Where the goods are alleged to come to the deft. by finding, it is sufficient for the plt. to prove that the goods came to the deft. by wrong (*Mills v. Graham*, 1 *N. R.* 140), at least, under *non detinet* by an attorney to an action for not delivering papers to his client after payment of his costs, plt. must prove that they were in deft.'s possession; but it will suffice to show that they were produced by his agent before the master, on taxation of his costs (*Anderson v. Passman*, 7 *C. & P.* 193); and if the deft. set up as a defence that he delivered the papers to R. *in pursuance of a notice from the plt.'s [**962**], attorney to that effect, plt.'s counsel may call R. as a witness in reply, to prove that he received the papers in another right, and R. is a competent witness to prove that he has a lien on them as against the deft. (*Anderson v. Passman, ib.*)

Detainer by Defendant.] The plt. must prove an actual possession of the goods by the deft. (2 *Rol. Abr.* 703; *Wilkins v. Despard*, 5 *T. R.* 112); as the gist of this action is the wrongful detainer, and not the original taking (3 *Bl. Com.* 152). Therefore, *detinue* cannot be supported against the executor of a bailee, if it appear in evidence that he has destroyed the chattel (*B. N. P.* 50); and, where there are several executors, and one only has possession, the plt. will be nonsuited, unless it be against him alone (*Bro. Abr. Detinue*, pl. 19). In detinue for a bond for 100*l.* upon bailment, if deft. plead that he did not receive a bond for such sum, and it is found that he received a bond for a greater sum, there must be a verdict for the deft.; because the bond is not the same as that which the plt. demands (2 *Rol. Abr.* 703; see, further, *post*, "TROVER").

In detinue for a promissory note, the deft. cannot, under *non detinet*, show that he held the note for a party to whom it had been previously indorsed by the plt. (Richards v. Frankum, 6 M. & W. 430); upon an issue denying property in the plt., it is no defence that there are other persons co-tenants with the plts. who ought to be joined in the action (Broadbent v. Ledward, 12 Ad. & E. 209); it is the subject of plea in abatement only (Ib. *ante*, p. 960).

Damages, Value, &c.] The language of the judgment being in the alternative, that the plt. do recover the goods or the value thereof, it is incumbent on the jury to find the value of every particular thing demanded (see Anderson v. Passman, 7 C. & P. 193; Pawley v. Holly, 2 Bla. R. 853; Sandford v. Alcock, 10 M. & W. 689); it is the duty of the plt. to prove the value of the articles he sues for (Anderson v. Passman, *supra*); and, if they give damages and costs, and no value, the defect cannot be supplied by a writ of inquiry (Cheney's case, 10 Rep. 119; 1 Selw. N. P. 670; Herbert v. Walters, Salk. 206; *post*, "TROVER"). In detinue for several things the court will not assess the damages, on motion, as to one article, and strike it out of the declaration on delivery of it (Phillips v. Hayward, 3 Dowl. P. C. 362).

In *detinue* for the detention of certain railway scrip re-delivered to the plt. after action brought and before verdict, the jury may, as a measure of damages, take into consideration the difference between the value of such scrip at the time of the demand and their value at the time of such re-delivery. In such action, when by reason of a re-delivery before verdict a subsequent delivery becomes impossible, the jury may find the facts specially, and so confine themselves to an assessment of damages; and in such case the form of judgment may be simply that the plt. do recover his said damages and costs (Williams v. Archer, 17 Law J. 82, C. P.).

DEVISE.

See "EJECTMENT BY DEVISEE."

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*DILAPIDATIONS.

See Grady on "FIXTURES AND DILAPIDATIONS," and *post*, "LANDLORD AND TENANT," "LEASE."

DISCLAIMER.

See "EJECTMENT BY DEVISEE."

DISTRESS, ILLEGAL.(a)

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Form of Remedy.

What Things may be distrained.] The horse of a customer standing at livery in the stables of a livery-stable keeper is not exempt from distress for rent due to the landlord of the premises (*Parsons v. Gingell*, 11 Jur. 437, C. P.). *Sem'le*, if articles are sent to remain at a place, they are distrainable; if sent for a particular purpose, and the remaining at the place be an incident necessary for the completion of such purpose, they are not (*Parsons v. Gingell*, 16 Law J. 227, C. P.). Goods in the hands of a commission-agent for sale in the way of business are exempt from distress (*Findon v. McLaren*, 6 Q. B. 891; 14 Law J. 183; see further upon this subject, Com. Dig. Distress, B, 1, 2, 3, 4; C, 5).

By the common law, any irregularity committed in the proceedings of a distress rendered the party a trespasser *ab initio* (Bac. Abr. Trespass, B.; 8 Rep. 146); and it is still so in distresses for damage feasant (*Wilder v. Shun*, 8 Ad. & E. 547). But, in the case of a distress for rent, the law has been entirely changed by 11 Geo. II. c. 19, s. 19, which enacts that, "When any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or his *or their agents, the distress itself shall [*964] not therefore be deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers *ab initio*, but the party or parties aggrieved by such unlawful irregularity shall and may recover full satisfaction for the special damage, he, she, or they shall have sustained thereby, and no more, in an action of trespass or on the case, at the election of the plt. or plts.; trover, therefore, since this act, will not lie (*Wallace v. King*, 1 H. Bl. 13); nor indeed trespass, unless for some act for which, independent of the statute, trespass would lie (*Nussing v. Kemble*, 2 Camp. 115); nor can the goods which constitute the excess be recovered in trover (*Whitworth v. Smith*, 1 Moo. & R. 193), and where the distress was illegal in its inception trespass will lie (see *Inland v. Johnson*, 1 Bing. N. C. 162). Trespass or trover is a proper form in all cases where the distress is *wholly* illegal (*Etherton v. Popplewell*, 1 East, 139), and where there has been an excessive distress, if it appear on the face of the record to be so very excessive, that the distrainer must be considered as a trespasser for taking it; as, in dis-

(a) See 2 U. S. Dig. Tit. "Distress," p. 94; 1 Supp. U. S. Dig. p. 582; 1 Ann. Dig. p. 175; 2 Id. p. 107; 3 Id. p. 145.

training six ounces of gold and a hundred ounces of silver for the sum of 6s. 8d.; for here the excess was not only palpable, but specific (Crowther v. Ramsbottom, 7 T. R. 658). In case for an excessive distress, though the warrant of distress be for a greater sum than is really due, the plt. is not entitled to a verdict unless the goods seized are excessive in regard to the sum really due (Crowder v. Self, 2 Moo. & R. 190). If an excessive distress be abused, that is a separate cause of action (Lynne v. Moody, 2 Stra. 851); or, if to such a distress be added any other distinct trespass, as that of turning the plt. out of his house, for such additional act an action of trespass will lie (Etherton v. Popplewell, 1 East, 139). But, in general, the remedy to be pursued for an excessive distress must be wholly founded on the statute of 52 Hen. II. c. 4 (Woodcroft v. Thompson, 3 Lev. 48; 2 Inst. 104, 131; Lynne v. Moody, *supra*; Hutchins v. Chambers, 1 Burr. 589; Holland v. Bird, 10 Bing. 15; Baylis v. Fisher, 7 Bing. 153); and trespass or trover are not in general maintainable for it. The action is not maintainable after a judgment recovered in replevin (Phillips v. Berryman, 1 Selw. N. P. 681). For driving or impounding a distress contrary to the directions of the statute 1 & 2 Ph. & Mary, c. 12, the remedy must be on that act; for, where, in an action of trespass brought for the taking of cattle, in which the deft. pleaded damage feasant and an impounding within three miles, and the plt. replied that the impounding was in another county, the court held it a departure, because the declaration was founded upon the common law, and the replication upon a statute; observing that, it being a statutory offence, the plt. ought to have brought his action upon the statute (Woodcroft v. Thompson, 3 Lev. 48; Mortimer v. Moore, 8 Q. B. 294). And, in a later case, where, on a justification for impounding cattle damage feasant, it appeared that the cattle were taken to the next pound, in another county, the court held that it did not make the distrainer a trespasser *ab initio*, although it subjected him to the penalties of the statute (Gimbart v. Pelah, 2 Stra. 1272). By 52 Hen. III. c. 4, it is punishable to convey the distress out of the county (see Burn, J. 26th ed. 990). Where growing rent has been reduced by payment of the land tax, if the landlord distrain for the whole rent reserved the tenant may properly sue in case (Carter v. Carter, 5 Bing. 406; 2 Moo. & P. 723). Case does not lie for detaining cattle distrained damage feasant, where tender of sufficient amends was made after the cattle had been impounded (Sheriff v. James, 1 Bing. 341; see West v. Nibbs, 17 Law J. 150, C. P.; [*965] 4 C. B. 172). An indictment or *information will not lie for an excessive distress (Rex v. Lesingham, 1 Lev. 299; S. C. 1 Ld. Raym. 193).

The plt. has frequently the option of declaring in case or trespass. Thus, where a distress has been made for rent, and there is no rent due, trespass or case may be supported on the 1 Will. & Mary, st. 1, c. 5, s. 5; and so, where a distress is made after a tender of the rent, and there has been no subsequent demand (Virtue v. Beasley, 1 Moo. & R. 21; Branscombe v. Bridges, 1 B. & C. 145; S. C. 2 D. & R. 256; S. C. 3 Stark. 171; Holland v. Bird, 10 Bing. 15; 3 Moo. & S. 363). But otherwise, where the tender is not made until after the distress has been impounded (Ellis v. Taylor, 10 Law J. 46, Exch.; 8 M. & W. 415); *quære* if maintainable on allegation and proof of malice (Ib.). So, if the party turn the plt. out of possession or continue in possession an unreasonable time, more than five days, trespass or case lies (Etherton v. Popplewell, 1 East, 139; Winterbourne v. Morgan, 11 East, 395; Messing v. Kemble, 2 Camp. 115; Pitt v. Shew, 4 B. & A. 208; 3 Stark. 171). So, where a party taking a distress damage feasant, has been guilty of any irregularity, making him a trespasser *ab initio* (8 Rep. Abr. Trespass, B.). So, where the distress was illegal in its inception,

trespass lies (*Ireland v. Johnson*, 1 Bing. N. C. 162); so it seems for a wrongful continuance in possession, after distress made (*Ladd v. Thomas*, 4 P. & D. 7, *per* Lord Denman, C. J.). But the tenant may waive case and declare in trespass (*Pitt v. Shew*, *supra*; *Branscomb (Lady) v. Brydges*, 2 D. & R. 256; 1 B. & C. 145); if goods are removed by the landlord, which were not taken originally under the distress, nor included in the inventory, because they were not discovered at the time, the tenant may maintain trover for them (*Bishop v. Bryant*, 6 C. & P. 484). Trover lies against a landlord who makes a second distress for the same rent, when he might have taken sufficient at first; so where, having taken a sufficient distress, he voluntarily abandons it (*Dauron v. Cropp*, 1 C. B. 981).

An action will lie for an excessive distress in taking growing crops (*Piggot v. Birtles*, 1 M. & W. 441; 2 Gale, 18). A tenant whose standing corn and growing crops have been seized as a distress for rent before they were ripe, cannot maintain an action on the case under 2 Will. & Mary, s. 1, c. 5, against the landlord or his bailiffs, for selling the same before five days had elapsed after the seizure, as such sale was altogether void (*Owen v. Legh*, 3 B. & A. 470). The proprietor of cattle, wrongfully distrained damage feasant, who has paid money for the purpose of having them re-delivered to him, cannot recover back that money in an action of assumpsit; because such mode of proceeding would impose great difficulties on the deft., by not apprizing him of what he was to defend; he should sue in trespass, replevin, or trover (*Lindon v. Hooper*, Cowp. 414; *Shipwich v. Blanchard*, 6 T. R. 298; see *Gulliver v. Cousens*, 14 Law J. 215, C. B.; 9 Jur. 666). The person whose goods, however, are wrongfully distrained may pay the sum demanded, in order to redeem his goods; and, after they are in his possession, bring trover against the distrainer for the unlawful taking (*lb.*) The sale of goods under a distress, after an irregular notice of replevy, without removing the goods off the premises, is not a sufficient conversion to enable the tenant to maintain trover (see "TROVER").

Right of Distress.] A mortgage deed, executed by the mortgagor, only contained in addition to the usual clause the following, that, "for better securing the interest, the mortgagor does hereby attorn and become tenant of the premises to the mortgagee at the yearly rent of 40*l.*, payable half-yearly, as long as the principal sum shall remain secured." The mortgagor having continued in possession, and having made several of these half-yearly payments, described in the receipts given by the mortgagee as for interest: held, that the relationship of landlord and tenant existed between the parties, and that the former had a right to distrain for half-year's arrears (*West v. Tritch*, 3 Exch. 216; 18 Law J. 50).

A tenant by elegit has a right to distrain without attornment (*Lloyd v. Davies*, 18 Law J. 80, Exch.; 2 Exch. 103).

Where the sheriff seizes goods in execution, and assigns to the execution creditor, having notice that a year's rent is due to the landlord, though he may be liable at the suit of the landlord, yet such landlord cannot distrain for such rent whilst the goods are in possession of the sheriff or his assignee (*Wharton v. Naylor*, 12 Jur. 894; 17 Law J. 278, Q. B.).

What distrainable.] Perishable commodities, such as the flesh of animals, which are incapable of being restored in the same condition within a reasonable time, are not distrainable for rent at common law (*Morley v. Pincombe*, 18 Law J. 272, Exch.; 2 Exch. 101).

Growing crops seized by the sheriff under a *fi. fa.*, and not removed from the land, are in the custody of the law, although in the hands of the execu-

tion creditor, under a bill of sale from the sheriff (*Wharton v. Naylor*, 6 D. & L. 136, Q. B.).

They therefore cannot be distrained for antecedent rent, of which the sheriff and the execution creditor had notice, but which they neglected to pay, the remedy of the landlord being by action on the case against the sheriff, and not by way of distress (lb.).

Trespass for breaking and entering the closes of the plt., and cutting down and taking away growing crops. Plea, that one J. L. held the closes as tenant thereof to the defts., under a certain demise, &c., and that half a year's rent being in arrear, defts. entered to distrain. Replication, showing a judgment at the suit of the plt.'s agent, J. L., and a *fi. fa.* under which the sheriff seized the crops in question, and sold them to the plt., and that before a reasonable time had elapsed for cutting and gathering them the defts. distrained and seized thereon. Rejoinder, that the rent for which the distress was made became due long before the judgment; that the sheriff and the plts. had due notice of it; that it continued in arrear, and did not exceed one year's rent; that they required the sheriff, before he sold to the plts., to pay the rent, of which also the plts. had notice, and that it was not paid: held, on demurrer, that the rejoinder was bad (lb.); held, also, that the replication was good, and was not a departure from the declaration (lb.).

Time for Selling.] The five days allowed to a tenant or owner of goods by stat. 2 Will. & M. sess. 1, c. 5, s. 2, to replevy a distress for rent, are to be reckoned exclusively both of the day of distress and the day of sale (*Robinson v. Waddington*, 13 Jur. 537; 18 Law J. 250, Q. B.).

Parties to Action.] A lodger may maintain an action if his goods are taken on an excessive distress by the head landlord (*Fisher v. Algar*, 2 C. & P. 374). The plt. ought not to join appraisers or servants with the landlord, merely with a view to exclude their evidence; the correct practice is to make the landlord alone, or the landlord and *the broker, the defts., and [*966] not join appraisers, &c.; and if a plt. do join them, the judge will oblige him to make out his case by strict rule, and not allow questions to be put to a witness who has been cross-examined, or a witness to be called back, with a view of fixing such appraisers, &c. (*Child v. Chamberlain*, 6 C. & P. 213; 3 Nev. & M. 520; 5 B. & Ad. 1049). The fair way is to bring the action against the landlord, or at most against the landlord and broker only, and not include the appraiser or man in possession (*Bishop v. Bryant*, 6 C. & P. 494, *per Parke, J.*). By sect. 20 of 11 Geo. II. c. 19, no tenant shall recover in an action on the case, if tender of amends have been made before action brought. If the judge certify under 43 Eliz. c. 6, it will deprive the plt. of costs, although the statute give the plt. full costs if he obtain a verdict (*Irwin v. Reddish*, 5 B. & A. 796). The bankruptcy of the tenant is only a personal release of the debt, and if the goods of a stranger be found upon the premises after the certificate they may be distrained for the rent of the bankrupt (*Newton v. Scott*, 9 M. & W. 344; affirmed in error, 10 M. & W. 471). It is no objection to a distress for rent that the tenant, after it became due, petitioned the Insolvent Debtors' Court under stat. 1 & 2 Vict. c. 110, inserted the rent in his schedule as a debt, was opposed in respect of it by the landlord, and obtained his discharge (*Phillips v. Shervill*, 6 Q. B. 944).

Form of Pleadings.

Declaration.] The general rules as to declarations in trespass or case

will here apply : see those titles. The venue is transitory. In an action on the case for an illegal or irregular distress, the particular grievance is specified in the declaration, according to the nature of the facts. It seems to be sufficient to allege that the distress was made for rent supposed to be due upon a certain demise before then made by the deft. to the plt., without specifying the particulars of the demise itself, and to state generally that it was taken for and in the name of a distress, without adding for rent arrear (*Solter v. Brunsden*, 4 Mod. 231 ; Com. Dig. Distress, D, 9). The tenancy must be accurately stated, and a mis-statement of who the landlord was would be fatal, the landlord and tenancy must, if described at all, be *accurately stated* (*Ireland v. Johnson*, 1 Bing. N. C. 166). The declaration in general avers a certain sum as due for rent ; but proof as to the precise sum is unnecessary (*Sells v. Hoare*, 1 Bing. 401). A variance in the description of the premises would be fatal (2 Moo. 557). On the 51 Hen. III. c. 4, for distraining beasts of the plough, the declaration need not show that there was a sufficient distress of other goods (Dy. 312 ; Sid. 348) ; the tenant cannot support this action, if there was reasonable ground for supposing that there was not a sufficient quantity to distrain without taking beasts, &c. (6 Pri. 3 ; 2 Ch. Rep. 167) ; and the distrainer would not be bound to sell the other goods first (6 Pri. 3) ; the action will not lie if there be nothing else to distrain save growing crops (*Pigott v. Birtles*, 1 M. & W. 441). Where the plt. declared on 2 Ph. & Mary, c. 12, for a distress taken in a hundred in one county, and driven six miles out of the county, without averring that it was more than three miles from the hundred in which the taking was, even after verdict, the judgment seems to have been arrested, upon the ground of its not necessarily appearing to be an offence within the statute ; because the hundred might have extended into both counties (*Anon. Godb.* 11). In a declaration under this statute, for double value of goods distrained and sold, it should seem a sale would be necessary in order to support the action (2 Ch. Pl. 534, n. (a)). In declaring on 51 Hen. III. c. 4, in *an action on this statute, it is necessary to show upon the face of the [*967] record that the distress is excessive ; for otherwise it does not sufficiently appear to the court to be a case within the act (*Rex v. Ledgeringham*, 1 Mod. 288). A landlord's broker went to the tenant's house and pressed for payment of rent alleged to be due, and 3*l.* 3*s.* for expenses of the levy, but touched nothing and made no inventory, the tenant paid him the rent and expenses under protest, on which he withdrew. In an action against the landlord for an excessive distress, held that the deft. could not say that there had been no actual distress (*Hutchins v. Scott*, 2 M. & W. 809) ; and where the agreement was altered, by changing the number of the house from 33 to 35 (the house occupied by the plt.), but by whom it did not appear, after its execution and delivery by the plt., held, that the altered agreement might be given in evidence in an action for an excessive distress (in which the demise was admitted on the record) to show the terms of the holding (Ib.).

The third count of a declaration for an excessive distress stated the tenancy, the rent, and the sum in arrear, and alleged that the deft. wrongfully and maliciously contriving to injure the plt., took and distrained certain crops, goods, &c., and thereby took a great, unreasonable distress for the rent, and wrongfully, &c., sold the same for much less than the best price that might have been obtained for the same, had the same been sold in a due and proper manner, and under due and proper conditions of sale, &c. ; plea, not guilty. It appeared in evidence that the hay and straw had been sold under a condition to consume them on the land, that being one of the conditions in the plt.'s lease, and, consequently, that they fetched less than if sold

absolutely; and this being a wrongful act the plt. was entitled to recover, under this count, the difference between the price obtained and that for which the goods would have sold unconditionally: held, that the sale was correct (*Abbey v. Fetch*, 8 M. & W. 421). Where, in case for an irregular distress, one of the counts of a declaration charged that the defts. took and distrained the goods of the plt. for rent, of more than sufficient value to satisfy the rent and costs, and then voluntarily abandoned the same, and afterwards wrongfully, injuriously, and vexatiously again took and distrained the same goods for the same rent, and refused to return the same and converted, &c.: held, on motion in arrest of judgment for misjoinder in case and trespass, that, although this second taking of the goods was a trespass, yet the plt. might bring case for the conversion, and that the count, though informal, was sufficient after verdict (*Smith v. Goodwin*, 4 B. & Ad. 413; see also *Lean v. Caldecott*, 12 Law J., N. S., Q. B. 169).

The declaration for taking a distress for more rent than was due should be framed on the common law. If the distress was excessive, it should be framed on the 52 Hen. III. c. 4 (*Lynne v. Moody*, 2 Stra. 851; *Woodcroft v. Thompson*, 3 Lev. 48; see *Mortimer v. Moore*, 8 Q. B. 294). In declaring on the equity of the 2 Will. & Mary, c. 5, for selling the distress within the five days, it is not necessary to aver that deft. gave notice of the taking (*Lut. 214*; 2 Ch. Pl. 541).

An action for distraining for more rent than is due is not given by the 52 Hen. III. c. 4, nor by 2 Will. & Mary, c. 5, s. 5 (*Lynne v. Moody*, Stra. 851), and must, therefore, be founded on the common law, and an action on the case lies at the suit of the tenant, though the goods distrained are of less value than the rent really due (*Taylor v. Henniker*, 12 Ad. & E. 488; 4 P. & D. 242); although the notice be withdrawn, and a second one served stating the real amount of rent (*Ib.*). Where a tenant, shortly after he had paid half a year's rent to his landlord, due at the preceding Lady-day,

*was called upon by the ground landlord for ground rent due previously to that day, and which the landlord refused to pay: held, [*968] that the payment of the ground rent by the tenant was not a voluntary one, although he obtained time for payment from the ground landlord, for he was liable to a distress; and that the tenant was entitled to deduct such payment from the next rent accruing due to his landlord, although not actually due at the time the ground rent was paid, and the tenant, having tendered the balance remaining due, after deducting such payment, together with another sum paid for land tax, previously due, which his landlord refused to accept, but distrained for the whole rent then in arrear. Held, that the tenant was entitled to recover in an action on the case for a wrongful distress, and that a count stating that the landlord had distrained for the whole rent, when only the sum tendered was due, was sufficient (*Carter v. Carter*, 2 Nev. & P. 732; 5 Bing. 406). But it was held, under special circumstances, that when the deft. had lost nothing by the error in the sum stated in the distress the count was not supported (*Avenell v. Croker*, Moo. & M. 174). In an action for distraining for more than the actual arrears of rent, Parke, B. said, the substantial question was whether the landlord had deprived the tenant of more of his goods than the real amount of his debt authorized (*Wilkinson v. Terry*, 1 M. & R. 379). A party cannot, in general, distrain twice for the same rent (*Dawson v. Cropp*, 1 C. B. 981; 14 Law J. 381, C. P.), but for a fresh arrear of rent the same goods previously replevied may be distrained (2 Ch. Pl. 538, n. (s)). And he may again distrain the same goods for rent subsequently accrued, previous to his executing his *retorno habendo*, without waiving his action against the sureties in the bond (*Hifford v. Alger*, 1 Taunt. 219). As to impounding goods off the premises,

and not giving the tenant notice, see 2 Will. & Mary, c. 5, s. 2; 11 Geo. II. c. 19, s. 10. As to what notice is necessary and how to be given, (see Moss v. Gallimore, Doug. 279; 1 Ld. Raym. 54; 1 H. Bl. 13). A parol notice of distress is insufficient, under stat. 2 Will. & Mary, sess. 1, stat. 5, s. 2 (Wilson v. Nightingale, 15 Law J. 309, Q. B.; 10 Jur. 917). Tender upon the land before distress makes the distress tortious; after the distress and before the impounding makes the detainer, and not the taking, wrongful; after the impounding makes neither one nor the other wrongful (Six Carpenters' case, Rep. 146; Thomas v. Harris, 1 Man. & G. 695; Ladd v. Thomas, 4 P. & D. 9; and Ellis v. Taylor, 8 M. & W. 415). Case for not removing goods distrained within a reasonable time, after the lapse of five days, founded on the equity of the statutes 2 Will. & Mary, c. 5, s. 2, and 11 Geo. II. c. 19, s. 10, has frequently been adopted; but trespass is the proper form of action when the party distraining continues too long in possession (Griffin v. Scott, 2 Stra. 717; 1 H. Bl. 15; Winterbourne v. Morgan, 11 East, 395; Ladd v. Thomas, 4 P. & D. 9). The goods must be removed within a reasonable time after the five days (Pitt v. Shew, 4 B. & A. 208). Where the deft. wrongfully distrained the plt.'s goods, and placed a man in possession of them, from the end of May to the middle of June, it was held that the owner might recover damages, although he had the use of the goods all the time (Baylis v. Fisher, 7 Bing. 153). An action lies for selling under a distress without having the goods appraised by two sworn appraisers, under the 2 Will. & Mary, sess. 1, c. 5, s. 1 (see form, and note (f), 2 Ch. Pl. 542), and the person distraining must not be one of the appraisers (B. N. P. 81; Lyon v. Weldon, 2 Bing. 337), and they must be sworn before the constable of another parish (Avenell v. Croker, 1 Moo. & M. 172; 1 H. Bl. 13). *Where the premises lay partly in the hundred of A. and partly in that of R., the constable of R. was [*969] held the proper officer to administer the oath (Walter v. Rumbal, 1 Ld. Raym. 53). The statute 57 Geo. III. c. 93, regulating the costs of distress for rent not exceeding 20*l.*, has not repealed the provisions of 2 Will. & Mary, sess. 1, c. 5, so as to make an appraisement by one broker sufficient upon such distress (Allen v. Flicker, 10 Ad. & E. 640). An action on the case lies for selling a growing crop under a distress, before the same was gathered and appraised, under the 11 Geo. II. c. 19, s. 8 (see Owen v. Legh, 3 B. & A. 470).

Since the pleading rules, H. T. 4 Will. IV. r. 5, only one count on the same cause of action is admissible, though several breaches are allowed. The rule orders that in actions of tort for misfeasance several counts for the same injury, varying the description of it, are not to be allowed, and in the like actions for nonfeasance several counts founded on varied statements of the same duty are not to be allowed.

In trespass for breaking and entering into the plt.'s house, and taking and carrying away his goods, the deft. justified the taking and carrying away the goods, as a distress *damage feasant*; replication, that after the distress, the deft. converted them to his own use; demurrer for departure, which was overruled, for he who abuses a distress is a trespasser *ab initio*; and, therefore, if in trespass the deft. justifies *nomine districtionis*, the plt. may show an abuse, and it is no departure; and in this case the conversion is a trespass or trover at the plt.'s election, and the matter disclosed in his replication makes good the election, for it proves it a trespass as well as a trover (Gargrave v. Smith, Salk. 221; Dye v. Leatherdale, 3 Wils. 20).

Replevin. Avowry that A. held the land as tenant to B. under a demise, subject to certain rents, provisions, conditions, and stipulations, *inter alia*,

that A. should not, during the continuance of the tenancy, sell any hay off the premises, under the penalty of 2s. 6d. for each yard of the hay so sold, to be recovered by distress as for rent in arrear. Averment of the sale of 800 yards of hay by A., contrary to the said stipulation, by reason whereof a sum of money, at 2s. 6d. per yard, became due to B.; nonpayment thereof, and a distress for the same. The demise only was traversed, and the issue thereon found for the deft. Held, in error, that this was an agreement to pay a rent of 2s. 6d. a yard for all hay sold in breach of the stipulation, and that the same being capable of being ascertained with certainty, might properly be distrained for, though the agreement as pleaded was not under seal (*Pollitt v. Forest*, 16 Law J. 424, Q. B.; 11 Jur. 1033).

Trespass, for breaking and entering plt.'s dwelling-house, locking the doors, and expelling the plt. Plea, justifying all the trespasses except the expulsion under a distress for rent, alleging that deft. kept and impounded it in the dwelling-house, &c., and in order safely to impound and keep it, necessarily locked and fastened the doors of the dwelling-house, and afterwards caused the goods to be duly appraised and duly sold in satisfaction of the rent and costs of distress and sale. Replication, that deft. broke, &c., the house, locked the doors, and seized, took, and converted the goods of his own wrong and for *another* and *different purpose* than that mentioned in the plea, i. e., for the purpose of ejecting, &c., the plt. from the possession of the dwelling-house, concluding with a verification. Demurrer. *Semble*, that the replication was bad for not traversing deft.'s entry for the purpose of distraining, and concluding to the country, instead of raising an immaterial issue on the intention of the deft. in entering. *Semble*, also, that the [*970] plea need *not aver notice of the distress, with the cause of the taking, to have been given according to 2 Will. & Mary, sess. 1, c. 5, s. 1; and that the plea, having perfectly answered the seizure, was not rendered bad in substance by going on unnecessarily to answer matters of mere aggravation laid in the declaration, viz., the conversion of plt.'s goods. Held, that the plea should have shown that the house, or that part of it of which the doors were locked, was the most fit and convenient place for securing the distress, or the tenant might be improperly kept out of possession (*Woods v. Durrant*, 16 M. & W. 169; 16 Law J. 313, Ex.).

In trover for household furniture, the deft. pleaded that he took the goods as a distress for rent. Replication, that, after the rent became due, and before the distress in the plea mentioned, the deft. took goods of the plt. other than those in the count mentioned as a distress for the arrears of rent, the said goods being liable to a distress for the said rent, and of sufficient value to satisfy it, and that the deft. could and might have satisfied the arrears, &c., thereof; yet that he wrongtully and vexatiously, and without excuse, refused and neglected so to do, &c.: held, on general demurrer, a good answer to the plea; for, assuming the rent to remain due, still the landlord could not under the circumstances lawfully make a second distress. Rejoinder, that the goods first seized were not of sufficient value to satisfy the arrears of rent, and that the deft., before the making of the second distress, lawfully abandoned and put an end to the first, and withdrew from possession, and that the rent so distrained for remained wholly due and unsatisfied. Surrejoinder, that the goods and chattels in the replication mentioned were of sufficient value to satisfy the arrears of rent. Held, on special demurrer, that if the rejoinder could be read so as to make the insufficiency of the goods distrained the ground for abandoning the distress, the averment of insufficiency was material, and the surrejoinder traversing it good; but that if it could not be so read, the rejoinder was bad by reason of its not showing any lawful ground for relinquishing the first distress and taking a second, so as to

answer the matters alleged in the replication (*Dawson v. Cropp*, 1 C. B. 981).

Plea under 11 Geo. II. c. 19, s. 1.] In trespass for entering the plt.'s dwelling-house, the deft. pleaded, that at the said time when, &c., S. held certain premises, situate at, &c., as tenant thereof to the deft., under a certain demise thereof, made on, &c., by the deft. to S., for the term of, &c., from thence next ensuing, upon which a yearly rent of 6*l.* was reserved by quarterly payment, on, &c.; that half-a-year's rent was owing from S. to the deft., and that after the said rent became due, and while it was unpaid, S. fraudulently removed certain goods from the demised premises to prevent the deft. distraining, and in concert with the plt. deposited the said goods in the said dwelling-house of the plt., in which, &c., and justified entering the plt.'s house within thirty days after the removal, for the purpose of seizing the said goods as a distress, there being no sufficient distress upon the demised premises, under 11 Geo. II. c. 19, s. 1: on special demurrer, it was held that the plea contained a sufficient statement of the deft.'s right to distrain (*Angell v. Harrison*, 17 Law J. 25, Q. B.; 12 Jur. 114).

Trespass for seizing and taking away goods. Plea, that the deft. had demised a house to the plt.; that rent was in arrear; that the plt. fraudulently removed the goods to prevent a distress, and that no sufficient distress being left, the deft. seized the goods in question. The plt. new assigned, that after the deft. had seized the goods as in the plea mentioned, and after the plt. had paid the deft. *the arrears of rent and costs of distress, [*971] and after the deft. had received the same in full satisfaction and discharge, and after the deft. ought to have restored the goods distrained, the deft. retained possession of the goods, and afterwards sold and disposed of them: on special demurrer, held, that the new assignment did not sufficiently allege an act of trespass; that as the new assignment did not state that the acceptance of the rent took place before the impounding of the goods, it must be considered to have taken place afterwards; and that where a landlord, after a lawful distress and impounding, accepts the rent in arrear and costs of distress, he is not liable as a *trespasser* for retaining possession of the goods distrained, and selling and disposing of them (*West v. Nibbs*, 17 Law J. 150 C. P.; 4 C. B. 172).

A distress cannot be made at common law after the tenancy has been determined by notice to quit, though the rent may have become due before such determination; and an avowry for such rent must therefore be framed so as to bring the case within the 8 Anne, c. 14 (*Williams v. Stiven*, 15 Law J. 321, Q. B.; 10 Jur. 804).

Precedents.

For distraining for more rent than was due.

[*Commencement as ante*, "CASE."] For that whereas the plt. before and at the time of the committing of the grievance hereinafter next mentioned held and occupied certain premises with the appurtenances as tenant thereof to the deft. (or E. F.) at and under a certain rent therefore payable by the plt. to the deft. (or E. F.) for and in respect of the same. Yet the deft. contriving and maliciously intending wrongfully and unjustly to injure and aggrieve the plt. in this behalf heretofore to wit on &c. (*day of taking, or about it*) falsely and maliciously pretending that a certain large sum of money to wit the sum of £ was then due and in arrear from the plt. to the deft. (or E. F.) for rent of the said premises with the appurtenances wrongfully and unjustly seized and took certain goods and chattels to wit &c. (*enumerate them as in trover*) of the plt. then found and being in and upon the said premises with the appurtenances of great value to wit of the value of

£ (insert enough) as a distress for the said sum of money so pretended to be due and in arrear as aforesaid and under that pretence kept and detained the said goods and chattels of the plt. from him the plt. for a long space of time to wit for the space of days then next following and until he the plt. in order to regain the possession of his said goods and chattels was forced and obliged to pay and did then pay, to the deft. (or E. F.) the said pretended arrears of rent and a large sum of money to wit the sum of £ for the costs and charges of the said distress and expenses incidental thereto. Whereas in truth and in fact at the time of the making of the said distress as aforesaid and during all the time aforesaid a small part only to wit the sum of £ of the said sum of money so pretended to be due and in arrear as aforesaid was due and in arrear from the plt. to the deft. (or E. F.) for the rent of the same premises with the appurtenances. (*A count for taking an excessive distress for rent, on stat. Marl. 52 Hen. III. c. 4, may be added. See a form, 2 Ch. Pl. 537.*)

For a form on 2 Will. & Mary, sess. 1, c. 5, s. 5, where no rent was due; on 51 Hen. III. c. 4, for distraining beasts of the plough and sheep, there being other goods sufficient to distress; for distraining tools of trade, when sufficient other goods on the premises to be answerable; for refusing to restore goods on tender of rent and costs; for selling a distress within five days on the equity of 2 Will. & Mary, c. 5, s. 2; for not removing goods within a reasonable time after the lapse of five days; and several other forms of declarations for illegal distresses,—see 2 Ch. Pl. 534—546.

[*972]

*Evidence.

Prove the usual allegation of relation of landlord and tenant by production and proof of the lease in the usual way, or by the deft.'s receipts for rent or other admissions by him of the terms, or, if there be no writing, by parol evidence of the contract, and the tenancy must be proved as laid (*Ireland v. Johnson*, 1 Bing. N. C. 162).

In general the plt. will have to prove the taking of the goods, that they were his property, their value, and the illegal act complained of, with the consequent damages. It is not necessary to show that they were sold or taken away, the seizure as a distress is sufficient (*Sells v. Hoare*, 8 Moo. 453; *Bayles v. Usher*, 4 Moo. & P. 790); the landlord's agent went round the tenant's premises and gave a written notice that he had distrained certain goods, lying there for arrears of rent and left no one in possession: held, a sufficient seizure to give a right of action for an excessive distress (*Swan v. Falmouth* (Earl), 8 B. & C. 456). So, where the tenant under protest, and before any seizure or inventory was made, paid the expenses of the levy (*Hutchins v. Scott*, 2 M. & W. 809). It is usually unnecessary to prove the precise terms of the tenancy, as it is sufficient to prove the goods were taken under colour of a distress (Com. Dig. Distress, D, 9). In some cases, however, as where the amount of the rent is in dispute, evidence of the terms of the tenancy should be adduced. Where the local situation of the premises was formerly stated, it should be proved as stated (2 Moo. 587; *Harris v. Cooke*, 8 Taunt. 539). The local situation of the premises may be proved by the collectors of the taxes or parish officers, or any other person acquainted with the boundaries of the parish (*Harris v. Cooke*, 2 Moo. 587); and, where the notice of distress is correct, it may be used as evidence of the tenancy, the amount of the rent, and the sum in arrear.

The Taking.] The facts of the taking are usually proved by the broker by whom the distress was made, if he has not been made a deft.; if he has, the plt. must call some other witness, as one or more of his servants or family, or the broker's assistant. He should produce and show a copy of the notice of distress, and proved it to have been served on the plt., or left at his

house and signed by the deft., whose hand should be proved. The broker, if a deft., should be served with a notice to produce his authority to distrain, and the service of this notice should be proved; if he be not a deft., he should be subpœnaed to produce it. Any acknowledgment made by defts., or their assistants, should be proved (see "ADMISSIONS").

It may be as well to observe, that the defts. are not bound by the contents of the notice of distress, it being a rule of law that the party may distrain for one thing, and avow or justify for another (*Gwinnett v. Phillips*, 3 T. R. 645). Therefore, though the cause of the taking, such as the amount of the rent due, or time during which it became due, or when it became due, be incorrectly stated, it will be immaterial (*Crowther v. Rambottom*, 7 T. R. 658; 3 T. R. 645; *Doug.* 279); and the deft. may distrain for rent due before a previous distress, although such previous distress purported to be for all rent due at that time, and although the second distress purported to be for rent due for the first (*Gambrell v. Falmouth*, 4 Ad. & E. 73).

*The action for taking an *excessive distress* for rent, on stat. 5 H. III. c. 4, is sustainable, though there was a tender before dis- [*973] tress made (*Branscombe (Lady) v. Brydges*, 2 D. & R. 256; 4 D. & R. 539; *Willoughby v. Backhouse*, 2 B. & C. 821); or though, between the distress and sale of the goods distrained, the parties came to an arrangement respecting the sale (*Willoughby v. Backhouse*, *supra*). Though the declaration aver a certain sum as due for rent, it is not necessary to prove the precise sum stated, but evidence must be given of what was actually due (*Sells v. Hoare*, 1 Bing. 401). It is not necessary to prove express malice; it should however, be shown in evidence that the distress was excessive (*Field v. Mitchell*, 6 Esp. 72; *Wells v. Moodey*, 7 C. & P. 59); as, if a man distrain two or three oxen for twelve pence, or if he distrain a horse or an ox for a small sum, where a sheep or a pig might be taken. But where there is only one thing which can be distrained, it is otherwise (*Field v. Mitchell*, 6 Esp. 72); and, therefore, it has been said that, even for a small demand, a cart and horse may be distrained, because they are not severable from each other (*Clarke v. Tucket*, 2 Vent. 183; *Bradley*, 276). This action is not maintainable after a judgment recovered in replevin (*Phillips v. Barryman*, 1 Selw. N. P. 681). Where plt. has received the taxed costs of his replevin on the distress, he cannot in this action recover as damages the extra costs incurred by the replevin (*Renkins v. Biddulph*, 4 Bing. 160; *Grace v. Morgan*, 2 Bing. N. C. 534; but see "MALICIOUS ARREST," "DAMAGES"); although the distress warrant be for a greater sum than is really due, the plt. cannot recover unless the goods seized are excessive in regard to the sum really due (*Crowder v. Self*, 2 M. & R. 190). But in such case an action at common law would lie for distraining for more rent than was due (*Taylor v. Henniker*, 12 Ad. & E. 488); although the landlord is not bound to weigh nicely the value of the property seized, he must take goods proportionate to the sum due (*Willoughby v. Backhouse*, *supra*).

And the landlord is liable when the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure, but the measure of the damages is not the value of the crops, but the inconvenience and expense which the tenant sustains in being deprived of the management of them, or which he is put to in procuring sureties to a larger amount than he would otherwise have been in replevying the crops (*Piggott v. Birtles*, 1 M. & W. 441; 2 Gal. 18). In order to establish the excess, the plt. must be prepared with proof of the value of the goods seized. And where the counsel for the plt. proposed to ask a witness what sums he thought might have been obtained for the goods distrained

from an incoming tenant in the same business as the plt., he was stopped by Parke, B., who said, "At present that is not the question. To determine whether the distress was excessive, you must ascertain what the goods seized would have sold for at a broker's sale. If it be excessive, the plt. is entitled to recover the full value of them" (Wells v. Moody, 7 C. & P. 59). Where there is a count for an excessive distress, and another in trover, it is competent to the plt. at the trial to abandon the special count, and, denying the tenancy, to recover under the count in trover without giving any previous intimation that he would adopt that course (Shargo v. Brown, 4 M. & R. 638; 9 B. & C. 935), sale of the goods at an under value cannot be shown unless alleged in the count (Thompson v. Wood, 4 Q. B. 493). Where the tenant signed an agreement drawn up by the broker, that if he did not pay within a given day the broker might re-enter and distrain again: held, no estoppel, and that the plt. might afterwards complain of an excessive distress made in consequence of the rent not being paid at the stipulated [*974] time (*Holland v. Bird, 2 Moo. & S. 363; 10 Bing. 15). In case for a distress where no rent is due, the judge should direct the jury to give double the value of the goods distrained (2 Will. & Mary, c. 5, s. 4; Masters v. Farris, 1 C. B. 715).

In an action for an *irregular distress*, the only evidence at all affecting R. was, that all the defts. appeared by the same attorney, and that the deft.'s attorney had given the plt.'s attorney notice to produce "the notice of distress, for rent due to Mr. R.," and that the managing clerk of the deft.'s attorney, when he served it, had offered 10*l.* to settle the action: held, that this was not evidence to go to the jury as against R., and the judge therefore directed his acquittal (Crabb v. Rilling, 6 C. & P. 216).

In an action for not *selling for the best price*, on the equity of stat. 2 Will. & Mary, c. 5, s. 2, the plt. should prove distinctly that the goods were not sold for the best price; for, otherwise, the price at which the goods were appraised will be presumed to be the best (Walter v. Rumball, 4 Mod. 390). The original costs of the goods had better be proved, and some competent witness subpoenaed to show their value beyond the price for which they were sold: the price must be much less than the best price. No order is required to be observed upon the sale (Jenner v. Yolland, 6 Pri. 5). It seems the deft. could not be justified in selling the goods to the highest bidder much under their value (3 Camp. 521; *sed vide* 1 Stark. 43). The plt. may show that the goods were allowed to stand in the rain, and that they were improperly lotted (Poynter v. Barclay, 5 C. & P. 512).

In an action for *not removing* goods distrained, within a reasonable time after the elapse of the five days, on the equity of the 2 Will. & Mary, c. 5, s. 2, and 11 Geo. II. c. 19, s. 10, it should be observed, that a reasonable time after the five days is allowed to the landlord for appraising and selling the goods (Pitt v. Shew, 4 B. & A. 208); and it is a question for the jury to say what is a reasonable time. The five days are reckoned inclusive of the day of sale (1 H. Bl. 13). By the consent of the tenant, the landlord may continue in possession longer than the five days, without incurring any responsibility (7 Pri. 690): if such consent has been given expressly or impliedly, the deft. should be prepared to prove the same.

In an action for *selling a distress within five days*, on the equity of 2 Will. & Mary, c. 5, s. 2, it should be observed, that such five days are reckoned inclusive of the day of sale; as, where goods are distrained on the first, they must not be sold before the sixth (Wallace v. King, 1 H. Bl. 13). The five days allowed to a tenant or owner of goods by stat. 2 Will. & Mary, sess. 1, c. 5, s. 2, to replevy a distress for rent, are to be reckoned exclusively both

of the day of distress and the day of sale (*Robinson v. Waddington*, 18 Law J., N. S., Q. B. 250; *Wallace v. King*, H. Bl. 13).

An action on the Stat. of Marl. 51 Hen. III. c. 4, for distraining beasts of the plough and sheep, there being other goods sufficient to distrain, cannot be supported, if there was reasonable ground for supposing that there was not a sufficient quantity to distrain without taking beasts, &c. (*Jenner v. Yolland*, 6 Pri. 3; 2 Ch. R. 167); and the distrainer would not, in such case, be bound to sell other goods first (*Ib.*). And, if the distress be made for rent in arrear, and afterwards the tenant, in order to regain his beasts, tender, or even pay, to the lord the arrears, and thereby obtain a delivery of them, although, by such act, he may seem to have affirmed the distress, yet he may have his action upon the statute (2 Inst. 113). A tender of the rent and charges after impounding is too late (*Ladd v. Thomas*, 4 P. & D. 9; 4 Jur. 798).

In an action for *refusing to restore goods distrained* for rent, on *tender of the rent and costs, the tender should be strictly proved [*975] (see *post*, "TENDER"). It should be observed, that a tender of the rent upon the land before the distress, makes the distress tortious; a tender after the distress, and after the impounding, makes the subsequent detainer, but not the taking, wrongful; a tender after the taking and impounding does not make either the one or the other wrongful; but in the case of a distress for rent, a sale, after the tender of the rent and costs, is illegal, under the equity of the stat. 2 Will. & Mary, c. 5. An action on the case will not lie for detaining the plt.'s cattle in the pound after tender of amends made subsequently to the impounding (*Anscomb v. Shore*, 1 Camp. 335; 1 Taunt. 261); nor where the tender is made after the distress, but before the impounding, for the proper action is replevin or trespass (*Lindon v. Hooper*, Cowp. 411; and see 6 T. R. 299).

In case for selling goods distrained for rent without an appraisement, the measure of damages is the value of the goods minus the rent (*Biggins v. Goode*, 2 Cr. & J. 364).

In an action of tort for an illegal sale of goods, the jury are bound to find a verdict for the gross amount produced by the sale (*Clarke v. Nicholson*, 1 Gale, 21).

In an action against a landlord for distraining for more rent than is due, it is no defence that after distress, and notice thereof, and before the sale, the landlord served a second notice on the tenant, stating the amount really due, and that the distress was taken for that amount only, and would be sold unless that amount was paid (*Taylor v. Henniker*, 12 Ad. & E. 488; 4 P. & D. 242).

The court refuses to allow a plt. to retain in his declaration a count in trespass in the ordinary form for breaking and entering the plt.'s premises, together with a count under the 2 Will. & M. sess. 1, c. 5, s. 5, to recover double the value of goods improperly distrained (*Hoare v. Lee*, 5 D. & L. 765; 5 C. B. 754).

A landlord gave a warrant to a broker to distrain the chattels of his tenant for rent due from him as tenant of a house. The broker, after taking the furniture, removed a shed, used as a workshop, and sold the materials, as well as a copper, which was also a fixture. The landlord received the proceeds, but without knowledge that any portion thereof had been derived from property illegally seized; held, that the landlord was not liable in trespass (*Freeman v. Roshier*, 13 Jur. 881; 18 Law J. 340, Q. B.).

Defence.] The deft. may still, under the general issue, under 11 Geo. II. c. 19, s. 21, show special matter, for the new rules have not affected

those provisions (*Williams v. Jones*, 11 Ad. & E. 643); not guilty by statute, therefore, puts in issue not only the matter of justification, but the tenancy and ownership of the goods (*Ib.*). The plt. is put, therefore, on proof of his whole declaration, and the deft. may give in evidence any defence. He may show that the distress was not excessive, or that the chattel distrained was entire, and that there was no other distress (*Field v. Mitchell*, 6 Esp. 71). An action is not maintainable for distraining beasts of the plough when there is no other sufficient subject of distress on the premises besides growing crops (*Piggott v. Birtles*, M. & W. 441). And a previous recovery in replevin was held a bar to the action (*Phillips v. Berryman*, 3 Doug. 286; but see *Grace v. Morgan*, 2 Bing. N. C. 534); and it is no defence in an action for an excessive distress that the plt. authorized the deft. to sell, and gave him other powers as to the goods seized (*Willoughby v. Backhouse*, 1 B. & C. 821; *Sells v. Hoare*, 4 Bing. 101). Where the deft. pleaded that the whole sum distrained for was due, and in arrear, on which issue was joined; held, that deft. was not precluded from insisting on certain arrears by the fact that since they became due other arrears had become due, and had been distrained for; and this, although, on the first distress, the warrant and notice stated the distress to be for rent due up to a day named, being subsequent to those on which the arrears in question accrued, and although, on the second distress, the deft. stated that it was for rent due since the last distress (*Gambrell v. Falmouth*, 4 Ad. & E. 73). Trespass for entering plt.'s house, continuing therein five days, and seizing plt.'s goods; justification under a distress for rent, stating deft.'s entry, seizing the goods, and impounding them on the premises; plt. new assigned that after the deft. entered, and after the plt. had made sufficient tender of the rent and charges, and after the deft. ought to have quitted the premises, he remained in the dwelling-house, &c. Plea to the new *assignment traversing the [*976] tender. After verdict for plt., the court arrested the judgment on the ground that it did not appear from the pleadings that the tender was made before the goods were impounded, and that the omission was not cured by verdict, also (*per Pattison, J.*, that it did not appear from the pleadings that the tender was made after the impounding (*Ladd v. Thomas*, 4 P. & D. 9; 4 Jur. 798).

DISTURBANCE.

See "NUISANCE," "COMMON," "WAY," "ANCIENT LIGHTS," &c.

DIVORCE.

See "HUSBAND AND WIFE."

DRUNKENNESS.

Intoxication is good evidence, upon a plea of *non est factum* to a deed, or *non concessit* to a grant, and upon *non assumpsit* to a promise (*per Lord Ellenborough*, *Pit v. Smith*, 3 Camp. 34; *B. N. P.* 172; *Fenton v. Holloway*, 1 Stark. 126). To an action by indorsee against indorser of a bill of exchange, the deft. pleaded that when he indorsed the bill he was so intoxicated, and thereby so deprived of sense, understanding, and the use of his

reason, as to be unable to comprehend the meaning, nature, or effect of the indorsement, or to contract thereby, of which the plt. at the time of the indorsement had notice. Held, to be a good answer to the action, and not to amount to an argumentative traverse of the indorsement (*Gore v. Gibson*, 13 M. & W. 623). It appears to have been decided, that mere drunkenness was not sufficient to avoid an obligation, unless it had been effected through the management or contrivance of him who gained the deed (*Johnson v. Medlicott*, 3 P. Wms. 130; *Co. Lit.* 247; 1 V. & B. 30. See, however, the judgment of Bayley, J., in *Bagster v. Portsmouth* (Earl of), 7 D. & R. 614). A publican cannot recover the price of beer furnished to deft. after he has become intoxicated by drinking beer in his house (*Brandon v. Old*, 3 C. & P. 440). See the 24 Geo. II. c. 40, s. 12, prohibiting the recovery of any sum, debt, or demand for spirituous liquors, unless such debt shall have been really and *bona fide* contracted at one time to the amount of 20s. and upwards, nor shall any item in any account or demand for such liquors be allowed where the liquors delivered at one time, and mentioned in such item, shall not amount to the full value of 20s. at least, and that without fraud or covin, and where no part of the liquors so sold shall have been returned, or agreed to be returned, directly, or indirectly. The statute applies to the keeper of an eating-house who buys liquors in small quantities to retail them again (*Hughes v. Done*, 1 Q. B. 294; overruling *Jackson v. Attrill*, Peak. Ad. Ca. 180). So, to a tavern-keeper's bill which contains items for spirits retailed to deft.'s guests (*Burnyeat v. Hutchinson*, 5 B. & A. 241); and if part of the consideration of a bill of exchange be for such spirits, it will be wholly void (*Scott v. Gillmore*, 1 D. & R. 359). See *Spencer v. Smith* (3 Camp. 9), where a bill for 6*l.* was held valid which had been accepted by an officer in payment of small quantities of liquor under 20s. supplied to recruits.

*DURESS.

[*977]

Form of Pleadings.] In assumpsit, or debt on simple contract, deft. was formerly allowed to plead specially, or give in evidence under the general issue, that he was under duress (5 Rep. 119). But, in debt on bond, or other specialty, deft. was required to plead that matter specially (lb. 119 *a*; *Com. Dig. Pleader*, 2 W, 19, 20; B. N. P. 171; 1 Saund. 103 *b*; see *Precedents*, 2 Ch. Pl. 964, 965). But now it would seem to be necessary to plead it specially in all cases (see R. G. H. T. 4 Will. IV.). A deft. who is a mere security to the bond, will not be permitted to plead the duress of his principal as a defence to the action on the bond, as the duress, to be a sufficient defence, must be of the person of the deft. (*Huscombe v. Standing*, Cro. Jac. 187).

By way of replication to the above plea, plt. may state that the deed was executed voluntarily, and not under menaces (*Com. Dig. Pleader*, 2 W, 19, 20; see *Form*, 2 Ch. Pl. 1172; *Atk. Appx.* 77).

Evidence.

To support a plea of duress, &c., where it is by imprisonment, it must appear that the imprisonment was unlawful, and not by virtue of legal process; and, therefore, where a deft., after judgment against him, without any legal cause of action, procured the plt. to be arrested on legal process, and threatened that he should lie in gaol unless he executed a release, upon which the party executed one, and was discharged, it was held, that the

release could not be avoided by duress (Lev. 69; 4 Inst. 47); but, though the imprisonment be lawful, if illegal force be used, or the party be made to endure unnecessary privation or hardship, it will constitute a duress (2 Inst. 482; Williams v. Brown, 3 B. & P. 69; The King v. Southerton, 6 East, 140; Pole v. Harrobin, 9 East, 417, n.). Where the duress is by threats, it must be proved to have been so severe and violent, as that it would be sufficient to intimidate a man of moderate firmness (Com. Dig. Pleader, 2 W, 19; 1 Selw. N. P. 552); but it seems that a menace of a mere battery or trespass to lands is insufficient (11 Mod. 201; B. N. P. 173; Bac. Abr. Duress). The defts. issued a commission of lunacy against the plt.; and at the hearing, before the commissioner, an agreement was entered into, that the proceedings should be dropped in consideration of the plt.'s assigning her property to trustees. This agreement was signed by her counsel; and, in order to carry it out, her title deeds were placed in the deft.'s hands. On the trial of an issue, as to whether the plt. was entitled to the deeds notwithstanding the agreement; held, first, that it was not open to the defts. to dispute the title of the plt. to the deeds independently of the agreement; held, secondly, that the agreement was entered into under duress, and was not binding on the plt., notwithstanding the consent of her legal advisers (Cummings v. Ince, 17 Law J. 104, Q. B.; 12 Jur. 331). It must be duress to the person, and not the party's goods (Ib.); duress by the party who enters into the contract (Bac. Abr. Duress, B.).

Where money has been obtained under duress, it may be recovered back in an action for money had and received (see that title, *post*). A will may be impeached by reason of duress (see *post*, "EJECTMENT").

[*978]

*DYING DECLARATIONS.

See "ADMISSIONS," "PEDIGREE," &c.

ECCLESIASTICAL COURT, SENTENCES OF.

Effect of, in Evidence.] The consuance of the right of marriages belonging to the ecclesiastical courts, faith and credit will be given to their proceedings; so, the sentence of an ecclesiastical court will be received in a court of common law as evidence in a case of marriage to prove a party legitimate (Banting's case, 4 Rep. 29; 7 Rep. 41): or to prove a marriage a nullity (Cleeve v. Bathurst, 2 Stra. 960; Dacosta v. Villa Real, ib. 961; Jones v. Bow, Carth. 225; and per Holt, C. J.). But it seems that a sentence in a suit of jactitation of marriage is not conclusive even in the court which pronounces it. "A matter which has been directly determined by their sentence cannot be gainsaid; their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary;" but that is to be intended only on the point directly tried, and otherwise it is, if a collateral matter be collected or inferred from their sentence (Blacham's case, 1 Salk. 290; Kingston's (Duchess of) case, 20 How. St. Tr. 538, 540; see also the cases cited in argument in Stockdale v. Hansard, 9 Ad. & E. 62). So, proceedings in a spiritual court against a father, for incontinency with the mother, could not be given in evidence against a child of the marriage, claiming by descent from the father (Hilliard v. Phaley, 8 Mod. 180; Robins v. Cruchley, 2 Wils. 124); nor are letters of administration, granted by an

ecclesiastical court, evidence of a fact merely to be inferred from them, as the death of the party (*Thompson v. Donaldson*, 3 Esp. 63; *Allen v. Dundas*, 3 T. R. 130; *Moons v. De Bernales*, 1 Russ. 301). The subject of the sentence must appear to have been within the jurisdiction of the spiritual court, or it will be inadmissible in evidence (*Sty. 10*; *Betsworth v. Betsworth*, 12 Vin. Ab. 128; *Phillips v. Crawley*, Freem. 84, pl. 103; *Allen v. Dundas*, 3 T. R. 130; *B. N. B. 247*). The validity of a will may also be established by the judgment of an ecclesiastical court (*Noel v. Wells*, 1 Lev. 235); and, after such sentence, evidence will not be admitted in a court of temporal jurisdiction, to show that the will was forged, or that the person making it was a lunatic (*Ib.*); or that another person was appointed executor (*B. N. P. 247*; *Noel v. Wells*, 1 Lev. 235). So, a probate granted by the ecclesiastical court is conclusive against the world (*Allen v. Dundas*, 3 T. R. 125); therefore the payment of money to an executor who has obtained probate of a forged will is a discharge of the debtor of the intestate though the probate be afterwards declared null (*Ib.*); except the jurisdiction of the court be denied, as where there were no *bono notabilia* within its jurisdiction (*B. N. P. 247*); or that the letters of administration have been revoked (*Ib.*); or the seal of the ordinary may be proved to have been forged (*Noel v. Wells*, 1 Lev. 236).

Proof of Sentence of.] The sentence of the ecclesiastical court may be proved by the seal of the court, which is sufficient evidence of its proceedings (*Kempton v. Cross*, Rep. t. Hard. 108). And, where the probate of a will, bearing the seal of the court, has been lost, a second probate will not be granted; but the court will *exemplify the first, and such exemplifications have been allowed to be given in evidence (*Shepherd* [*979] v. *Shorthose*, 1 Stra. 412). So, the certificate, in the usual way of the ecclesiastical court, that administration has been granted, is evidence (*B. N. P. 246*; 1 Lev. 25); or the book of the court, in which the order, granting administration, is entered (*Elden v. Keddell*, 8 East, 187; *Bac. Abr. Ev. F. 631*; *Davis v. Williams*, 13 East, 232; *Hay v. Clarke*, *ib.* 238); or the act of the court, indorsed upon the will, is sufficient evidence (*Doe v. Barnard*, Cowp. 295). An indorsement or note at the foot of the original will by the surrogate and deputy registrar, is primary evidence of probate where no other record is kept (*Doe v. Mew*, 7 Ad. & E. 240). The revocation of probate is proved by the entry in the book of the Prerogative Court, where no other record is kept (*Rambottom's case*, 1 Lea. C. C. 30, n.). The revocation of a will may also be proved by the entry in the book of the Prerogative Court (*B. N. P. 246*). Where notice was given to defts. to produce the probate of their testator's will, and they refused, it was held, that a document, purporting to be the original will, and produced by an officer of the Ecclesiastical Court, under the seal of the court, was admissible as secondary evidence, to show that their testator had acknowledged therein that he had received money in his lifetime for the use of the plt. (*Gorton v. Dyson*, 3 Moo. 558; *S. C. 1 B. & B. 219*; see *Waite v. Gale*, 2 D. & L. 831). A sentence of separation *a mensâ et thoro* is admissible without proof of the libel (*Stedman v. Gooch*, 1 Esp. 6). The sentence of an admiralty court is evidence of condemnation without producing the libel and answer, at least if not found or usually filed with it (*Com. Dig. Ev. C. 1*). Where the reading of the sentence in the jactitation suit without the libel, allegation, and all other proceedings was objected to they were then put in evidence (*Kingston's (Duchess of) case*, 20 How. St. Tri. 377; and see *Leake v. Westmeath (Marquis)*, 2 Moo. & R. 394; see *Phillips v. Crawley*, 1 Free: 83; *Laybourne v. Crisp*, 4 M. & W. 320, cited under title "CHANCERY"). It seems

the minute book of the Consistory Court is admissible as evidence of a decree for alimony (*Houlston v. Smyth*, 2 C. & P. 25). The act book of the ecclesiastical court, containing an entry of the will, having been proved, and of the probate granted to the executors therein named, is evidence of an executorship, without accounting for the non-production of the probate (*Cox v. Allingham*, Jac. 514). The courts will take judicial notice of the limits of ecclesiastical jurisdictions (*Adams v. Savage*, *Ld. Raym.* 854).

EJECTMENT.(a)

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Nature of Remedy, and when it lies.

Ejectment is a mixed action, and the form of remedy by which a person is entitled to recover the possession of real property, either in fee, fee-tail for life or for years (Selw. N. P. 692). This, and *trespass, are the only forms to recover the rents and profits of premises, when the occupation is adverse (Birch v. Wright, 1 T. R. 386; 2 Ld. Raym. 1216). This action does not lie where the thing to be recovered is incorporeal (3 Bla. Com. 206); yet it will lie for a common appendant or appurtenant (Newman v. Holdingfast, Stra. 54; B. N. P. 99; Baker v. Rowe, Ca. t. Hard. 129). It will not lie for rent, an advowson, a common in gross, or *per cause de vicinage*, or any other thing which passes only by grant (Ad. Ej. 4th ed. 16); and, by stat. 32 Hen. VIII. c. 7, s. 7, where tithes are appropriated, they may be recovered in ejectment (2 Saund. 304 a). It will not lie for lands belonging to the crown of which the crown is in possession by its officer (Doe d. Legh v. Roe, 8 M. & W. 579). This action cannot be maintained where the thing to be recovered cannot be delivered in execution, and whereon an entry cannot be made (B. N. P. 99 a). So, it will not lie for a watercourse, but the ground over which the water passes, being deliverable in execution, upon which an entry can be effected, may be recovered in this action (Chaloner v. Thomas, (Yelv. 143). An ejectment may be maintained for a pool, or pit of water (Ib.; Co. Lit. 5 b). So, it lies for a coal-mine (Comyn v. Kineto, Cro. Jac. 150; Comyn v. Wheatley, Noy, 121). But it lies not for a *tin-bound* (Doe d. Falmouth (Earl) v. Alderson, 1 M. & Ay. 210). Where a grant of mines does not operate as a demise, but merely as a license to dig, search for, and take metals, &c., within a certain district, during the term granted; it seems that, the party

claiming thereunder, who shall open, work and be in the actual possession of any mines, may, if ousted, maintain ejectment for them, but not for those which are not opened, or, having opened, he has abandoned (*Doe d. Harley v. Wood*, 2 B. & A. 724; *Croker v. Fothergill*, ib. 652). It lies for a boilarry of salt (*Smith v. Barrett*, Sid. 161; 1 Lev. 114; Co. Lit. 41 *b*). A church or chapel may be recovered in this action, being considered as messuages (*Hillingsworth v. Brewster*, Salk. 256); it will not lie for a canonry, nor a prebendal stall (*Doe d. Butcher v. Musgrave*, 1 Man. & G. 625; 1 Sco. N. R. 451; 4 Jur. 631; and see *R. v. London* (Bishop of), 1 Wils. 11, 14); and in *R. v. Old Arlesford*, Ashhurst, J., says, "There is no doubt but a fishery is a tenement; trespass will lie for an injury to it, and it may be recovered in ejectment;" though former cases have held the contrary (*Molineux v. Molineux*, Cro. Jac. 144; *Herbert v. Laughlyn*, Cro. Car. 492; *Waddy v. Newton*, 8 Mod. 275); and, subject to a public easement, the owner of soil may maintain this action for land which is part of the king's highway (*Goodtitle d. Chester v. Alker*, 1 Burr. 133, 145). An ejectment will not lie for setting up a stall in a public street, even assuming the freehold to belong to the parish (*Doe d. Overseers, &c., v. Cowley*, 1 C. & P. 123). Persons entitled to the first grass or after-math, are so far considered the owners of the land on which such rights exist, as to enable them to maintain this action (*Ward v. Petifer*, Cro. Car. 362; *R. v. Stoke* (Inhabitants of) 2 T. R. 451); and so for herbage (*Wheeler v. Toulson*, Hardr. 330). But, in these cases, the action should be brought for the profits of the soil, and not for the soil itself (ib.); and so for the pasture of an hundred sheep (*Anon.* 2 Dal. 95); and for a cattle-gate (*Barnes v. Paterson*, Stra. 1063; *Bennington v. Goodtitle*, ib. 1084); but a right to the pannage is not enough (*Pornbee v. Sterne*, 1 Lev. 212; 1 Sid. 416). Ejectment does not lie for dower before assignment (*Doe d. Nutt v. Nutt*, 2 C. & P. 430).

The committee of a lunatic may bring ejectment; formerly it was brought in the name of the lunatics, as the committee could not make leases [*982] of the land (*Drury v. Fitch*, Hut. 16; *Cocks v. Daroon*, *Hob. 215; *Knipe v. Palmer*, 2 Wils. 130). They now have that power by 11 Geo. IV. & 1 Will. IV. c. 65.

Aliens cannot take lands by descent; they cannot therefore bring ejectment; with regard to the issue of aliens, and children born out of the realm, see 25 Edw. III. st. 2; 7 Anne, c. 5; 4 Geo. IV. c. 26; 13 Geo. III. c. 21; and *ante*, "ALIEN."

Corporations, aggregate or sole, may maintain ejectment (Ad. Ej. 57). It has been held, that the London Dock Company may maintain ejectment under a clause in their act of incorporation on a lease granted by the directors before the incorporation (*Doe v. Knebell*, 2 Moo. & R. 66). In a case previous to 59 Geo. III. c. 12, s. 17, empowering parish officers to hold parish property in the character of a corporation, it was held that the existing overseers could not maintain ejectment for land in the possession of a pauper, having no derivative title from their predecessors, and the pauper having done no act to recognise his holding under the new overseers (*Doe v. Clarke*, 14 East, 488). Evidence of payment of rent to parish officers as such, will show that the property for which it is paid is parish property, within the 29 Geo. III. c. 12, s. 17, so as to enable the parish officers for the time being to maintain ejectment (*Doe v. Terry*, 4 Ad. & E. 274). Churchwardens alone cannot execute leases as a body corporate of parish lands within this statute (*Phillips v. Pearce*, 5 B. & C. 433; see also *Doe v. Heley*, 10 B. & C. 885; *Smith v. Adkins*, 8 M. & W. 362; 1 Dowl. N. S. 129).

If a rent-charge be granted to any one, with a proviso, that if the rent be

in arrear, it shall be lawful for the grantee, his heirs and assigns, to enter and hold the lands out of which the rent-charge is granted until the arrears be satisfied, this will give to the grantee such an interest that he may make a lease of the land, on which he may maintain ejectment (*Jemott v. Cowley*, 2 Saund. 112; 1 Lev. 170; see also *Doe v. Boulter*, 6 Ad. & E. 675). The right of entry however in such cases must always be construed strictly (*Hassell v. Gouthwaite*, Willes, 500). An ejectment does not lie for dower, which has not been assigned (*Doe v. Nutt*, 2 C. & P. 430). It lies against a parson who has been simoniacally presented (*Doe v. Fletcher*, 8 B. & C. 25; 2 M. & R. 206). A. having let premises to a company as yearly tenants, determined the tenancy by a notice to quit, and brought ejectment. A., on the day of the demise laid in the declaration, was a partner in the company: held, on a bill of exceptions, that the fact of A. being a member of the company was no objection to an ejectment on a demise by him (*Francis v. Harvey*, 4 M. & W. 331). Where a rent-charge is granted with power to the grantee, in case the rent should be in arrear for a certain space of time, to enter and enjoy the lands charged, and to receive and take the rents, &c., for his own use and benefit, until satisfaction of the arrears of rent, with all costs, the grantee may, upon the rent becoming in arrear, maintain ejectment against the terre-tenant, without proof of a previous demand of rent (*Doe v. Horseley*, 3 Nev. & M. 537). It is no objection that the name of John Doe is given as the name of both plt. and deft. (*Doe d. — v. Roe*, 2 Jur. 496); nor that no attorney's name had been introduced into it (*Doe d. Simpson v. Roe*, 6 Dowl. 469).

The necessary title to the premises to support the action will be found, *post*, p. 998. The party (plt.'s lessor) must have an exclusive right of entry and possession: and such right of possession must be of some duration (2 East, 190; 11 East, 345). As to what will take away this right of entry, see Ad. Ej. 35; *post*, p. 998. He must have a strict *legal* title—a mere equitable one is not sufficient; he must also be able to recover on the strength of his own title, and *not merely on the insufficiency [*983] of his opponent's (*Goodtitle v. Jones*, 7 T. R. 43; 4 Burr. 2487; 5 T. R. 110, n. 1; 1 East, 246; Ad. Ej. 28; 1 Ch. Pl. 173, 174; *post*, p. 999). As to when an actual entry is necessary, see *post*, p. 1001.

Form of Pleadings.

Declaration.] The declaration, from the peculiar mode of proceeding in this action, may be considered as a kind of writ or process (see *R. v. Unitt*, Stra. 567). It is most usual to frame it as if the proceedings were by original; but in the Q. B. they may be framed as if they were by bill. A mistake in form in the declaration is immaterial if the tenant have not appeared (*Doe v. Roe*, 1 W. W. & H. 32; *Doe d. Simpson v. Roe*, 6 Dowl. 469). So is the omission of the statement, that the plt. is indebted to our lady the Queen, and of the *quo minus* clause in the Exchequer (*Doe v. Roe*, 3 M. & W. 187; 9 Dowl. 388).

Title of Term, Commencement.] The rules of M. T. 3 Will. IV. do not extend to the action of ejectment, and therefore the old forms of entitling and commencing the declaration should be observed (*Doe d. Fry v. Roe*, 3 Moo. & S. 370; *Doe d. Evans v. Roe*, 1 Ad. & E. 11; *Doe d. Gillett v. Roe*, 2 Dowl. P. C. 690; *ante*, "DECLARATION"). The declaration should therefore be regularly entitled of the term immediately preceding the vacation in which it is delivered; but a mistake or omission in this respect is immaterial, as the consent-rule precludes the deft. from taking any advantage of a

defect in it (*Doe d. Gore v. Ross*, 3 Dowl. P. C. 5; *Doe d. Willes v. Roe*, 5 Dowl. P. C. 380; *Doe v. Roe*, 2 Dowl. P. C. 186; *Doe d. Smithers v. Roe*, 4 Dowl. P. C. 374; *Doe d. Brooke v. Roe*, 9 Dowl. P. C. 347; *Doe d. Evans v. Roe*, 5 Dowl. P. C. 508; *Doe d. Crooks v. Roe*, 6 Dowl. P. C. 184). Where the declaration was entitled *M. T. 54 for 55 Geo. III.* (*Goodtitle d. Ranger v. Roe*, 2 Ch. 172); *T. T. 56 for 55 Geo. III.* (*Doe d. Greaves*, ib. 172); *M. T. 8 for 7 Will. IV.* (*Doe d. Phillips v. Roe*, 4 Sco. 359; 5 Dowl. 380; *Doe d. Elliott v. Roe*, 1 Jur. 71; *Doe d. Evans v. Roe*, 5 Dowl. 508; *Anon.* 1 Jur. 776; *Doe d. Crooks v. Roe*, 6 Dowl. 187); *T. T. 6 for 5 Will. IV.* (2 Ch. 172); *Hilary for Michaelmas*, and *Michaelmas for Easter*, (*Anon.* 2 Ch. 172, 173); they were held sufficient; for the notices to appear were correct, and the declarations delivered at the proper times. So, "In the C. P. June 12, 1834," was held sufficient (*Doe v. Roe*, 1 Bing. N. C. 253; 1 Sco. 166); and, where there was no title at all, but the declaration was delivered before the first day of "Hilary" Term, and the notice was dated "January 1, 1818," and was to appear within the first four days of the next term: held sufficient (*Goodtitle v. Badtittle*, Ad. Ej. 163). The omission to entitle a declaration in ejectment of some term is immaterial, where the notice at the foot thereof is properly dated (*Doe d. Smith v. Roe*, 6 Man. & G. 754). But a declaration, entitled 6 for 7 Will. IV. (*Doe d. Gowland v. Roe*, 5 Dowl. P. C. 273); *T. T. 4 for 3 Vict.*, although sworn that the service was effected on 29th October, with notice to appear in next *M. T.* (*Doe d. Vincent v. Roe*, 9 Dowl. 43; *Doe d. Newman v. Roe*, 4 Jur. 1134; *Doe d. Pearson v. Roe*, 4 Jur. 1037); so, *M. T. 1840*, "with notice to appear on next *M. T.*" and which was served before the commencement of the term, on which occasion the tenant said, he knew no steps could be taken until March (*Doe d. Channell v. Roe*, 9 Dowl. P. C. 67), have been held insufficient. Where the declaration in ejectment was entitled of Trinity Term, 9th (instead of 8th) Vict., and the notice [*984] *had no date, but required the tenant to appear in next Michaelmas Term (1845), and a regular service was effected before that term, the court granted a rule for judgment (*Doe d. Gyde v. Roe*, 14 M. & W. 788). As to where the declaration was entitled of a term not arrived, and there was no date to the notice, see *Doe v. Roe*, 2 Dowl. P. C. 186; *Doe d. Giles v. Roe*, 7 Dowl. P. C. 579; *Doe d. Newman v. Roe*, 9 Dowl. P. C. 131; *Anon.* 2 Ch. 172; *Doe d. Green v. Roe*, 8 Dowl. P. C. 612; *Anon.* 3 Jur. 1193; *Burgess v. Roe*, 4 Jur. 87. Where there is an omission of the court in the title of the declaration, which is supplied by the notice, it is not material (*Doe d. Tattersall v. Roe*, 8 Dowl. P. C. 612). It is not material whether the name be filled in with the casual ejector or the tenant in possession (*Doe d. Dickinson v. Roe*, 9 Dowl. P. C. 363). A declaration of a term, in the course of which there has been a demise of the crown, should be entitled of the first year of the successor's reign (*Anon.* 1 Dowl. 4).

Where the declaration is founded upon the provisions of the 1 Will. IV. c. 70, s. 36, it must be specially entitled of the day next after the day of the demise, whether the same shall be in term or vacation, but with this exception, the declaration may be entitled of a term anterior to such demise (*Ad. Ej. 165*). The statute only applies to issuable terms (*Doe v. Roe*, 1 Dowl. 304; 2 Cr. & J. 123). It does not apply to the case of a tenancy expiring before the first day of term (*Doe d. Somerville v. Roe*, 4 Moo. & S. 747). Where the right accrues in *H. T.*, and the premises are situate in Middlesex, the statute does not apply (*Doe d. Norris v. Roe*, 1 Dowl. 547). If the right accrue after the essoin day of *T. T.* the landlord cannot serve a declaration in ejectment, as of that term, under the statute (*Doe v. Roe*, 1 Dowl.

79); and it cannot be objected at nisi prius that the action was not commenced within ten days after the right accrued (*Doe v. Brindley*, 1 B. & Ad. 84).

The names of the parties are usually fictitious, but a mistake does not seem to be very particular (*Anon.* 1 Ch. 573 n.; *Doe v. Roe*, 9 Dowl. P. C. 363).

Venue.] This is local, and must be in the county where the premises are situate (6 Mod. 222; *Mostyn v. Fabricas*, Cowp. 161, 176); a variance will nonsuit the plt. If the venue in the body of the declaration be correct, a mistake of that in the margin is unimportant (*Doe d. Goodwin v. Roe*, 3 Dowl. P. C. 323; see *Doe d. Manners v. Roe*, 1 W. W. & H. 32). In an action of ejectment it is sufficient, first, if the venue be stated in the body of the declaration, though no venue be stated in the margin; second, if the notice to appear specify the court, though the declaration be not entitled in any court (*Doe d. Parmiter v. Roe*, 2 Dowl. N. S. 112, C. P.).

Statement of Demise, by whom.] The demise itself is merely fictitious; but it must, nevertheless, be consistent with the title of the lessor of the plt.; as, where the declaration stated the demise to be joint when it was several, it was held bad (*King v. Berry*, Poph. 57; *Treport's case*, 6 Rep. 14 b; see *Doe d. Burney v. Adams*, 2 Cr. & J. 232; 2 Tyrw. 289). So, where the demise was laid as joint, when it was made by tenants in common, it was bad; because tenants in common cannot make a joint demise, their estates being several and distinct, and no privity existing between them (*Moor v. Fursden*, 1 Show. 342; *Heatherley v. Weston*, 2 Wils. 232; see *Doe d. Poole v. Errington*, 1 Ad. & E. 750). Two of three co-executors may recover in ejectment on a demise in the names of both (*Doe d. Stace v. Wheeler*, 16 Law J. 312, Ex.; 15 M. & W. 623). Joint-tenants, or parceners, may

*declare upon a joint demise, because they are seised *per my et per* [*985] *tout*, and derive their estates from one and the same title (*Millener v. Robinson*, Moo. 682; *Boner v. Juner*, 1 Ld. Raym. 726; *Morris v. Barry*, 1 Wils. 1; *Doe d. Blight v. Pitt*, 11 Ad. & E. 842; *Doe d. Poole v. Errington*, 1 Ad. & E. 750); or several demises may be alleged from each, because the plt. has, by the several demises of each, the entire interest in the whole subject, and the several letting to the plt. having severed the joint tenancy, there is, therefore, no incongruity in his recovering (*per Ld. Ellenborough*, *Doe d. Marsack v. Read*, 12 East, 61; *Roe d. Ruper v. Lonsdale*, ib. 39; *Doe d. Gill v. Pearsan*, 6 East, 182; *Doe d. Leelham v. Fenn*, 3 Camp. 190); and it may be stated to be a demise of the whole premises by each joint-tenant (ib.). But, where tenants in common are lessors of the plt. the demise must be stated as coming severally from each; or, to avoid this necessary allegation, they may demise to a third person, and the demise in the declaration may be made to the plt. through that person (*Ad. Ej.* 4th ed. 167); and, though tenants in common must demise severally, yet the demise may be laid as of the whole premises, under which an undivided moiety may be recovered (*Doe d. Bryant v. Wipper*, 1 Esp. 330). If a term vests in three co-executors, the land may be recovered on a joint demise by all or by two of them, or by one of them it seems (*Doe v. Wealer*, 15 M. & W. 623). If the right of entry be in husband and wife, in right of the wife, the demise may be laid either by husband and wife, or by the husband alone (*Jordan v. Wilkes*, Cro. Jac. 332; *Tracey v. Dutton*, ib. 617). It is not now necessary, as formerly was the practice when a corporation demised, to allege it to have been made under a power of attorney, and by deed (*Furley v. Canterbury (Mayor of) v. Wood*, 1 Esp. 198; *Partridge v. Ball*, Ld. Raym. 136;

Doe d. Rochester (Dean and Chapter of) v. Pearce, Ad. Ej. 190); and so, in the case of tithes, the demise need not be stated to have been made by deed (Partridge v. Ball, Ld. Raym. 136; Carth. 390). It is advisable, where any difficulty arises as to the party in whom the legal interest exists, to allege several distinct demises by persons severally interested, as in the case of trustees and *cestui que trust* (2 Ch. Pl. 669, n. (f); Ad. Ej. 167). It is necessary to obtain the consent of the person under whom a demise is claimed, to be permitted to make use of his name (Doe d. Vine v. Figgins, 3 Taunt. 440; Doe d. Hammek v. Fillis, 2 Ch. Rep. 170; Shepherd v. Roe, 2 Ch. 171). The court struck out B.'s name where the action was brought on two several demises of A. and B., it appearing that the tenant claimed under B., and the action was defended to protect B.'s interest against A., and that A. claimed under a conveyance, asserted to be fraudulent, although it was sworn that the conveyance from B. to A. was *bona fide*, for good consideration, and that A. was in circumstances to indemnify B. (Doe d. Hunt v. Clifton, 4 Ad. & E. 809). If there be a dispute as to the inheritance, the court will not compel the trustee of an outstanding term attending such inheritance to lend his name to either party (Doe d. Prosser v. King, 2 Dowl. P. C. 580). Where, by an under-lease, power was reserved, on non-payment of rent, "to the lessors, and the original lessor," to enter: held, that the demise was properly laid to be to the lessors alone, and that it need not be a joint demise by the lessors and original lessor (Doe v. White, 4 Bing. 276). Where by lease mortgagee demised, and the executrix of mortgagor demised and confirmed a power of re-entry being reserved to them or either of [*986.] them; held, that it operated as a demise *by the mortgagee and the confirmation of the mortgagor's representative (Doe d. Barring v. Adams, 2 C. & J. 232; see Treport's case, Rep. 14 b).

The name of the lessor of the plt. must be correctly stated, or a variance will be fatal (Cro. Eliz. 776). If the demise be by a corporation aggregate, the christain names of the parties need not be inserted; but it is otherwise if the corporation be sole (Carter v. Cromwell, Sav. 128; cited Dy. 86).

Where the demise was laid to be by the "Mayor, &c., of the borough town of Malden," and the name of the corporation was "Mayor, &c., of Malden," it was held to be no variance, it appearing from the charter, which was in evidence, that Malden was a borough town (Doe d. Malden (Mayor, &c., of) v. Miller, 1 B. & A. 699). The 59 Geo. III. c. 12, s. 17, vests all lands, &c., in the churchwardens and overseers for the time being, and requires that the parties shall in all actions be named and described as overseers; but where, in one count, the lessors were described by their title of office, without their names; and in the other their names without their office: held sufficient after verdict (Doe d. Orleton v. Harper, 2 D. & R. 708). Where one set of counts omitted the names, the court ordered them to be struck out (Doe d. Llandesilio v. Roe, 4 Dowl. P. C. 222). The demise by a corporation aggregate may be laid in the usual way, without any statement of a power of attorney or a lease being made, in the declaration (see Ad. Ej. 170); nor is it necessary in an ejectment for tithes, to declare on a demise by deed (Swadling v. Piers, Cro. Jac. 613; Partridge v. Ball, 1 Ld. Raym. 136); nor when the demise is by the master and fellows of a college, dean, and chapter of a cathedral, master or guardian of an hospital, parson, &c., to state rent to have been reserved, &c., pursuant to 13 Eliz. c. 10 (Carter v. Cromwell, Sav. 129); nor need such statement be made where the demise was by an infant (Zouch v. Parsons, Burr. 1794). Where the demise is by an infant, it is usual, with regard to the costs, to make his father or guardian the plt., instead of a fictitious person (Noke v. Windham, Stra. 694; Anon. 1 Wils. 130; Cowp. 182).

Statement of Time of Demise.] The demise must be laid subsequently to the plt.'s right of entry (*Goodtitle v. Galloway*, 4 T. R. 680; B. N. P. 105). Ejectment for part of a messuage. By indenture of lease, dated the 28th of April, 1834, the lessor of the plt. demised to Evans a messuage, to hold from the 1st of May then next for forty years, at the rent of 25*l.* a year. Evans covenanted thereby not to underlease without the consent in writing of the lessor, and there was a proviso for forfeiture in case he should be adjudged bankrupt. With the consent in writing of the lessor, Evans underlet three rooms in the messuage to the deft. for twenty-one years, by a lease, dated the 25th of March, 1839. In January, 1840, Evans was adjudged a bankrupt, and the lessor of the plt. brought ejectment for the whole of the messuage, except the rooms leased to the deft., and entered under a writ of possession on the 12th of May, 1841. The deft. continued to occupy the three rooms, and in February, 1843, an execution having issued against him, the lessor of the plt. served the sheriff with a notice that there was a sum of 25*l.* being one year's rent, due in November, 1842, in respect of the premises occupied by the deft. as his tenant, and requiring the sheriff to pay the same to him. The sheriff accordingly paid over to the lessor of the plt. 25*l.* out of the levy. On the 24th of April, the deft. was served with a six months' notice to quit. The *demise in the present action was laid on the 4th of May, 1844. Held, that the tenancy must be considered as commencing on the [*987] 12th of May, and that the demise on the 4th of May was before title had accrued to the lessor of the plt., and therefore the ejectment was not maintainable (*Doe d. Lloyd v. Ingleby*, 14 Law J. 246, Ex.; 14 M. & W. 91). The demise must not be laid after the service of the declaration, "because it would then appear upon the proof that the nominal plt. had no title at the time of the service" (per Bailey, J.; *Doe d. Lawrence v. Shawcross*, 3 B. & C. 754; 5 D. & R. 711; *Doe v. Fachan*, 15 East, 286). It should be laid as far back as the title of the lessor will admit, with a view to the mesne profits, as the plt. is entitled to all such as may arise subsequently to the day of the demise (*Aislin v. Parkin*, Burr. 665). Where a sequestration of glebe land was published after the expiration of a notice to quit, a demise by the rector, laid on a day subsequent thereto, but preceding the publication, was held good, though the bishop had previously indorsed the writ (*Doe v. Black*, 3 Camp. 447). A demise by an administrator may be laid before administration granted, but it must be after the death of the party (2 Selw. N. P. 682; *Roe v. Summersit*, 2 Bl. R. 694); and a demise by the heir by descent, on the day of the death of his ancestor, was held good, because, though made on the same day, yet it might be after the death (*Roe d. Wrangham v. Hersey*, 3 Wils. 274; *Doe v. Wells*, 10 Ad. & E. 427); *semble*, a posthumous son taking lands under the provisions of 10 & 11 Will. III. c. 16, would be entitled to lay the demise from the day of his father's death (B. N. P. 105). Where the mortgage-deed authorized the mortgagor to remain in possession until default made in payment, the demise must be laid on a day subsequent to the time of payment (*Wilkinson v. Hall*, 3 Bing. N. C. 508). When assignees of a bankrupt are lessors of the plt., the demise must be laid after execution of bargain and sale by the commissioners to the assignees, for the freehold remains in the bankrupt, though not beneficially, until taken out of him by the conveyance (*Doe d. Esdaile v. Mitchell*, 2 M. & S. 446; *Doe d. Whatley v. Telling*, 2 East, 256; see 6 Geo. IV. c. 16, and 1 & 2 Will. IV. c. 56, s. 25; see now 12 & 13 Vict. 106, *ante*, "BANKRUPTCY"). When an actual entry is necessary to avoid a fine, the demise must be laid after the entry (*Berington d. Dormer v. Parkhurst*, 13 East, 489; S. C. Stra. 1086). Fines and recoveries are now abolished by 3 & 4 Will. IV. c. 74. Where the surrenderee of a copyhold is lessor of the

plt., the demise may be stated to have been made between the times of surrender and admittance (Holdfast d. Woollams v. Clapham, 1 T. R. 600; Doe d. Bennington v. Hall, 16 East, 211, where Lord Ellenborough observes, "We will not look to his title till admittance; but, when admitted, and his legal title perfected, we will look to his real title, derived from the act of the party surrendering to him, which has been made perfect by the subsequent admittance"). Where the date of the year of the demise is omitted the plt. should apply to the court to compel the lessor to insert the correct date (Doe d. Parsons v. Heather, 8 M. & W. 158). In Doe v. Leach, 3 Man. & G. the court amended it. Where the ejectment is on 4 Geo. II. c. 28, s. 2, the day of the demise must be subsequent to the last day on which rent is payable to save the forfeiture (Doe d. Lawrence v. Shawcross, 3 B. & C. 752). In the case of a tenancy at will, the demise must be laid after the possession has been demanded (Ad. Ej. 172), the possession of the deft. then becoming unlawful (Right d. Lewis v. Beard, 13 East, 210; Hegan v. Johnson, 2 Taunt. 148; Goodtitle v. Burkett, 4 T. R. 680). In *the case of

[*988] a demise by overseers of the poor, it should be stated to be made by those for the time being, at the period of bringing the action, if the party has recognised a tenancy under them; or, if not, it may be laid as the demise of the overseers who granted him possession (Doe d. Grundy v. Clarke, 14 East, 488); perhaps any recognition, under any set of overseers, would be sufficient to support a demise laid from them (Ib. 489). In ejectment on the forfeiture of a lease, the day of the demise may be laid on the same day the forfeiture was incurred (Doe v. Wells, 10 Ad. & E. 427). So it may be laid on the same day a disclaimer was made (Doe v. Long, 9 C. & P. 773). Where the lease contained the usual clause of re-entry, with a general covenant to repair, and a further covenant to repair within three months after notice, &c., the demise may be laid before the expiration of the three months (Roe v. Paine, 2 Camp. 520; see Horsefall v. Testar, 1 Moo. 89). It is no ground of nonsuit in ejectment under 4 Geo. II. c. 28, s. 2, for a forfeiture on non-payment of rent that the service of the declaration was on a day subsequent to that of the demise to J. Doe, if it appear that there was rent in arrear, and no distress on the premises at the time the declaration was served (Doe v. Shawcross, 3 B. & C. 752). As regards the time of the demise, it is sometimes usual, should any difficulty occur as to the exact period, to insert different demises by the lessor of the plt. to have taken place on different days (Ad. Ej. 171; 2 Ch. Pl. 670, n.). The duration of the term, as alleged to have been demised to the plt., is not material; so the plt. may declare on a demise for five years, though the lessor of the plt. have only a lease for three years (Doe d. Shore v. Porter, 3 T. R. 13; B. N. P. 106; Clerk v. Rowell, 1 Mod. 10, overruling Roe v. Williamson, 2 Lev. 140; see Doe d. Strode v. Seaton, 2 C. M. & R. 728). Where an actual entry is necessary, the demise should be laid subsequently to it (Doe d. Lee Compere v. Hicks, 7 T. R. 433). Where the demise was laid on the 3rd of October, without stating the year, it was held enough to prove a title on any 3rd of October, and that no amendment at nisi prius could be made, nor was one necessary (Doe v. Heather, 8 M. & W. 158); but the day of the demise may be amended at nisi prius so as to suit the proof of title (Doe d. Edwards v. Leach, 3 M. & G. 229; Doe v. Hall, 5 Man. & Gr. 795).

Statement of Premises.] The description of premises in the declaration must be sufficiently certain; it will be enough to state lands by the provincial names usually adopted in the counties where they are situate: thus, in Norfolk, "five acres of alder carr" has been held good; so, in Suffolk, for

a beastgate, and, in Yorkshire, for a cattlegate; so, in Durham, for coal-mines, without showing the number (*Whittingham v. Andrews*, Salk. 254; *Barnes v. Peterson*, Stra. 1603; *Bennington v. Goodtitle*, ib. 1084); and, in Ireland, for a township, or kneave, for so many acres of bog, or of mountain (Ib.; *Cottingham v. King*, Burr. 623); but for mountain or waste in England the description must be more certain, because those terms comprehend many sorts of land (*Hancock v. Price*, Hardr. 57). Describing premises as a hop-yard, so also as an orchard, has been held sufficient (*Wright v. Wheatley*, Noy, 37; S. C. Cro. Eliz. 854; *Royston v. Eccleston*, Cro. Jac. 654). The word tenement is not a sufficient description of the premises (*Goodtitle v. Walton*, 2 Stra. 834; *Copleston v. Piper*, 1 Ld. Raym. 191); nor is a messuage *or* tenement (*Goodright d. Welch v. Flood*, 3 Wils. 23; *Wood v. Payne*, Cro. Eliz. 186); nor messuage *and* tenement (**Doe d. Bradshaw v. Plowman*, 1 East, 441; *Doe d. Stewart v.* [*989] *Denton*, 1 T. R. 11); but this error in describing the premises cannot, it appears, be now taken advantage of by the deft. (*Goodtitle d. Wright v. Otway*, 3 East, 357; see *Doe d. Laurie v. Dyball*, 2 Moo. & P. 330; 8 B. & C. 70; 2 M. & R. 184). A description, however, of the premises as a messuage *or* tenement, will be sufficient, if there be additional words tending to explain the uncertainty of the expression, as a messuage *or* tenement, *called the Black Swan* (*Burbury v. Yeomans*, 1 Sid. 295); describing the place as a passage-room has been held good (*Bindover v. Sindercombe*, 1 Ld. Raym. 1470). So, "a certain place called the vestry" (*Hutchinson v. Pul-ler*, 3 Lev. 95); and "a room or chamber in a second story" (*Anon.* 3 Leon. 210). So, for a stable and cottage (*Hill v. Giles*, Cro. Eliz. 218; *Lady Dacre's case*, 1 Lev. 58; *Hamond v. Ireland*, Sty. 215). So, for a messuage or bur-gage, because they both have the same signification (*Danvers v. Wellington*, Hardr. 173; *Rochester v. Rickhouse*, Poph. 203). So, describing the pre-mises as "part of a house in A." (*Sullivan v. Seagrave*, Stra. 695; *Rawson v. Maynard*, Cro. Eliz. 286). So, ejectment for "four corn-mills" (*Fitzgerald v. Marshall*, 1 Mod. 90). In describing land, the particular species should be alleged, as pasture or meadow, &c., and the quantity of each must be shown (*Massey v. Rice*, Cowp. 346; *Savell's case*, 11 Rep. 55); the term close is not a sufficient description (*Knight v. Sims*, Salk. 254; *Joans v. Hoel*, Cro. Eliz. 235; see *Palmer's case*, Owen, 18; *Martyn v. Nichols*, Cro. Car. 573; *Jorden v. Cleaburne*, Cro. Eliz. 379; *Pomble v. Staine*, 1 Lev. 213); ten acres of underwood has been deemed sufficiently certain (*Warren v. Wakeley*, 2 Roll. R. 482); so, fifty acres of gorse and furze (*Fitzgerald v. Marshall*, 1 Mod. 90); and fifty acres of furze, and heath and moor and marsh (*Connor v. West*, Burr. 2672), and ten acres of peas (*Odingsall v. Jackson*, 1 Brown, 149). An objection to a verdict as including an entire interest in land, instead of one-third, is no ground of exception, and cannot be entertained on a writ of error; it might have been rectified by the court on application (*Faussett v. Carpenter*, 5 Bli. N. S. 75). So, for a manor, or a portion of a manor, as a moiety, without a more particular description (*Ad. Ej.* 4th ed. 25). In ejectment for tithes, the quantity need not be stated; they will be sufficiently described as certain tithes of hay, wool, wheat, &c. (*Harpur's case*, 11 Rep. 25; *Worrall v. Harper*, 1 Roll. 65; *Anon.* Dy. 116; *Baldwin v. Wine*, Cro. Car. 301). When there has been a former ejectment, and the person ejecting builds upon the premises, the owner need not men-tion the building; a description of the land will be sufficient (*Goodtitle d. Chester v. Alker*, 1 Burr. 133). It is usual to allege the number of acres or messuages, &c., in the declaration to be greater in number than may actually be the case, for the plt. will be entitled to recover less than the num-ber alleged, but he cannot recover more than that number (*Den d. Burgis v.*

Purvis, Burr. 326; Gay v. Rand, Cro. Eliz. 13); and a moiety, or third part, may be recovered, where in the declaration the whole is claimed (Ablett v. Skinner, 1 Sid. 229; Goodwin v. Blackman, 3 Lev. 334).

Statement of Local Situation of Premises.] A local description of the premises in the declaration, beyond a statement in the county in which they lie, is unnecessary. A demise of premises, situate in the county aforesaid, has been held sufficient on motion in arrest of judgment (Doe d. Edwards v. Gunning, and Doe d. Bassett v. Mew, 7 Ad. & E. 240). There is no occasion to mention the parish or hamlet in which the premises are
[*990] situate; the name of the place *will be sufficient (Goodtitle d. Brembridge v. Walter, 4 Taunt. 671); and, indeed, the name of the place need not be strictly alleged, if, from other parts of the declaration, a sufficient description can be collected (Goodright d. Smallwood v. Strother, Bl. R. 706). Where, however, the parish, &c., is attempted to be set out, it must be correctly alleged, or a variance will be fatal; as, where the premises were described as situate *in the united parishes of St. Giles in the Fields and St. George, Bloomsbury*, when it appeared that the two parishes were united by act of parliament for the maintenance of their poor only, and not for any other purpose, it was held bad (Goodtitle v. Lammiman, 2 Camp. 274; S. C. 6 Esp. 128). So, describing lands as situate in the parishes of A. and B., or one of them, was held bad for uncertainty (Goodright v. Fawson, 7 Mod. 457; Cottingham v. King, Burr. 624; Goodwin v. Blackman, 3 Lev. 334; see Burr. 330; and Doe d. Marriott v. Edwards, 1 M. & R. 319). Where the premises are described as situate in the parish of A. and B. which were separate parishes, the court rejected the word parish as surplusage, and considered the demise as of lands in A. and B. (Goodtitle d. Brembridge v. Walter, 4 Taunt. 671). But see Doe d. Marriott v. Edwards, 1 M. & R. 319, in which a similar variance was held fatal. But, where they were stated to lie *in the parish of West Putworth and Bradbury*, and it appeared they were separate parishes, it was nevertheless held good, for the word *parish* might be rejected (Goodwin v. Blackman, *supra*; Goodtitle v. Walter, 4 Taunt. 671). See Doe v. Edwards, 1 Moo. & R. 319, where also it was amended; and see Doe v. Leach, 3 Man. & G. 229, approving of Doe v. Edwards, *post*, pp. 992, 1002). So, where they were described as being in the parish of *Farnham*, and it appeared to be Farnham Royal (Doe d. Tollett v. Salter, 13 East, 9); or in St. Mary, Lambeth, and they were situate in Lambeth (R. v. Glossop, 4 B. & A. 619; Kirtland v. Pounsett, 1 Taunt. 570). Where the situation of the premises was stated to be in *Westbury*, and it appeared there were two *Westburys*, one on *Trym*, the other on *Severn*, it was still held to be good (Doe d. James v. Harris, 5 M. & S. 326; see also Doe v. Carter, 1 Y. & J. 492; but see 13 East, 9). Where the premises are situate in two parishes, they may be described as lying in the two, or in each respectively (see *post*, "*Precedents*"). But although it is not necessary to give any local description, beyond a statement of the county in which they lie, yet the omission of *all* local description would be error, although the county and villa in which the demise was made are stated in the declaration, and the county is stated in the margin (Doe d. Rogers v. Bath, 2 Nev. & M. 440; see "*AMENDMENT*").

Plaintiff's Entry.] This need not be alleged to have been made on any particular day, although it is usual to state one (Ad. Ej. 176; Wakeley v. Warren, 2 Roll. R. 466).

Statement of Ouster.] An ouster should be stated; as to proof of it, see

post, 1003. The day on which the ouster is stated to have taken place should be after the commencement of the supposed demise. It is not unusual, though unnecessary, to mention a particular day (*Morrell v. Smith*, Cro. Jac. 311). But it is the better practice to mention a particular day. A mistake in the statement of the day, especially if the words "afterwards, to wit," are introduced before it, would, it seems, be immaterial (Cro. Jac. 96; *Ad. Ej.* 177; *B. N. P.* 106).

The omission of the allegation that John Doe is indebted to the *Queen, and the *quo minus* in a declaration in ejectment in the Ex- [*991] chequer are immaterial (*Doe d. Bloxham v. Roe*, 3 M. & W. 189; *Dowl.* 388; overruling *Doe v. Gillett*, 4 Tyrw. 69).

The court would now permit the lessor to amend his declaration before appearance, provided it worked no injustice to the deft. (*Ad. Ej.* 179; *Doe d. Dickinson v. Roe*, 9 *Dowl. P. C.* 363). But a mistake in the christian name of the lessor was not allowed to be amended where there was no appearance (*Doe d. Strut v. Roe*, 8 *Dowl. P. C.* 444). As to where an amendment will be permitted, see *Ad. Ej.* 179, 183 (see "VARIANCE").

Notice to Appear, Form of.] The notice to appear at the foot of the declaration should be directed to the tenant in possession, by his name (*Doe d. Burlton v. Roe*, 7 T. R. 477; 1 Chit. Rep. 215 a; 1 Moo. 113; 2 Chit. Rep. 179). It is best to insert both his christian and surname (*Doe v. Roe*, 1 Chit. Rep. 573 a). But the insertion of a wrong christian name, or the omission of it altogether, will not invalidate the notice (*Doe d. Warne v. Roe*, 2 *Dowl. P. C.* 517; *Doe d. Foulkes v. Roe*, ib. 567; *Doe d. Frost v. Roe*, 3 *Dowl. P. C.* 563; *Doe d. Peach v. Roe*, 6 *Dowl. P. C.* 62; *Doe d. Smith v. Roe*, ib. 629; *Doe v. Roe*, W. W. & D. 607; *Doe d. Smart v. Roe*, 9 *Dowl. P. C.* 340; *Doe d. Cowan v. Roe*, W. W. & D. 607; *Doe d. Messer v. Roe*, 5 *Dowl. P. C.* 716; and see *Doe d. Stainton v. Roe*, 6 M. & S. 203). But a notice directed to the personal representative of A. B., the deceased tenant (*Doe d. St. Margaret's Hospital (Governors of) v. Roe*, 1 Moo. 113; *Doe d. Paull v. Hurst*, 1 Chit. Rep. 162); or addressed to A. B., but served upon C. D., will be insufficient (*Doe d. Smith v. Roe*, 5 *Dowl. P. C.* 254; 2 Tyrw. 280). And the notice will be sufficient, although the address of the tenant be omitted, if he were duly served with the declaration before the first day of the term, and acknowledged such service (*Doe d. Pearson v. Roe*, 5 Moo. 73). When the possession of the disputed premises is divided among several, it is usual and sufficient not to insert in the copy served more than the name of the tenant on whom the particular copy is to be served (*Doe d. Field v. Roe*, 1 H. & W. 516; and see *Doe v. Roe*, 7 T. R. 477; *Doe v. Roe*, 8 *Dowl.* 500; *Doe d. Briggs v. Roe*, 4 Jur. 1134). A mistake in the name of one tenant in a copy served on another is immaterial (*Doe v. Roe*, 5 D. 716; *Doe v. Roe*, 6 *Dowl.* 62; *Doe v. Roe*, ib. 629. *Doe v. Roe*, 1 Arn. 386). It seems that where several tenants have been duly served, it will be sufficient, although the notice at the foot of the declaration was not addressed to any or either of such tenants (*Doe v. Roe*, 5 Moo. 73). The names of the lessors of the plts., who sue as church-wardens, need not be given in the notice to appear (*Doe d. Pitminster v. Roe*, 1 W. W. & H. 347). If, besides a regular notice to appear, a notice to find recognizances is annexed to the declaration, the latter may be treated as surplusage (*Doe v. Roe*, 5 *Dowl.* 508).

Under the 11 Geo. IV. & 1 Will. IV. c. 70, s. 36, the notice must require an appearance and plea within ten days in the court in which the action is brought. The notice must require the tenant to appear, and apply to the court to be admitted deft., instead of the casual ejector, within a certain time

after the declaration is delivered; and the time when the notice should require the tenant to appear and make his application is regulated by the locality of the premises; and when the provisions of the 1 Geo. IV. c. 87, s. 1, are resorted to, the notice must also inform the tenant that he will be required to enter into a recognizance with two sufficient sureties, &c.

[*992] If the declaration be duly served before the *essoign* *day, the omission of the term in which the tenant is to appear is immaterial (Doe v. Roe, 1 Tyrw. 280; 1 Cr. & J. 330). But a notice ordering the tenant to appear and defend in due time, is sufficient (Doe d. Isherwood v. Roe, 2 Nev. & M. 476; Doe v. Forbes, 2 Dowl. 420; Ad. Ej. 184). In a country ejectment, the notice should require the tenant to appear generally in the ensuing term, whether it be an issuable one or not (Tidd, Pr. 524; R. G. E. T. 2 Geo. IV.; Doe d. Clarke v. Roe, 4 Taunt. 738). In London or Middlesex, he should be required to appear on the first day of the term next after delivery of the declaration, specifying the term by name; but if it be to appear generally of the term it will do, though then the tenant will have the whole term to appear in (Ad. Ej. 184). But it has been held sufficient if the notice be to appear "in the beginning of the term" (Tridder v. Davis, Barn. 175). So, to appear in Hilary, omitting the word term (Doe d. Diamond v. Roe, 8 Dowl. P. C. 308). So, to appear within ten days when it was served before term (Anon. 1 Dowl. P. C. 18). It is, however, insufficient where the notice was to appear "on the morrow of the Holy Trinity" (Selw. N. P. 640). So, in eight days of St. Hilary (Lackland d. Dowling v. Radland, 8 Moo. 79). So, to appear in due time (Doe d. Isherwood v. Roe, 2 Nev. & M. 476). And the court granted a rule nisi where the notice was to appear "next Eastern Term," and was dated May 13, and the affidavit of service stated that it had been explained to the tenant that he was to appear in the next Trinity Term (Doe d. Symes v. Roe, 5 Dowl. P. C. 667). A declaration delivered in Easter vacation was entitled of Eastern Term, and the notice to appear on the first day of *next* Term; the court granted a rule for judgment against the casual ejector during Easter Term (Ad. Ej. 185). When the notice was given by mistake for Hilary instead of Trinity Term, and the tenant was afterwards informed of the mistake, a rule nisi was granted (Anon. 2 Chit. Rep. 171; Doe d. Greaves v. ———, ib. 172; see Doe d. Thomas v. Roe, ib. 171; Lackland d. Dowling v. Badland, 8 Moo. 79). A rule nisi has been granted where the declaration was entitled in the Queen's Bench, and the notice to appear was in the Common Pleas (Doe d. Evans v. Roe, 9 Dowl. P. C. 998). Under the 11 Geo. IV. & 1 Will. IV. c. 70, s. 36, the notice is to appear within ten days; and in a case not under the statute, a notice in this form was held immaterial (Anon. 1 Dowl. 18); under 1 Geo. IV. c. 87, s. 1, the notice must be to appear on the first day of the following term (see p. 993). The term should regularly be mentioned by a name, but if the notice and declaration otherwise show what term is meant, it will be immaterial (Ad. Ej. 184).

The notice should be regularly subscribed with the name of the casual ejector, but it will suffice if it be subscribed with the plt.'s name, or that of the lessor or of any other person (Peaceable v. Troublesome, Barn. 172; Hazlewood d. Price v. Thatcher, 3 T. R. 351; Goodtitle d. Norfolk (Duke of) v. Notitle, 5 B. & A. 849). The notice is sufficient, if signed "A. B., agent for the plt.," requiring the tenant to appear and give bail for such purposes as are specified in the statute, without going on to state those purposes in detail (Doe d. Beard v. Roe, 1 M. & W. 360). The notice pursuant to 1 Geo. IV. c. 87, s. 1, must be signed by the landlord himself or his agent, and not by the casual ejector (Anon. 1 D. & R. 435, n.; Doe d. Gilbert v. Roe, 1 W. W. & H. 346); and should be in addition to that signed by the

casual ejector (Anon. 1 D. & R. 435; Doe d. Sampson v. Roe, 6 Moo. 64). The notice should state that the consequence of the action not being defended will be turning the tenant *out of possession; if not, it is [*993] defective, but may be amended on terms (Doe d. Darwent v. Roe, 3 Dowl. 336). The date is immaterial, whether there be one, or a wrong one (Doe d. Evans v. Roe, 2 Ad. & E. 11). Where the notice was to appear in the King's Bench, the court having afterwards become the Queen's Bench, it is sufficient for a rule (Doe d. Davis v. Roe, 6 Dowl. 36). So, Common Bench instead of Queen's Bench (Doe d. Evans v. Roe, 9 Dowl. 899). Where the declaration against the casual ejector was intituled "In the Exchequer of Pleas," and the notice required the tenant to appear in this court, a rule for judgment was refused (Doe d. Phillips v. Roe, 6 M. & Gr. 980). Where the names of all the tenants are not affixed to each of the notices served, judgment in ejectment can only be moved for against the tenant to whom the notice was directed (Doe d. Musket v. Roe, 5 Law T. 173). The christian name of the tenant in possession was omitted in the notice to appear, and at the time of service the tenant refused to supply it; held, that the notice was sufficient (Doe d. Lewthwaite v. Roe, 1 C. B. 20). The notice ought to require appearance on the "first day of the term" (Doe v. Rushworth, 4 M. & W. 74). In proceedings in ejectment, by a landlord against a tenant, under the 1 Geo. IV. c. 87, s. 1, notice should be given to appear on the first day of the term next following. A notice, therefore, requiring the tenant to appear in next Easter Term generally, instead of the first day of the term, is bad (Doe d. Anson v. Roe, 9 Jur. 640). The court refused a rule for judgment against the casual ejector, upon a notice requiring the tenant in a country ejectment to appear "on the *first day of term*" (Doe d. Jacques v. Roe, 7 Man. & G. 347). The court refused to grant even a rule *nisi* for judgment against the casual ejector, where the notice at the foot of the declaration required the tenant to appear "on the first day" of the term, instead of in the term generally (Doe d. Burton v. Roe, 3 C. B. 607). A notice in ejectment to a tenant in possession to appear in the next term but one is insufficient (Doe d. Love v. Roe, 17 Law J. 176, C. P.). The notice need not be in the name of the plt., but if in the name of the lessor, or even if signed by a wrong name, the court will permit judgment against the casual ejector to be entered up (Goodtitle v. Notitle, 5 B. & A. 849).

Where two notices were annexed, one in the usual form, the other pursuant to 1 Geo. IV. c. 87, the court granted the common rule, allowing the plt. to treat the second notice as surplusage (Doe d. Roberts v. Roe, 5 Dowl. P. C. 508; see Anon., *ante*, p. 992). As to amendment of the notice, see Doe d. Bass v. Roe, 7 T. R. 469; Doe d. Darwent v. Roe, 3 Dowl. P. C. 336.

Plaintiff's Title.] In 1839 A. died, seised in fee of lands of which his eldest son, B., was his tenant. B., supposing him to have died intestate, entered on the lands, claiming them as heir-at-law; and, in 1830, mortgaged them in fee, and levied a fine to confirm the mortgage; and at the same time, an outstanding term of 500 years was, by his direction, assigned to the trustee for the mortgage. In 1835 B. sold the estate to the deft., who paid off the mortgage. The legal estate in fee and the equity of redemption were conveyed to the deft., and the term was assigned to a trustee for him, to attend the inheritance. In 1845 it was discovered that A. had executed a will, whereby he devised the lands in fee to his second son, who thereupon brought ejectment to recover the estate from the deft. and laid a demise in the name of the trustee to whom the term was assigned in 1835: held, first, that B.

had a sufficient estate to make him a good conusor of the fine (*Doe d. Cadwalader v. Price*, 16 M. & W. 603). Held, secondly, that, by the operation of the 8 & 9 Vict. c. 12, the term had absolutely determined; and the plt. could not recover upon the demise laid in the name of the trustee (*lb.*).

The lessor of the plt. claimed as assignee of a term of 999 years, which was traced from J. A conveyance was proved, by which M. assigned the term to J. more than fifty years before the trial, and J. was shown to have had possession thenceforward; and it was proved that possession had been in parties claiming through J. down to a term within a few years of the trial. It also appeared, that, before the conveyance to J., W. had released the term, to M., by a deed reciting the will of E., a party entitled to the term, under which W. and M. each asserted an interest. Probate of the will was not put in, and no proof was given of search for it. It did not appear that W. was not the party entitled to the term, in case of the intestacy of E.: held, first that a jury were not entitled to presume that probate of such will as was recited in the deed of release had been granted; and, therefore, that the title to the term was not traced from W. to M. (*Doe d. Woodhouse v. Powell*, 8 Q. B. 576). Held, secondly, that upon showing cause against a rule for a new trial, after a verdict for the lessor of the plt., it was not competent to him to abandon his claim of the term, and insist that independently of the will, the jury might presume an estate in fee from the possession (*lb.*).

W. H., seised in fee of a house and land, died in 1798, leaving a widow and his son, J. H., a minor above fourteen years of age. The widow (with whom J. H. lived) continued to occupy the house and land. In 1798, J. H. being still a minor, the widow married the deft., who continued thenceforward the occupation. In 1805, J. H. left the premises, but occasionally resided there afterwards, for two or three weeks at a time, with deft. and his wife. The wife died in 1841. In 1842, J. H. mortgaged the premises in fee to the lessor of the plt. for money, which was paid to the deft., deft. being present at the execution of the deed and privy to its contents, and receiving the money from J. H.: held, that in ejectment by the mortgagee the jury were warranted in presuming that the deft. occupied as tenant at will to J. H. (*Doe d. Groves v. Groves*, 10 Q. B. 486).

A., seised in fee, mortgaged in fee to B., and afterwards leased to deft. D. purchased the legal estate from B., and also the equitable estate from a party who derived it from A., which party also joined in the conveyance of the legal estate: held, that D., though he had received rent from deft., was not bound by A.'s lease, but might recover against deft. in ejectment after expiration of a notice to quit, or sue him for use and occupation after the payment and receipt of rent (*Doe d. Downe (Lord) v. Thompson*, 9 Q. B. 1037).

A., being tenant for life, under a power of leasing, created in 1763, demised to the deft. in 1826. The lease was not a good execution of the power, and in 1844, after the death of A., B., the reversioner, brought an ejectment against the deft., the demise being laid by B. only. It appeared at the trial, that in 1708, a term of a thousand years was created in the property in question for certain purposes, and to attend the inheritance, and that in an indenture of the 1st of March, 1757, the indenture creating the term was recited, and the executor of the surviving trustee of the term was required to assign it to attend the inheritance: held, that the action being brought and tried before the 31st of December, 1845, when the 9 & 10 Vict. c. 112, came into operation, the term could not be presumed to be surrendered, and that B. could not recover it on his own demise (*Doe d. Egremont (Earl) v. Langdon*, 13 Jur. 96; 18 Law J. 17, Q. B.). Held, secondly, that the deft. was not estopped from setting up the term, as he did not thereby deny the general

title of B., but protected his own lease, which was consistent with such title (Ib.).

In 1838, M. H. mortgaged premises for 1000 years to D., and in 1839 conveyed the fee for 187., subject to the mortgage term, to her daughter, the wife of deft.; this conveyance was unknown to the parties to the subsequent deeds. In 1842, M. H. mortgaged the premises in fee to M., and in October, 1844, conveyed the equity of redemption to C., the lessor of the plt. In October, 1844, M. assigned the mortgage of the fee to R. T., and the representatives of D. assigned the term of 1000 years to J. T., as trustee, "to secure the mortgage money to, and afterwards to be re-conveyed as C. should direct." In September, 1847, part of the premises being required for a railway, C. received the purchase-money from the company, and therewith paid off the mortgagees: held, that the term had not become attendant upon the inheritance by construction of law, so as to be determined by sect. 2 of stat. 8 & 9 Vict. c. 112; and therefore C. was entitled to recover upon the demise of J. T. (Doe d. Clay v. Jones, 13 Jur. 824; 18 Law J. 260, Q. B.). *Quære*, whether deft. could maintain that the term was satisfied (Ib.).

In ejectment the lessor of plt. relied on her own possession for thirteen years, and her husband before her for eighteen years, but in so doing showed that her husband died leaving children. Deft., in whom the legal estate was, before twenty years had turned the lessor of plt. out of possession: held, first, that the possession of the lessor of plt., not being connected by right with that of her husband, sect. 34 of stat. 3 & 4 Will. IV. c. 27, did not give her the right of possession against deft. (Doe d. Carter v. Barnard, 13 Jur. 915; 18 Law J., 306, Q. B.). Held, secondly, that the possession of the husband of the lessor of the plt. was *prima facie* evidence of the title of his heir, against which the possession of the lessor of plt. could not prevail (Ib.).

Plea.] The general issue is, not guilty; it is not now customary to plead any other plea (Ad. Ej. 227), though accord and satisfaction were once permitted to be pleaded to this action (Peytoe's case, 9 Rep. 77); and a plea to the jurisdiction has been allowed by permission of the court (Williams d. Johnson v. Keen, Bl. R. 197; Doe d. Morton v. Roe, 10 East, 523; Denn d. Wroot v. Fenn, 8 T. R. 474). The plea of ancient demesne has also been allowed in this action (Ib.; Doe d. Rust v. Roe, Burr. 1046; Brittle v. Dale, Salk. 158; S. C. Ld. Raym. 43; see Ad. Ej. 229). A plea *puis darrein continuance*, it seems, may be pleaded (Doe d. Burn v. Brewer, 4 M. & S. 300; but see Ad. Ej. 231).

Pleadings subsequent to the declaration in this form of action are not to be delivered between the parties (Doe v. Williams, 4 Nev. & M. 259).

A verdict in ejectment may be taken distributively, and the deft.

*is entitled to have it entered for him for that part of the premises [*994] to which the lessor of the plt. has failed to prove title (Doe d. Bowman v. Lewis, 2 D. & L. 667).

Particulars of Defects in Lease.] In ejectment brought by remainderman against lessee of the late tenant for life, on the ground that the lease was granted under a power not properly executed, the court will, on motion, order the lessor of the plt. to give particulars of the alleged defects in the execution (Doe d. Egremont v. Williams, 7 Q. B. 686).

Precedents.

Declaration by original on a single demise.

In the Q. B. (C. P.). — Term in the — year of the reign of Q. Vict.
 [Venue] (to wit.) Richard Roe was attached to answer John Doe of a plea of trespass and ejectment and thereupon the said John Doe by E. F. his attorney complains for that one A. B. on the day of A. D. at the parish of in the county of demised to the said John Doe (*describe the premises sufficiently to cover those sought to be recovered; the description may be as follows:*) ten messuages ten dwelling-houses ten carcasses of buildings ten stables ten out-houses ten yards ten gardens ten orchards 100 acres of arable land 100 acres of meadow land 100 acres of pasture land 100 acres of land covered with water and 100 acres of other land (*see description of other premises and property sought to be recovered; viz. a manor, rectory and tithe, common of pasture, tithes, &c.*, 2 Ch. Pl. 670, 671), with the appurtenances situate in the parish aforesaid (*ante*, p. 989), in the county aforesaid to have and to hold the same to the said John Doe and his assigns from thenceforth for and during and unto the full end and term of seven (*insert enough to cover time when plt. will get final judgment*) years from thence next ensuing and fully to be complete and ended. By virtue of which said demise the said John Doe entered into the said tenements with the appurtenances and became and was thereof possessed for the said term so to him thereof granted as aforesaid and the said John Doe being so thereof possessed the said Richard Roe afterwards to wit on the day and year aforesaid (or on the day of in the year aforesaid) with force and arms &c. entered into the said tenements with the appurtenances which the said A. B. had demised to the said John Doe in manner and for the term aforesaid which is not yet expired and ejected the said John Doe from his said farm and other wrongs to the said John Doe then and there did to the great damage of the said John Doe and against the peace of our said lady the now queen. Wherefore the said John Doe saith that he is injured and hath sustained damage to the value of 50*l.* and therefore he brings his suit &c. (*Add the following notice*).

Notice to appear thereto, directed to the tenant or tenants in actual possession.

Mr. C. D. &c. (*ante*, p. 991).

I am informed that you or some or one of you are in possession of or claim title to the premises in this declaration of ejectment mentioned or some part thereof and I being sued in this action as a casual ejector only and having no claim or title to the same do advise you to appear in next term (*if in the country, or if in London or Middlesex, on the first day of next term*), in her majesty's Court of Queen's Bench wheresoever her said majesty shall then be in England (*or, in the Common Pleas, in her majesty's Court of Common Bench at Westmr.*) by some attorney of that court and then and there by rule of the same court to cause yourself to be made deft. in my stead otherwise I shall suffer judgment therein to be entered against me by default and you will be turned out of possession. Dated this day of A. D. 1850.

Yours, &c.

Richard Roe.

Declaration by original on a double demise.

In the Q. B. (C. P.). — Term in the — year of the reign of Q. Vict.
 [Venue] (to wit.) Richard Roe was attached to answer John Doe of a plea of trespass and ejectment and thereupon the said *John Doe by his [*995] attorney complains for that one A. B. on &c. at the parish of in the county of demised to the said John Doe (*enumerate the premises sought to be recovered, which may be as ante*, p. 994) with the appurtenances situate in the parish aforesaid (*ante*, p. 989) in the county aforesaid to have and to hold the same to the said John Doe and his assigns from thenceforth for and during and unto the full end and term of seven (*insert enough to cover the time till plt. can get final judgment*), years from thence next ensuing and fully to be complete and ended * And also for that one E. F. on the day of A. D. at the parish aforesaid in the county aforesaid demised to the said John Doe ten other messuages &c. (*as in the first count, inserting the word other before each enumeration of property, then proceed*) to have and to hold the same with the appurtenances to the said John Doe and his assigns from thenceforth for and during and unto the full end and term of seven years from thence next ensuing and fully to be complete and ended. By virtue of which said several demises the said John Doe entered into the said several tenements first and secondly above-mentioned with the appurtenances and became and was thereof possessed for the said several terms so to him thereof respectively granted as aforesaid and the said John Doe being so thereof possessed the said Richard Roe afterwards to wit on the day of A. D. with

force and arms &c. entered into the said several tenements first and secondly above-mentioned with the appurtenances which the said A. B. and E. F. had respectively demised to the said John Doe in manner and for the several terms aforesaid which are not yet expired and ejected the said John Doe from his said several farms and other wrongs &c. (*Conclude as in the preceding precedent, and add the like notice to appear*).

The like, with two ousters.

[*Commencement as in the last precedent to *.*] By virtue of which said demise the said John Doe entered into the said tenements with the appurtenances and became and was thereof possessed for the said term so to him thereof granted. And the said John Doe being so thereof possessed the said Richard Roe afterwards to wit on &c. with force and arms &c. entered into the said tenements with the appurtenances which the said A. B. had demised to the said John Doe in manner and for the term aforesaid which is not yet expired and ejected him the said John Doe from his said farm. And also for that the said E. F. on &c. at &c. had demised certain other tenements with the appurtenances to the said John Doe that is to say (*describe the premises as before*) to have and to hold the same to the said John Doe and his assigns from thenceforth for and during and unto the full end and term of seven years from thence next ensuing and fully to be complete and ended. By virtue of which said last-mentioned demise the said John Doe then entered into the said last-mentioned tenements with the appurtenances and became and was thereof possessed for the said last-mentioned term so to him thereof granted as aforesaid. And the said John Doe being so thereof possessed the said Richard Roe afterwards to wit on &c. with force and arms &c. entered into the said tenements with the appurtenances lastly above-mentioned which the said E. F. had demised to the said John Doe in manner and for the term last-aforesaid which is not yet expired and ejected the said John Doe from his said last-mentioned farm and other wrongs &c. (*Conclude as in first precedent, and add the like notice to appear*).

For a form in the Exchequer and other forms, see the different works on pleading.

Plea of general issue.

In the Q. B. (C. P. or Ex. of P.) On the day of A. D. 1850.

C. D.
ats.

And the said C. D. by L. M. his attorney says that he is not guilty of the supposed trespass and ejectment, (or, if several ousters are laid in the declaration, of the supposed trespasses and ejectment) above laid to his charge (or any part thereof)

in manner and form as the said John Doe hath above thereof complained [*996] against him and of this he the said C. D. puts himself upon the country &c.

Amendments.] A declaration in ejectment has been amended even after judgment and writ of error brought, by leaving out the word "tenements" (Doe d. Lawrie v. Dyball, 1 Moo. & P. 330; 8 B. & C. 70; Anon. Chit. Rep. 537). So, a plt. has been permitted to amend on payment of costs, by adding a new count on another demise after three terms had elapsed, and the roll had been made up and carried in (Doe d. Beaumont v. Armitage, 1 D. & R. 173; 2 Chit. Rep. 302). It seems, an error, by inserting the name of the servant in possession in the declaration, may be amended (Doe d. Coby v. Roe, Ad. Ej. 3rd ed. 225). An amendment has been made at the trial in the name of the parish, under 3 & 4 Will. IV. c. 42, s. 23, even though the ejectment was brought for a forfeiture (Doe d. Marriott v. Edwards, 6 C. & P. 208; 1 Moo. & R. 319, approved in Doe v. Leach, *post*, p. 1002). Where there was an omission of all local description of the premises, the court allowed the declaration and issue to be amended, pending a rule nisi to arrest the judgment on the ground of such error on payment of costs of both rules (Doe v. Bath, 2 Nev. & M. 440). Where the declaration was on a supposed joint demise by two, and it appeared in evidence that they had not such an interest that they could join in a demise for the plt. an amendment was refused under the 3 & 4 Will. IV. c. 42, s. 23, by severing the demises (Doe d. Poole v. Errington, 3 Nev. & M. 646; 1 Ad. & E.

750). The court amended a declaration in ejectment, by adding a demise from another lessor, laid on the same day as the former, after a rule absolute for a new trial; the lessors of the plt. consenting that all evidence that would have been admissible if the amendment had not been made, should be admitted on the second trial (*Doe d. Bacon v. Brydges*, 6 Man. & G. 1034). The court will not amend a mistake in the christian name of the lessor of the plt., of John instead of James, no one having appeared (*Doe d. Strutt v. Roe*, 8 Dowl. 444). In certain cases the court will permit an amendment to be made in the notice at the bottom of a declaration in ejectment (*Doe d. Bass v. Roe*, 7 T. R. 469; *Doe d. Barwent v. Roe*, 3 Dowl. 336). After verdict, if the objection be grounded upon the mere mistake of the clerk, or a trifling nicety, there is no need of any actual amendment at all; the court will overlook the exception (*Doe d. Wrangham v. Hersey*, 3 Wils. 275). This distinction must be attended to; if there be only evidence at the trial upon such of the counts as are good and consistent a general verdict may be altered by the notes of the judge, and entered only on those counts; but if there be any evidence applicable to the other bad or inconsistent counts, the *postea* cannot be amended; the only remedy then is by a *venire de novo* (*Run. Ej.* 235).

An amendment in ejectment may be made even in the time of the demise, to prevent being barred (*Doe d. Hardman v. Pilkinton*, 4 Burr. 2447); thus, where the ejectment was to avoid a fine and the demise was laid before the plt. had made the entry, instead of after, it was, on motion, ordered to be amended. So, an amendment was allowed where the day of the demise was laid before the title accrued (*Doe d. Rumford v. Miller*, 1 Chit. Rep. 536). So, upon payment of costs of the application, by laying the demise anterior to the time of forfeiture even after the record was made up, and the cause set down for trial (*Doe d. Rumford v. Miller*, Ad. Ej. 3rd ed. 227); but an amendment was refused by altering it to a day subsequent to the day of the delivery of the declaration (*Doe d. Foxlow v. Jeffries*, Ad. [*997] *Ej. 3rd ed. 227). Where the demise is stated on a certain day of the month, but the year is omitted, the deft. should apply to the court to compel the insertion of the year; if he does not, the declaration will be applicable to any year, though the judge, at the trial, cannot amend as for a variance by inserting the year (*Doe d. Parsons v. Heather*, 8 M. & W. 158; 1 Dowl. N. S. 64). An amendment may be made at the trial under the stat. 3 & 4 Will. IV. c. 42, s. 23, in the day of the demise (*Doe d. Edwards v. Leach*, 9 Dowl. 877; 3 Sco. N. R. 509).

If the term demised to the plt. be expired, or likely to expire before trial, the court will now, at any time before trial, upon motion to amend, enlarge it upon payment of costs: thus in one case the term was enlarged after it had expired twelve years, though the cause was at issue, a special jury struck, and the parties had gone down to trial before the mistake was discovered (*Roe d. Lee v. Ellis*, 2 Bl. R. 940); but it was in another case considered too late to apply after the cause had been called on (*Doe d. Manning v. Hay*, 1 Moo. & R. 243). In another case still stronger, after a judgment in ejectment from Ireland affirmed, the court amended the declaration by enlarging the term on payment of costs, though the record was remitted to Ireland (*Vicars v. Heydon*, in error, Cowp. 841); but where an ejectment had been brought and judgment recovered in 1798, and the term of the demise laid in the declaration had since expired, the court refused to grant a rule for enlarging the term, and issuing a *scire facias*, the possession having changed, and the person who was the owner having since died (*Doe d. Rendell*, 1 Chit. Rep. 535). Again, where judgment in ejectment was signed sixty years ago, when the Court of Chancery granted an injunction to stay execu-

tion, and nothing appeared to have been done in the cause since; the Court of Queen's Bench refused to enlarge the term in the declaration, for the purpose of enabling a descendant of the original plt. to sue out a *scire facias*, in order to revive the judgment and take out a writ of possession against the heir-at-law of the original deft., unless it were quite clear that such amendment would work no injustice (*Bradney v. Hasselden*, 2 D. & R. 227; 1 B. & C. 121).

Evidence for Plaintiff.

Right to begin.] See "EVIDENCE." Where plt. claims as heir-at-law, and deft. as devisee, the latter by admitting the pedigree of the former may claim a right to begin and to reply (*Doe v. Braham*, 4 T. R. 497; *Feen v. Johnson*, Ad. Ej. 256). So where plt. claimed under a will, and deft. under a codicil, the latter on admitting the will may begin (*Doe v. Corbett*, 3 Camp. 368; *Pea. Ev.* 6, n.). Where deft. claimed as devisee, and admitted that the lessor of the plt. was heir: held, that he was entitled to begin (*Doe v. Smarth*, 1 Moo. & R. 476). Where the plt. claimed as devisee of the heir-at-law of A., and deft. as devisee of A., deft. having admitted that plt. was entitled to recover unless the former proved A.'s will: held, that he was entitled to begin (*Doe v. Barnes*, 1 Moo. & R. 386). But the admission must be applicable to the whole case without qualification (*Doe v. Wilson*, 1 Moo. & R. 323; *Doe v. Tucker*, Moo. & M. 536; *Doe v. Bray*, Moo. & M. 166). In ejectment the lessor of the plt. claimed under a will of the testator, dated the 23d of September, 1844. The deft. claimed under a subsequent will of the same testator, dated the 30th of December, 1844. The deft. admitted that the will of the *23d of September was a perfect will [*998] in every respect, and upon that admission claimed the right, and was allowed by the judge to begin at the trial. Held, that the admission of the deft. was not an admission of the whole of the plt.'s case, and therefore the right to begin had been improperly conceded to the deft. (*Doe d. Bather v. Brayne*, 17 Law J. 127, C. P.).

In General—Plaintiff's Title.] Strict proof of title will not be necessary, where a privity exists between the parties, as in the case of the common relationship of landlord and tenant, where the tenant is precluded from disputing his landlord's title (*Driver v. Lawrence*, 2 Bl. R. 1259, *post*, p. 1018); nor, where the lessor claims as mortgagee, nor where the deft. has been admitted into possession pending a treaty, or the like (Ad. Ej. 232). In other cases, where no such privity exists, strict proof of title will be necessary. In cases where there is a privity between the parties, it will, in general, be sufficient to prove that the deft. was, or those under whom he claims were, admitted into possession of the premises by the lessor of the plt., and that their right to the possession has ceased (Ad. Ej. 234): as well also when the privity is not between the immediate parties to the action with the derivative title of the claimant from the party by whom the deft. was originally admitted into possession (*Doe v. Abrahams*, 1 Stark. 305; *Rennie v. Robinson*, 1 Bing. 147). The title proved must not be inconsistent with the demise in the declaration; and therefore where the demise is laid as joint, proof of a joint interest in the whole premises must be given (Ad. Ej. 234). But if the demise be laid by each separately, they will be entitled to recover whether they have a joint or several interest, for a several demise severs a joint-tenancy (*Doe v. Read*, 12 East, 57).

Where a joint demise was laid by several trustees of a charity who were appointed at different times, and the tenant had paid one entire rent to their common clerk, it was held that such payment should enure in the most beneficial way for the trustees in support of their title, as brought forward by themselves, unless the deft. expressly proved them to be entitled in a different manner, and the fact of their being appointed at different times was not sufficient evidence for that purpose (*Doe d. Clark v. Grant*, 12 East, 221). The consent rule admits the lease, entry of the plt., ouster by the deft., and the possession of the premises by the deft. or tenant, when served with the declaration, and the plt. is not bound to produce the consent rule (*Doe v. Raby*, 2 B. & Ad. 948; overruling *Doe v. Lamble*, Moo. & M. 237). The only instance in which it can now be necessary to produce the rule is when the plt. applying his case to certain premises, the other contends that he does not defend, for there the rule may then be requisite to show for what he does defend (*Doe v. Raby*, *supra*; per Tenterden, C. J., accord.; *Doe v. Armfield*, 1 Dowl. N. S. 327). Prior possession, however short, is a sufficient *prima facie* title in ejectment against a wrongdoer (*Doe v. Dyeball*, Moo. & M. 346; 3 C. & P. 610). If it be proved that the lessor of a plt. let the *locus in quo* to a tenant, who held peaceable possession for about a year, this is sufficient evidence of title against a party who came in in the night, and forcibly turned such tenant out of possession (*Ib.*). The lessor of the plt. showed a conveyance in fee from S. in 1807, and that S. was in possession of the property in 1806 and 1807: held, evidence of S.'s seisin in fee unless there be evidence to show a less estate (*Doe v. Penfold*, 8 C. & P. 536).

It has been considered, that a party may be estopped from dis-
 [*999] putting *the title of another in this action, by referring the question of the right to the land to an arbitrator, who has awarded in favour of the lessor of the plt. (*Doe v. Rosser*, 3 East, 11; *sed vide* *Hunter v. Rice*, 15 East, 100). So, when the question of tenancy and rent was submitted to the Master of the Rolls by an amicable suit, the tenant cannot dispute the plt.'s title to rent after acquiescence in the decree against him (*Allason v. Stark*, 9 Ad. & E. 255).

Where there are several demises, and proof is given in respect of all of them at the trial, if evidence be tendered by the deft. which affects some of them only, the claimant may abandon such demises, and rest his case on the demises which such evidence does not affect (*Roe d. Rawlinson v. Wainright*, 2 Ad. & E. 520; *Doe d. Hogg v. Tindal*, 1 Moo. & M. 314).

The plt. must, in all cases, prove that he has a *legal* title to the premises, at the time of the demise laid in the declaration; evidence of an equitable estate will not be sufficient (*Goodtitle v. Jones*, 7 T. R. 49; *Doe v. Wroot*, 5 East, 132; *Roe v. Read*, 8 T. R. 118). The assignee of a copyhold, by a common-law conveyance without surrender, cannot sue even the widow of the assignor (*Doe v. Webber*, 3 N. C. 922). Where a will recited that the deviser had charged the land with 3000*l.* on his daughter's marriage; then followed a devise to trustees to keep down the interest, and apply the surplus rents as directed until the lessor of plt. should come to the age of twenty-three, and then to him subject to the charge: held, that this did not show a legal estate out of the lessor of the plt. (*Doe v. Heakin*, 6 Ad. & E. 495). As to when trustees take the legal estate, see *Jefferson v. Morton*, 2 Saund. 11; 2 Bla. Com. n. Chitty's ed.; *Fletcher, Leg. Est. of Trustees*. If a feoffment be to A. and his heirs, to the use of or in trust for B. and his heirs, B.'s estate is a legal seisin in fee. If the deed be to A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs, B. has a legal, and C. only an equitable estate. If the deed be to B. and his heirs, to the use of and

in trust for the same A. and his heirs to the use of B. and his heirs, B. has only an equitable interest (*Doe v. Passingham*, 6 B. & C. 305).

The lessor of the plt. must show that he had a sufficient title at the time of the demise laid in the declaration (B. N. P. 105). An heir-at-law may lay the demise on the day on which the ancestor died (*Roe v. Hersey*, 3 Wils. 274). So, a posthumous child taking lands by way of remainder, under 10 & 11 Will. III. c. 16 (B. N. P. 105). Where a person comes into possession under a negotiation for a lease or purchase, the demise must appear to be after demand (*Right v. Beard*, 13 East, 210). So, with regard to a tenancy at will, the demise must be laid on a day subsequent to the determination of the will (*Goodtitle v. Herbert*, 4 T. R. 680). But in an action by mortgagee against mortgagor in possession, the demise may be laid on a day anterior to the actual determination of the will (*Birch v. Wright*, 1 T. R. 383); and where there is a clause in the mortgage deed that the mortgagor shall remain in possession until default made in payment, the demise may be laid on a day subsequent to the day of payment (*Wilkinson v. Hall*, 3 B. N. C. 508). Where assignees laid the demise after the act of bankruptcy, and before the assignment, it was held bad (*Doe v. Mitchell*, 2 M. & S. 446). The demise was laid on the 3rd of October, without mentioning any year: held, that proof of title on *any* October was sufficient, and that no amendment could be made, or was necessary at nisi prius (*Doe v. Heather*, 8 M. & W. 158). A joint demise by two persons is not supported by evidence, that they are entitled as tenant for life and remainderman (Trepot's case, 6 Rep. 14 b; and see *Doe v.*

**Adams*, 2 Cr. & J. 283). Upon a several demise from each of [*1000] joint tenants, or coparceners, the portion belonging to each may be recovered, and if several join and declare on the separate demises of each, the whole may be recovered (*Doe v. Read*, 12 East, 57; *Doe v. Penn*, 3 Camp. 190); and when it was proved that the entire rent was paid to the common agent of the lessors, it was held *prima facie* evidence of their joint title (*Doe v. Grant*, 12 East, 221). When the demise is joint by coparceners, and the title of one is barred by fine and nonclaim, there can be no verdict for the other (*Doe v. Pett*, 11 Ad. & E. 842; 4 P. & D. 273); and tenants in common must make several demises (*Doe d. Errington*, 1 Ad. & E. 750); and the court refused to amend at nisi prius either by inserting several demises, or striking out one of the lessors (*Ib.*).

Plt. cannot rely upon the inadequacy of the deft.'s title, but must recover upon the strength of his own (*Martin d. Tregonwell v. Strachan*, 5 T. R. 110. n.; *Graham v. Peat*, 1 East, 246; *Goodtitle d. Parker v. Baldwin*, 11 East, 488). Proof of an undisturbed adverse possession for twenty years, is sufficient presumptive evidence of title to recover in ejectment (B. N. P. 103; *Barwick v. Thompson*, 7 T. R. 488; *Denn v. Bernard*, 1 Cowp. 597; *Stoker v. Berny*, Salk. 421; S. C. 1 Ld. Raym. 741; *Goodtitle d. Parker v. Baldwin*, 11 East, 488; *Taylor v. Horde*, 1 Burr. 119; *Cholmondeley v. Clinton*, 2 J. & W. 151; 2 Saund. 175, n.). As to what constitutes such adverse possession, see *post*, p. 1051).

And now the stat. 3 & 4 Will. IV. c. 27, s. 34, gives a clear title, for all right and title of the party out of possession are thereby extinguished (*Scott v. Nixon*, 3 Dr. & W. 388); but it would seem bare possession would of itself constitute no title even as against a wrongdoer (*Doe v. Bilyard*, 3 M. & R. 112, n.; *Harper v. Charlesworth*, 4 B. & C. 592; but see *Allen v. Rivington*, 2 Saund. 111). But where the deft. forcibly expelled the plt., who had been in possession as tenant for a year, it was held sufficient evidence of title as against the deft., who showed none (*Doe v. Dyeball*, Moo. & M. 346). So, where it was proved that the deft. obtained possession by

the license of the plt. whom he then excluded (*Doe v. Baytup*, 3 Ad. & E. 188). So the plt. was held entitled to recover, where he proved twenty years' possession, and the deft. proved that he has been subsequently in possession for less than twenty years (*Doe v. Cooke*, 7 Bing. 346; see *Brest v. Lever*, 7 M. & W. 593). The lessee for years of a copyholder may recover as against any one but the lord, without proof of a custom or a license to demise for years (*Doe v. Tresidder*, 1 Q. B. 416). It seems to be now settled that after twenty years' possession of encroachments made by a lessee upon land adjoining the demised premises, the lessor has such a title as will enable him to maintain ejectment for the encroachment (*Doe v. Rees*, 6 C. & P. 610; *Doe v. Murrell*, 8 C. & P. 134; *Doe v. Williams*, 7 C. & P. 332; *Doe v. Morris*, 7 Bing. N. C. 189; *Bryan v. Winwood*, 1 Taunt. 208; *Doe v. Davies*, 1 Esp. 461; *Doe v. Mulliner*, ib. 460).

Right of Entry.] The plt. must also prove that his legal estate was accompanied by a *right of entry* on the premises at the time of the demise laid in the declaration. Proof of his being entitled to this right of entry at the time of the demise laid will be sufficient, although such right be divested before trial (11 East, 488; Co. Lit. 285 a; *Doe v. Bluck*, 3 Camp. 447). Whatever takes away this right of entry, takes away also the remedy by ejectment, although the legal estate still remains in the claimant (Ad. Ej. 34). A right of entry may be destroyed or taken away by the Statute of Limitations. If the plt. comes within any of the exceptions in the statute, [*1001] or has any answer to a defence of this nature, he should be prepared with proofs accordingly (*post*, p. 1054).

Actual Entry, when necessary.] Proof of actual entry is not now necessary in any case, except that of vacant possession; for those cases in which it was formerly required, viz., where an estate was divested by a fine levied with proclamations, and where an entry was had in order to exclude the operation of the Statute of Limitations, are no longer law, now that the stat. 3 & 4 Will. IV. c. 74, has abolished fines and recoveries, and the 3 & 4 Will. IV. c. 27, s. 10, has enacted that no person shall be deemed to have been in possession of premises merely by making an entry thereon. It is, however, thought advisable to retain the cases that have been decided on this subject, because although they are no longer law with regard to future fines and recoveries, inasmuch as they cannot now be affected, yet they may be useful where a question arises as to a fine, &c., before the statute. An actual entry must be proved, to avoid a fine levied with proclamations (*Oates v. Brydon*, 3 Burr. 1897; *Doe v. Watts*, 9 East, 19; *Barrington v. Parkhurst*, 2 Stra. 1086; S. C. 13 East, 489; *Doe v. Turner*, 1 C. & P. 91); but not so where the fine is levied without proclamations (*Jenkins v. Pritchard*, 2 Wils. 45); or if the proclamations be made after the commencement of the action (*Doe v. Watts*, 9 East, 19); and, in general, if the action be commenced within twenty years, no entry seems necessary, though, if the twenty years be near expiring, it is said to be a prudent measure to make an entry; "for, in the case of an actual entry *before* the expiration of twenty years, it seems that an ejectment may be brought *after*; or if the plt. should fail in the ejectment, whether brought *within* twenty years or *after*, he may bring another, provided the ejectment in these cases is commenced within a year after such actual entry made; according to 4 Anne, c. 16, s. 16" (1 Saund. 319 f; *Doe d. Lee Compere v. Hicks*, 7 T. R. 433). Nor is an entry necessary, where the fine has been levied by a mere tenant for years (18 Vin. Abr. 413; *Peaceable v. Read*, 1 East, 575); nor where the son of a tenant by sufferance holds over (*Doe v. Perkins*, 3 M. & S. 271); nor is

it necessary, where the action is brought on a clause of re-entry for non-payment of rent (*Goodright v. Cator*, Doug. 477). B. died, leaving two sons, who died without issue; survivor devised to his wife for life, remainder to children of E. living at time of his wife's death, when nine of them were living, two of whom in her lifetime had levied fines of their shares to G.; after her death, H., a stranger, entered, and six weeks afterwards, whilst H. was in possession, all the children conveyed by lease and release, and fine to G.; held, first, that the interests of the two who had levied fines, although contingent only, were not thereby extinguished and passed to G.; that the conveyance by the children to G. was valid without a previous entry by them, and that G. might recover against H. for all the lands (*Doe v. Martyn*, 2 M. & R. 485). Where the younger son, who lived with his father some years before his death, and managed his concerns, and had the superintendence of his property, entered into his fee simple at his death, and continued for several years in possession, claimed as heir to his father on the ground of his eldest brother's illegitimacy, and levied a fine: held, that the entry, possession, and fine, did not bar the right of the eldest son to recover in ejectment without any actual entry to avoid the fine (*Doe v. Davis*, 1 C. & P. 130). Where a termor made a feoffment, and levied a fine with proclamations and thereby *incurred a forfeiture, yet the term might, [*1002] until entry, be treated as subsisting so as to enable his executor to recover in ejectment (*Doe v. Pett*, 11 Ad. & E. 842).

The entry need not be made by the party claiming; if it be done by some person under his authority, it will be sufficient (Co. Lit. 258; *Podger's case*, 9 Co. 106); even though the entry be made without the consent of the claimant, yet a subsequent ratification will make it good (Ib.); indeed, the bringing the action of ejectment will be evidence of assent (B. N. P. 103). Such assent must, however, be within five years after entry made (Co. Lit. 245; *Fitchet v. Adams*, Stra. 1128). The entry must be made upon the land claimed, and it will not be sufficient to make the claim at the gate of the house, unless such gate be upon part of the land (B. N. P. 103; *Focus v. Salisbury*, Hurd, 400; *Anon. Skin.* 412); but, if an actual entry is prevented, the claim may then be made as near the land as it conveniently may (Co. Lit. 253). An entry generally, or on part of the lands, is an entry upon the whole, unless it be declared to be otherwise (1 Saund. 319; *Doe d. Tarrant v. Hellier*, 3 T. R. 170); though, if the lands are situate in different counties, there must be an entry for each county (Lit. S. 417; *Ad. Ej.* 92); and it must be made with the intention of claiming the land. An entry to avoid a fine must be made *animo clamandi*, but it need not be accompanied with a declaration, that the object of the entry is to avoid the fine (*Doe v. Williams*, 2 Nev. & M. 602); so, it was held an insufficient entry, where the lessor's intention was to make the demise, and not for the purpose of avoiding the fine (*Berrington d. Dormer v. Parkhurst*, Stra. 1086; *S. C.* 13 East, 489). Where tenant for life levies a fine, though it is no bar to those in remainder, yet it seems that a remainderman must make an actual entry before he can maintain an ejectment (*Doe d. Compere v. Hicks*, 7 T. R. 433). If one of two tenants in common of a reversion levy a fine of the whole, such fine does not require an actual entry by the other tenant in common to avoid it (*Roe d. Touse v. Elliott*, 1 B. & A. 85).

In the case of a vacant possession (that is, where the premises are wholly deserted by the tenant, and he cannot be found, in order to be served with a declaration in ejectment), an actual entry must first be made upon some part of the premises (see the mode of so doing, with the other requisites, 2 Arch. Pr. 964; see *Woodfall*, 5th ed. 859). But the entry will in certain cases be dispensed with (*Doe d. Frith v. Roe*, 2 Dowl. 431).

Identity of Premises, and Defendant's Possession of them.] Since the rules of M. T. 1 Geo. IV., K. B., and H. T. 1 & 2 Geo. IV. C. B., this is no longer necessary. But it is necessary to prove the local situation of the premises, as described in the declaration (Ad. Ej. 234; 3 Stark. Ev. 430; Doe v. Welch, 4 Camp. 264; a variance will be fatal unless amended (Goodtitle v. Lammiman, 2 Camp. 274). If the premises are described as situated in the parishes of A. and B., and part be in each parish, and there is no such parish as A. and B., the variance will be fatal (Doe v. Edwards, 1 Moo. & M. 319; see Goodtitle v. Walter, 4 Taunt. 671; but Parke, B., permitted an amendment in Doe v. Edwards, which was approved in Doe v. Leach, 3 Man. & G. 229; see *ante*, pp. 990, 996). Where the deft. has obtained particulars of the premises sought to be recovered, plt. cannot travel out of them. It is no variance where they are described as lying in the parish of Farnham, and proved to be in Farnham Royal (Doe v. Salter, 13 East, 9).

So, in the parish of Wesbury, and it is proved that there are two [*1003] parishes of that name, each *distinguished by additions (Doe v. Harris, 5 Moo. & S. 326; Doe v. Carter, 1 Y. & J. 492). But an amendment will not be permitted where the merits are not affected by it.

Actual Ouster.] The common consent-rule will now, in general, be sufficient evidence of the deft.'s ouster, or forcible dispossession (Oates v. Bryden, 3 Burr. 1895; Doe v. Cuff, 1 Camp. 173). In an action, however, by one joint-tenant parcener, or tenant in common, against his companion, where the latter has entered into a special consent-rule, not absolutely confessing an ouster, such ouster should be proved. Where one tenant in common held possession, absolutely and solely, for thirty-six years, without any account to, demand made, or claim set up by his companion, it was held sufficient evidence of an ouster (Doe d. Fisher v. Prosser, Cowp. 217); but the bare perception of the profits by one tenant in common is not sufficient to afford presumption of an ouster (Fairclaim d. Fowler v. Shackleton, 5 Burr. 2604; see 3 & 4 Will. IV. c. 27). If one tenant in possession claims the whole, and denies possession to the other, this is evidence of an ouster, it being beyond the act of receiving the whole rent (Doe v. Bird, 11 East, 49.) Where there were two joint-tenants, and one went out at the request of the other, it was held to be an ouster (Vin. Ab. V, 14, 512); and so a demand of possession by one tenant in common, and a refusal by the other, stating that he claimed the whole, is evidence of an ouster of his companion (Doe d. Hellings v. Bird, 11 East, 49; Cowp. 217). One tenant in common levying a fine of the whole, and taking the rents and profits afterwards, without accounting for nearly five years, is no evidence of an ouster of his companion at the time of the fine levied (Peaceable d. Hornblower v. Read, 1 East, 568, 574; see now 3 & 4 Will. IV. c. 27, *infra*). Adverse holding over the possession of the premises, contrary to the terms of the tenancy, is presumptive evidence of an actual ouster (Taylor v. Fisher, Loft, 766).

So, where three of four co-tenants authorized a company to use the land for a railroad, it was held that such an occupation amounted to an ouster (Doe v. Horn, 5 M. & W. 564). By the 3 & 4 Will. IV. c. 27, s. 12, it is enacted that when any one or more of several persons entitled to any land or rent as coparceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share of such land, or of the profits, or of such rent for his or their own benefit, or for the benefit of any person other than the person entitled to the other share of the same land or rent, such possession, or receipt, shall not

be deemed the possession, or receipt of, or by such last-mentioned person, or persons, or any of them. It has been thought that since this statute, the action would lie without proof of an actual ouster, and that the deft. ought no longer to be permitted to enter into a special consent-rule, but the old practice still continues (per Littledale, J., Bail Court, M. T. 1838; and see *Doe v. Horn*, 3 M. & W. 333).

The above section has a retrospective operation, and makes the possession of tenants in common, &c., separate from the commencement of the tenancy in common, &c., and not merely from the time of the act passing, and the statute therefore runs from the commencement of the tenancy (*Salby v. Taylerson*, 11 Ad. & E. 1008).

Damages.] In ordinary cases, the damages are merely nominal; the damages actually sustained by the detention of the property, &c., being usually recovered in an action of trespass for mesne profits (*post*, "MESNE PROFITS"). But, in ejectment by landlord *against tenant, whether the deft. appear at the trial or not, the plt., after proof of his right [*1004] to recover possession of the whole, or any part of the premises, may proceed to give evidence of the mesne profits thereof which shall have accrued from the day of the determination of the tenant's interest down to the time of the verdict, or to some preceding day, to be specially mentioned therein; and the jury shall thereupon give their verdict, both as to the recovery of the premises, and as to the amount of the damages to be paid as mesne profits (1 Geo. IV. c. 87, s. 2; 2 Arch. Pr. 953). If the plt. wish to recover the mesne profits from the time of the verdict down to the time when possession is delivered to him, he may afterwards proceed for it by action of trespass for mesne profits (lb.; as to the evidence of damages, *post*, "MESNE PROFITS").

BY HEIR.

By Heir of Freehold.] When an heir-at-law maintains this action, he must at common law prove that the ancestor, or person from whom his title springs, was the person last seised of the premises (*Jenkins d. Harris v. Prichard*, 2 Wils. 47); and that he is the heir, either lineally or collaterally descended (2 Bla. Com. 208; *Higham v. Ridgway*, 10 East, 120). If he be heir to a remainder-man, he must show that his ancestor was the person in whom the remainder was first vested by purchase (*Radcliffe's case*, 3 Rep. 42 *a*; *Watk. on Desc.* 120).

But the 3 & 4 Will. IV. c. 106, seems to have made a change in the law, for sect. 2 enacts, that "in every case descent shall be traced from the purchaser, and to the intent that the pedigree may never be carried further back than the circumstance of the case and nature of the title require, the person *last entitled* to the land shall, for the purposes of that act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited; in which case the person from whom he inherited shall be considered to have been the purchaser, unless it shall be proved that he inherited; and in like manner the last person from whom the land shall be proved to have been inherited, shall, in every case, be considered to have been the purchaser, unless it shall be proved that he inherited the same," and the provisions of the act extend to all hereditaments, corporeal or incorporeal, freehold, copyhold, or customary, and to any possibility, right, or title of entry, or action, or to any other interest capable of being inherited, whether in possession, reversion, remainder, or contingency; and the word "purchaser" is explained to mean the person who has last acquired the land,

otherwise than by descent, &c.; and the "person last entitled," extends to the last who had a right to the land, whether he did or did not obtain possession or receipt of the rents and profit (sect. 1); and where any one shall acquire land by purchase, under a limitation to the heir, or heirs of the body of any of his ancestors, in any assurance executed after the 31st December, 1833; or in any will of a testator dying after that day, the land shall descend, and the descent shall be traced as if his ancestor had been the purchaser (sect. 4); and the heir may trace his descent through an attained person who died before the descent took place, unless the land escheated in consequence of the attainder, before the 1st January, 1834 (sect. 10). But the act does not extend to any descent before the 1st of January, 1834 (sect. 11). But as scarcely any decisions have taken place on the statute, the old cases are still retained.

The *seisin* of the ancestor may be shown by the fact of his having been *in possession; for possession alone is *prima facie* evidence of a [*1005] *seisin* in fee (Co. Lit. 15 a; B. N. P. 103). The *seisin* may also be proved by showing the ancestor was in the receipt of rent from the *ter-tenant* (Ib.; Jayne v. Price, 4 Taunt. 326; and see Bushby v. Dixon, 3 B. & C. 298). The possession of a guardian in *socage* confers an actual *seisin* in the infant (Goodtitle v. Newman, 3 Wils. 528). Where A. dies seised, having two infant daughters by different venters, an entry by the mother of the youngest daughter, as her guardian in *socage*, constitutes a sufficient *seisin* in the eldest daughter to carry the descent of her moiety, on her death, to her heirs (Doe d. Bennett v. Keen, 7 T. R. 386). If a father die, his estate being out at a freehold lease, that is not such a possession as to induce the *possessio fratris*, unless the elder son live to receive rent after the expiration of such lease; but it has always been the settled rule, that if the father die, leaving his estate out on a lease for years only, the possession of the tenant is so far the possession of the elder son as to constitute the *possessio fratris* (per Lord Kenyon, C. J., Ib.). The *seisin* may be proved by the declaration of a deceased tenant, that he held under the ancestor (Uncle v. Watson, 4 Taunt. 16; Carn v. Nicholl, 1 Bing. N. C. 430). Proof of the possession by the ancestor's lessee for years is evidence of *seisin*, or the possession of a tenant for years gives an actual *seisin* to the owner of the inheritance (Co. Lit. 243 a; Bushby v. Dixon, *supra*). Holding courts and appointing game-keepers are proof of the *seisin* of a manor (Doe v. Heakin, 6 Ad. & E. 495). But evidence of shooting and appointing a game-keeper by the lord of a manor, is not properly referable to a right of soil, though it is evidence that the *locus* is within the limits of the manor (Tyrwhitt v. Wynne, 2 B. & A. 560; Doe v. Langton, 2 B. & Ad. 680). If it be probable that deft. can rebut plt.'s *prima facie* case of *seisin*, strict proof of the ancestor's title had better be adduced.

To show the *heirship* of the claimant, he must prove his descent from the person last seised, when he claims as lineal heir; or the descent of himself and the person last seised from some common ancestor, or, at least, from two brothers or sisters (Roe d. Thorne v. Lord, 2 Bl. R. 1099; see 3 & 4 Will. IV. c. 106, s. 5), if he claims collaterally, together with the extinction of all those lines of descent which would claim before him: this is done by proving the marriages, births, and deaths, necessary to complete his title, and showing the identity of the several parties (Ad. Ej. 240). As to proof thereof, see "PARISH REGISTER," "PROBATE," &c., "PUBLIC DOCUMENTS."

In ejectment, it being proved by the rector of the parish of C. that no parish registers existed there of earlier date than 1733, the transcripts of the registers of that parish for 1705 and 1706, returned under the 70th canon of 1603, were produced by the registrar of the diocese from the bishop's

registry, and received as evidence of a marriage in 1705, and a baptism of in 1706, of persons through whom the lessor of the plt. traced his title (*Doe d. Wood v. Wilkins*, 2 C. & K. 328, Maule). Reputation or cohabitation is proof of marriage (*Reed v. Passer*, Pea. 233; B. N. P. 114; see "CRIM. CON."); and reputation is sufficient evidence even where the parents are alive (*Doe v. Fleming*, 4 Bing. 266). It is not requisite in the first instance to give evidence of the regular publication of the banns, or of the regularity of the license (*Devereux v. Much Dew Church*, 1 Bl. R. 367). Either of the married parties, if not interested, is competent to prove or disprove the marriage (*Doe v. Moss*, Cowp. 593). But, when the marriage is not disputed, neither can prove, directly or indirectly, *non-access* (*R. v. Sourton*, 5 Ad. & E. 180); though they may bastardize their issue *by any [*1006] other evidence except non-access (*lb.* 186; per Patteson, J.). The rule that issue shall not be bastardized, after death, is confined to the single case of bastard *eigne* and *mulier puisne* (*Pride v. Bath* (Earl of), 1 Salk. 120). The plt. must prove that all the intermediate heirs between himself and the ancestor, from whom he claims, are dead, without issue (*Richards v. Richards*, 15 East, 294, n.). It is a maxim, that he who asserts the death of another, who was once living, must prove his death, whether the affirmative issue be that he be dead or living (*Wilson v. Hodges*, 2 East, 312; *ante*, "DEATH"). The testimony of persons present when the events happened, or who knew the parties concerned at those periods, and the production of extracts from parish registers, are the most satisfactory modes of proving facts of this nature (*post*, "PARISH REGISTER," "HEARSAY EVIDENCE," "PUBLIC DOCUMENTS"); and, when the claimant is the lineal descendant of the person last seised, but little difficulty can arise in procuring the necessary proofs. But, when he claims as collateral heir, and it is necessary to trace the relationship between him and the person last seised, through many descents, to a common ancestor, difficulties often intervene from the remoteness of the period to which the inquiries must be directed, which, upon the ordinary rules of evidence, would be insuperable. To remedy this evil, the courts, from the necessity of the case, have relaxed those rules in inquiries of this nature, and allow hearsay and reputation (which latter is the hearsay of those who may be supposed to have known the fact handed down from one to another) to be admitted as evidence, in cases of pedigree (*Higham v. Ridgway*, 10 East, 120; Ad. Ej. 241; *post*, "PEDIGREE," "HEARSAY EVIDENCE"). But hearsay evidence of a relation cannot be admitted, when he himself can be called (*Pendrell v. Pendrell*, Stra. 925; *Harrison v. Blades*, 3 Camp. 457); nor can the opinions of deceased neighbours, or acquaintances of the family, be admitted (*Vowells v. Young*, 13 Ves. 147, 514; *R. v. Eriswell* (Inhabitants of), 3 T. R. 707, 723; *Weeks v. Sparke*, 1 M. & S. 688; *Johnson v. Lawson*, 2 Bing. 90); nor do the declarations of an illegitimate member of a family fall without the rule (*Doe v. Barton*, 1 M. & R. 28). Hearsay evidence is also inadmissible to prove the *place* of any particular birth (*R. v. Erith* (Inhabitants of), 8 East, 542). The declarations of the deceased relative should also, to render them admissible evidence, be made under circumstances when the relation may be supposed without any interest, and without a bias; therefore, declarations made after a suit commenced, or a controversy preparatory to one, are not admissible (4 Camp. 401). On an issue to try the right to nominate to a fellowship vested in the heirs male of the body of A., who died *tempore Elizabeth*, the question was, whether the plt. or deft. had the better right to nominate. The plt. proved his descent in tail male from a third son of A.: held, that he had done enough to call on deft. to prove that he was a nearer heir male (*Sandys v. Sandys*, 1 Q. B. 316).

Stronger and further proofs should be adduced, according to the expected defence (see *post*, "EVIDENCE FOR DEFENCE"). In ejectment by the heir-at-law of F., against the devisee under F.'s will for the devised estates: held, that the plt. might give parol evidence that one J. purchased the property, as agent for F., the testator, although J. had contracted in writing for the purchase in his own name (*Marston v. Fox*, 8 Ad. & E. 14).

When the lessor claims as heir, and proves his pedigree, and stops, and the deft. sets up a new case, which is answered by fresh evidence on the part of the lessor, the deft. is entitled to the general reply (Good- [*1007] *title v. Braham*, 4 T. R. 497); and if, after the pleadings *are opened by the junior counsel for the lessor, the deft.'s counsel expresses himself ready to admit the lessor to be heir, it will entitle him to open the case, and make the first address to the jury (*Doe v. Corbett*, 3 Camp. 368; *Doe v. Wilson*, 1 M. & R. 323; *ante*, p. 997). But if the deft.'s case is met by a new case on the part of the plt.; as, for example, if the plt. originally claims as heir, and the deft. establish a will, and the plt. set up another will, the deft.'s counsel will be allowed to reply on the new case set up by the lessor of plt., and the counsel for the pl. has the general reply (*Doe v. Gostee*, 2 Moo. & R. 243; 9 C. & P. 46; Ad. Ej. 238).

By Heir of Copyhold, &c.] If the lessor of the plt. be heir by custom of the place, in addition to the foregoing, he must show the custom (*Ramney v. Earls*, 4 Leon. 242; 1 Roll. 624), and that he comes strictly within it (Ib.). If the lessor claims as heir to a copyhold, the rolls of the manor must be produced, which show a surrender to him, or to those under whom he claims (16 East, 208; 3 T. R. 162; *post*, p. 1014). It is not necessary he should prove his own admittance, unless the action be against the lord (1 Leon. 100; *Holdfast v. Clapham*, 1 East, 600; *Doe v. Hellier*, 3 T. R. 162; *R. v. Bennett*, 2 T. R. 197; *Doe v. Rolfe*, 3 Nev. & P. 648; *Doe v. Crisp*, 6 Ad. & E. 779). An heir on whom a contingent remainder in a copyhold has devolved, may bring ejectment before admittance (*Doe v. Rolfe*, 3 Nev. & P. 648). If the ejectment be against the lord, he must either show that he is admitted, or that he has been refused admittance. It is not necessary for him, in such case, to have tendered himself to have been admitted at the lord's court, if the steward, upon application out of court, has refused to admit him (*Doe v. Bellamy*, 2 M. & S. 167; Ad. Ej. 244). The custom may be proved by the different admissions of the customary heirs upon the court-rolls of the manor, produced by the steward upon oath, or by the medium of verified examined copies; but, if the ancient rolls be lost, or there be no instance of any admission in them similar to the custom set up by the lessor, an entry upon the rolls, stating the mode of descent of lands in the manor, will be admissible evidence as to the existence of the custom (Ad. Ej. 245; *Doe v. Parker*, 5 T. R. 26; *Donn v. Spray*, 1 T. R. 466; see *Doe v. Mason*, 3 Wils. 63). A lessee for years, of a copyholder, may maintain ejectment, although he have not the license of the lord, and there be no custom authorizing such leases (*Doe v. Tressider*, 1 Q. B. 416). If the heir apparent of a copyholder in fee surrender in the lifetime of his ancestor, and survive him, the heir of such surrenderor is not estopped by that surrender from claiming against the surrenderee, for in order to pass an estate by surrender, the estate must pass into the hands of the lord, through whom it must be taken, and if a surrender be not good there will be no estoppel (*Goodtitle v. Morse*, 3 T. R. 365).

Where ejectment was brought by heir of copyholder, by direction of the court, to try the title, the lord (who was deft.) was not permitted to set up the

title of the devisee, who had not claimed to be admitted (*Doe v. Harrison*, 6 Q. B. 631).

BY DEVISEES.

By Devisee of Freehold.] To enable the devisee of a *freehold* estate to support this action, he must prove the seisin in fee of the testator (see "*Heir at Law*," *ante*, p. 1004); or that he was "entitled" under 7 Will. IV. & 1 Vict. c. 26, s. 3. The will under which he takes must also be proved, with all its requisites as to attestation, &c., *pursuant to 29 Car. II. c. 3, s. 5 (B. N. P. 246), which is still in force as to [*1008] wills made before 1st Jan. 1838 (see 7 Will. IV. & 1 Vict. c. 26; as to those made since that time, *post*, "*WILL*"). If, indeed, the will be one of thirty years' standing, after proving the custody whence it came, it may be read in evidence, without further proof (9 Ves. jun. 9; *Doe v. Brabant*, 4 T. R. 707; see *post*, "*WILL*," "*WRITTEN EVIDENCE*"). The conditions precedent to the lessor's taking as devisee, if any, must be proved to have been fulfilled. The determination, also, of any estates limited by the will prior to the lessor's devisee, if any, should be proved and attested pursuant to that statute: as to the proof of the execution of a will, see *post*, "*WILLS*." The death of the testator should also be proved (*ante*, "*DEATH*"). A devisee of a freehold may immediately, without any possession, maintain an ejectment for the lands devised (Co. Lit. 240 *b*). A testator, after giving a life estate to his daughter-in-law in real estates, devised the remainder to her son, T. T. (who was his heir) in fee, upon condition that he would within three months after the death of the testator convey certain leaseholds to his three sisters; but in case he should refuse to do so, upon failure thereof, he devised his real estates to his three granddaughters. The testator died in 1818, his daughter-in-law entered and continued in possession until 1827, when the daughters entered and continued in possession until an ejectment brought by the heirs of T. T.: held, on a special case, stating the will and the above facts, that as it was not expressly stated that T. T. had notice of the will within three months after the testator's death, the court could not infer the fact; and therefore, as it did not appear that the conditional limitation had taken effect, the lessors of the plt. were entitled to maintain ejectment (*Doe v. Crisp*, 8 Ad. & E. 779). By a will in 1789, the estate was devised to A. G. M. for life, with remainder, as he should by deed or will appoint, and in default of appointment, remainders to the heirs of his body, with remainders over. In 1790, A. G. M. levied a fine to the use of himself, in fee, and afterwards died without issue: held, in ejectment by the lessors of the plt., claiming as heirs-at-law of A. G. M., that the fine created a discontinuance, and gave a tortious fee to A. G. M., and that his heir-at-law was consequently entitled to recover in ejectment, the remainders over being divested, and the rights of the remainderman only capable of being enforced by real action (*Doe d. Gibbert v. Roe*, 7 M. & W. 102). In such a case the stat. 3 & 4 Will. IV. c. 27, s. 38, presumes the right of the remainderman to bring formedon (*Ib.*). By the 3 & 4 Will. IV. c. 106, s. 3, where land, &c., shall be devised by any testator, who died since 31st December, 1833, to his own heir, such heir shall be considered as taking by devise, not by descent. Before this act a devise to any one of the same estate, which he would otherwise have taken as heir-at-law of the devisor, was inoperative, and the devisee took by descent, and not by devise. Further and stronger proofs should be adduced, according to the expected defence (see "*Evidence for Defence*," *post*).

By Devise of Copyhold.] When the lessor of the plt. claims as devisee of a *copyholder*, he must prove that his devisor was admitted to the estate, and his surrenderor to the use of the will, and he must also show that he himself has been admitted (Doe d. Vernon v. Vernon, 7 East, 8; Roe d. Jeffery v. Hicks, 2 Wils. 13; Roe v. Wroot, 5 East, 137; Doe v. Lovell, 2 B. & A. 453); for which purpose the entries on the manor rolls may be produced as evidence (Folkard v. Hemet, Bl. R. 1061; Rex v. Shelly, 3 T. R. 141; ante, "COPYHOLD"); though, if he be devisee in remainder, it will be sufficient *for him to prove the admittance of the tenant for life (Auncelme v. Auncelme, Cro. Jac. 31; Phypers v. Eburn, 3 Bing. N. C. 250). The title of surrenderee is not complete before admittance, which he must prove; but after admission his title has relation to the time of surrender against all parties but the lord, and he may therefore recover in ejectment, upon a demise laid between the time of surrender and admittance, provided the admittance be before the trial (Doe v. Clapham, 1 T. R. 600; Doe v. Hall, 16 East, 208). A person to whom an original grant of a copyhold is made by the lord is tenant before admittance (Doe v. Whittaker, 5 B. & Ad. 409). An heir may, before admittance, devise copyholds descending to him (King v. Turner, 1 Myl. & K. 456). But not an unadmitted devisee or surrenderee before the late act 7 Will. IV. & 1 Vict. c. 26 (Doe v. Lawes, 7 Ad. & E. 211, 213). Where an admittance was entered at a void court, and the proceedings of that court regularly entered by the steward on the court rolls, it was held sufficient (Doe v. Whittaker, 5 B. & Ad. 409).

He must prove the seisin of the testator. The surrender by the testator to the use of his will is no proof of his seisin (Barfoot v. Sadler, Rosc. Ev. 439). The actual possession of the tenement and admittance of the testator would be evidence of seisin.

He must also prove the surrender to the use of the will. As between surrenderor and surrenderee, a presentment on the court rolls of an admittance as upon a surrender out of court, is primary evidence of surrender, without producing the original surrender, and without regard to the stamp upon it (Doe v. Olley, 12 Ad. & E. 481). The identity of the parties admitted must also be established (Doe d. Hanson v. Smith, 1 Camp. 197; Doe v. Hall, 16 East, 208). The party must also produce his devisor's will, which, not falling within the Statute of Frauds, was held sufficient, though not signed or attested (Walsh v. Edmunds, Cro. E. 100; Doe d. Cook v. Danvers, 7 East, 299; Wagstaff v. Wagstaff, 2 P. Wms. 259); the will, however, must appear to be in writing (32 Hen. VIII. c. 1), though papers, bearing but a slight resemblance to wills, have been held sufficient to pass copyhold premises (Carey v. Askew, 2 Bro. C. C. 58; Doe v. Smith, Pea. Ev. 456; 1 And. 34); though it said that it need not be in writing (1 Wat. Cop. 13); however, the will must now be in writing, and executed pursuant to 7 Will. IV. & 1 Vict. c. 26, s. 9; and a will so executed is good, though the testator may not have surrendered to the use of the will; and though being entitled as heir, devisee, or otherwise, he may not have been admitted; and though there may be no custom, or only a limited custom to devise or surrender to the use of the will (s. 3). A recital of it in the admittance is not evidence as between heir and devisee (B. N. P. 108). Nor is the probate admissible evidence of it (Archer v. Slater, 11 Sim. 507). Where the devisee of a customary estate, which had been surrendered to the use of the will, died before admittance, it was held that the devisee, though afterwards admitted, could not recover in ejectment, for the admittance of the second devisee had no relation to the last legal surrender (Doe v. Vernon,

7 East, 8). The devisee must prove his own admittance, though an heir may bring ejectment without it.

A customary court may, after the 31st December, 1841, be held without the presence or even the existence of any copyholder (5 Vic. c. 35, s. 86). The lord, his steward or deputy steward, may admit at any time or place, within or out of the manor, and without holding any court (s. 88); no presentment of such admittance is necessary (s. 90). The lord, &c., is compellable to enrol a copy of any will or codicil delivered to him, and that entry on the rolls shall be taken *to be made in pursuance of a presentment [*1010] by the homage (s. 89). The 3 & 4 Will. IV. c. 106 (*ante*, "HEIR AT LAW"), applies to copyhold and customary lands.

Admittance of Copyholder.] Where copyhold lands descendible from ancestor to heir, according to the custom, are held for the joint lives of the lord and the tenant for the time being, and the copyholder is admitted to hold to him (not saying and his heirs) for the joint lives of himself and the lord, according to the custom, &c.: held, that the heir of the copyholder cannot maintain ejectment before admittance *Doe d. Dand v. Thompson*, 18 Law J., 326, Q. B.).

Actions by Heir of Copyhold.] The determination of a copyhold interest may be shown without producing the copy of court roll (*Doe d. Welsh v. Langfield*, 16 M. & W. 497). Thus, a declaration by the party in possession, that his interest was less than a fee, e. g. for his own life only, would be primary evidence that it ceased to exist at his death (*Ib.*). *Secus*, where he declared that he held "for life interest," that statement being consistent with one or more life interests coming into existence at his death (*Ib.*).

By Devisee of Leasehold.] In ejectment by a devisee of a leasehold interest, the plt. must establish the title of the testator, showing that he had a chattel interest in the premises. Proving that he died in possession would not suffice as that would, *prima facie*, be evidence of a sesin in fee (*Ad. Ej.* 266). The leasehold interest is usually proved by production and proof of the execution of the lease; or, if the testator was an assignee, the execution of the lease and the assignment to him. In a case where the lessor put in an answer of the defts. to a bill in equity, in which the deft. stated "he believed the lessor was possessed of the leasehold premises in the bill mentioned," it was held, as against the deft., sufficient evidence that the interest of the testator was only a chattel one (*Doe v. Steel*, 3 Camp. 115).

The plt. must also adduce evidence of the probate of the will (see *post*, "EXECUTOR," "PROBATE"), and prove the executor's assent to the bequest (1 Inst. 111 a). Such assent is absolutely necessary (*Toller*, 344); and it makes no difference though the legatee be also an executor. By the assent the term is vested in the devisee from the death of the testator (*Saunders's case*, 5 Rep. 12 b; *Doe v. Guy*, 3 East, 120). A very small matter will amount to assent (*Noel v. Robinson*, 1 Vern. 94; *Doe v. Mabblerly*, 6 C. & P. 126). The assent may be express or implied; slight evidence of it is sufficient (1 Lev. 25; 1 Rol. Abr. 920; 2 Roll. R. 158; *Toller*, 344, 345). It is a question of fact for the jury (*Mason v. Farnell*, 12 M. & W. 674). As to disclaimer, see 3 B. & A. 31.

BY TRUSTEES.

When the ejectment is by a trustee, he must show he has the legal estate

in the premises. In all cases in which the trusts are not executed by the Statute of Uses, the legal estate vests in the trustees; and see the law and cases as to when trustees have been held or not to take the legal estate, Ad. Ej. 74 to 79; 2 Bla. Com. by Chitty, 335, n. 60. The general rule is, that where something is to be done by the trustees, which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee, or devisee, has only a trust estate (see Kenrick v. Beaucherk, 3 B. & P. 178; 2 T. R. 444; 6 T. R. 213; Doe v. Deardon, 8 East, 248; 12 East, 445; 4 Taunt. 772; Boughton v. Langley, 1 Lut. 814, 823; Doe v. Homfray, 6 Ad. & E. 207; Doe v. Biggs, 2 Taunt. 109; White v. Parker, 1 Bing. N. C. 573; Doe v. Nicholls, 1 B. & C. 342; and see Doe v. Simpson, 5 East, 171; Houston v. Hughes, 6 B. & C. 421; Fletcher, Leg. Est. Trust. 50). As to outstanding terms, it should, in general, be proved they have been surrendered. Where it is the interest of the owner of the inheritance that a satisfied term should be considered as surrendered, and it appears that no beneficial purpose can be answered by the continuance of the term, a surrender may be presumed (Doe v. Wrighte, 2 B. & A. 720). Where the legal estate has been vested in a trustee, and there is no direct evidence of a conveyance or surrender to the *cestui que trust*, a jury may, under circumstances, presume such conveyance or surrender

[*1011] (Lade v. Halford, B. N. P. 110; Goodtitle v. Jones, 7 T. R. *45). As, where an estate is directed to be conveyed, a jury may, within four years from the time when the estate was directed to be conveyed, presume that it has been so conveyed by the trustee (Doe v. Slade, 4 T. R. 682). In the case of a satisfied term, where acts were done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not reasonably to be done, or omitted, if the term existed in the hands of the trustee, and there does not appear to be anything to prevent a surrender from having been made, those acts are evidence from which a jury may presume such surrender (Doe d. Putland v. Hilder, 2 B. & A. 791). But in Doe v. Plowman, 2 B. & Ad. 573; Aspinall v. Kempson, Sugd. V. and P. 1148, this doctrine was questioned, and the circumstances were considered insufficient to found a presumption of the surrender of a term attendant. Where a term of years becomes attendant upon the inheritance, either by operation of law, or by a special declaration upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion, thus become the *cestui que trust* of the term, may be accounted for by the union of the two characters of *cestui que trust* and inheritor; and there appears, therefore, to exist no circumstance from which a jury can imply a surrender (Doe d. Putland v. Holder, *supra*; Townsend v. Champernoun, 1 Y. & J. 544). And the mere fact of a term being satisfied furnishes no ground from which the jury can presume it surrendered: there ought to be some dealing with the term to authorise such a presumption (Evans v. Bicknell, 6 Ves. 185; Cholmondeley v. Clinton, cited Sugd. V. and P. 1147; Doe v. Williams, 2 M. & W. 749). Where a term has been expressly assigned to attend the inheritance, and there has been no act or omission inconsistent with the existence of the term, there is still less ground to presume a surrender from the mere lapse of time, and silence of the party who possesses the inheritance (see Sugd. V. and P. 389, 391; Rose. Ev. 440; Doe v. Plowman, *supra*). The recognition of the term as subsisting at a late period, the fact that it would have been contrary to the duty of the trustees to surrender the estate, or that the original enjoyment of the party who sets up the presumed conveyance was consistent with the fact

of there having been no conveyance (*Doe v. Read*, 5 B. & A. 237; *Doe v. Scott*, 11 East, 478; *Keene v. Deardon*, 8 East, 267), are all circumstances from which a jury may infer that no conveyance has taken place (*Rosc. Ev.* 440).

Where A. devised an estate to trustees for years, with remainder to B., who, eighteen years after the death of A., treated the estate as his freehold, and leased it for lives: held, that the jury ought not to presume a surrender of the term; Bayley, J., asking the question, "Is there any case where a surrender has been presumed within twenty years? I do not think a jury ought to be required to presume what they do not believe. In the present case, if a surrender had really taken place, it would have been known to many individuals" (*Day v. Williams*, 2 C. & J. 460). "No case can be put, in which any presumption has been made, except when a title has been shown by the party who calls for the prescription, good in substance, but wanting some collateral matter necessary to make it complete in point of form (*Doe v. Cooke*, 6 Bing. 179).

But see now the 8 & 9 Vict. c. 112, which enacts that every satisfied term which was on the 31st December, 1845, either by express declaration or construction of law attendant on the inheritance of any land, shall on that day cease as to such land, but that the term so attendant by express declaration shall, notwithstanding, afford to every one the same protection against charges, actions, &c., as *if it had continued to exist, [*1012] but had not been assigned or dealt with after that day; and shall be considered for the purposes of such protection, in every court of law and equity, a subsisting term (sect. 1). Every term subsisting on 31st December, 1845, or thereafter created and becoming satisfied and attendant, either by express declaration or construction of law, since 31st December, 1845, shall immediately on its becoming so attendant absolutely cease as to the land on which it was attendant (sect. 2); so that all protection from satisfied terms since 1st January, 1846, has ceased, with the exception of what is preserved by the first sect.

"If the real plt. require, and is entitled to the protection of the term, the demise in the declaration must be by the person who was, in 1845, but has in fact ceased to be, the legal owner of it. If the termor have died since 1845, on whose demise can the plt. recover? If on that of his personal representative, then the plt. will have to prove the imaginary devolution of a non-existing term from the deceased owner in 1845, and for this purpose may find it necessary to take out administration for property which has no existence (*Rosc. Ev.* 440; referring to 9 Jar. Conv. 109). Where the term is required by the deft. it will perhaps be needful only to show the existence of it on 31st December, 1845, and that it was attendant by express declaration for the benefit of the deft., or of some one under whom he claims (*Rosc. Ev.* 440).

The cases above cited were decided before the passing of this act.

BY ADMINISTRATOR OR EXECUTOR.

In ejectment by an executor or administrator, the lessor of the plt. must prove the leasehold title of his testator, the testator's death, the probate, or grant of administration. The leasehold title may be proved by producing and proving the lease in the usual way see ("DEEDS"). The death of the termor is proved by parol evidence, or by proof of the register of burial and identity of the party deceased (see "DEATH"); see 3 & 4 Vict. c. 92, which makes certain non-parochial registers of births, deaths, &c., transferred to the custody of the registrar-general, evidence, either by producing

them or certified extracts from them after notice to the opposite party of the intention to use them. The probate or letters of administration are not of themselves evidence of the decease. The plt. may produce the letters of administration under the seal of the court; or the entry under the ecclesiastical record, or an examined copy of it, will be sufficient (*Garrett v. Lister*, 1 Leon. 25; *Peaselie's case*, ib. 101; *Elden v. Kiddell*, 8 East, 187; *Ray v. Clerk*, 13 East, 238); or an exemplification of the letters of administration (8 East, 187; *Kempton v. Cross*, Ca. t. Hard. 108). Where the lessor of the plt. is an executor, he must produce the probate of the will (*R. v. Stone*, 6 T. R. 295; *R. v. Horseley*, 8 East, 410). We have seen an executor may lay the demise before the probate, but after the death of his testator (*ante*, p. 987; *Com. Dig. infra*). It is immaterial whether the ouster be after or before the death of the testator, or intestate (4 Co. R. 92, 95 *a*). In addition to these proofs, however, the title of the testator or intestate must be proved (*ante*, pp. 998, 1004).

The personal representative may also maintain this action under 7 Will. IV. & 1 Vict. c. 26, s. 6, for estates held *per autre vie*, where there is no special occupation; and the statute extends to copyholds, which 29 Car. II. c. 3, s. 12, did not. Administration when granted is said to relate back to the intestate's death (*Com. Dig. Administration*, B, 10; *Thorpe v. Stallwood*, 1

D. & L. 24; *Patten v. Patten*, Alc. & Nap. (Ir.), 493; but see Wol-
[*1013] ly v. Clarke, 5 B. & A. *745; see 3 & 4 Will. IV. c. 27, s. 6).

If, by the practice of the Ecclesiastical Court, the act of the court in granting probate is indorsed on the will itself, and no other record is kept, the will so indorsed is primary evidence that such person is executor (*Doe v. Gunning*, 7 Ad. & E. 240; *Doe v. Mew*, ib.).

BY ASSIGNEES OF BANKRUPT OR INSOLVENT.

In Ejectment by Assignees of Bankrupt.] They must prove the title of the bankrupt to the premises for which they maintain the ejectment (2 Ph. Ev. 306); and the assignment and bankruptcy must also be proved in the usual way (*ante*, "BANKRUPTCY"). By the 6 Geo. IV. c. 16, s. 63, and 1 & 2 Will. IV. c. 56, ss. 25 & 26, the general assignment invests the assignees with all the power necessary to maintain the ejectment of all leaseholds (except for lives) belonging to the bankrupt, whether in his possession or not, at the time of the bankruptcy (see now 12 & 13 Vict. c. 106; "BANKRUPTCY"). With respect to freehold estates for lives, and estate tail (except copyhold), they do not pass by such assignment, but must, by the 6 Geo. IV. c. 16, s. 64, and 1 & 2 Will. IV. c. 56, ss. 25 & 26, be conveyed by the commissioners by deed indented and enrolled; and, until enrolment and bargain and sale are completed, the assignees cannot maintain an ejectment for such property (*ante*, p. 430). In ejectment by assignees under the compulsory clause in the Lord's Act, it is sufficient for the plt. to produce the assignment by the prisoner, without proving the previous notices; at all events, it is sufficient if the rule for the prisoner's discharge be also produced (*Doe d. Milburn v. Edgar*, 2 Bing. N. C. 391; 2 Sco. 581). This provision includes, not only estates in possession, but also estates in remainder or reversion (3 P. Wms. 132; *Amb. 394*; 3 Merr. App. 667). It also includes incorporeal hereditaments (*Archb. B. L. 125*). The deed only affects premises to which the bankrupt is entitled at the time of its execution; if he acquire any future real estates, there must be a new bargain and sale to vest the legal estate in the assignees (1 Atk. 252; *Esp. 431*). As to copyholds, see the 6 Geo. IV. c. 16, s. 68; the conveyance to the assignees is by bargain and sale (see 12 & 13 Vict. c. 106).

A living tenant in fee simple of customary land, which passed by bargain and sale, with surrender and admittance, became bankrupt, and the commissioners assigned the lands to the assignees; afterwards the bankrupt died, and after that the assignees were admitted. Ejectment was brought on the demises of the bankrupt's heir-at-law, and of the assignees, both laid between the bankrupt's death and his admission: held, that the plt. must recover on one or other, for that the title was not in abeyance; but if the assignees' title were not perfect, it was in the heir (*Doe v. Parke*, 4 Ad. & E. 816).

The assignees of an insolvent may maintain the action (see 1 & 2 Vict. c. 110, s. 51), even for copyholds, although the assignment to them had not been enrolled in the court rolls of the manor, pursuant to 7 Geo. IV. c. 57, s. 20 (*Doe v. Glenfield*, 1 Sco. 699). The assignees of an insolvent have the same powers of suing that the assignees of a bankrupt have (see 5 & 6 Vict. c. 116). And the provisional assignee might sue without the previous approbation of one of the commissioners, or order of the Insolvent Court (*Doe v. Spencer*, 11 Moo. 232; 3 Bing. 203; 2 C. & P. 79; and see *Doe v. Clark*, 3 Bing. 370).

A lessor whose property has been assigned to a provisional assignee, *under the Insolvent Debtors' Acts, cannot eject an occupier of land which passed under the assignment, although the provisional [*1014] assignee has never taken possession, nor any permanent assignee been appointed, nor the rent ever withheld from the lessor (*Doe v. Andrews*, 4 Bing. 348).

BY COPYHOLDER OR HIS ASSIGNEE.

In ejectment by the surrenderee of *copyhold* premises, he must prove the surrender to his use, and his subsequent admittance; for the legal title does not vest in the surrenderee until after admittance (*Doe v. Hicks*, 2 Wils. 13, 15; 1 T. R. 393). When the admittance has been made, the title relates back to the time of the surrender, against all persons but the lord; and, therefore, a surrenderee may recover in ejectment against his surrenderor, or a stranger, upon a demise laid between the times of admittance and surrender, provided the admittance be made before the trial (1 East, 600; 16 East, 208; Ad. Ej. 61). When the lessee of a copyholder is plt., he must, after proving the copyholder's title, show a special custom in the manor, allowing the copyholder to make leases for years, or that the lord has licensed the lease to be made before it was made (Co. Copyh. s. 51). If a copyholder, without license, make a lease for one year, or, with license, make a lease for many years, and the lessee be ejected, he must not sue in the lord's court by plaint (Ib.; *Goodwin v. Longhurst*, Cro. Eliz. 535; and see *Doe v. Tressider*, 1 Q. B. 416). An assignment of copyhold premises by common law conveyance of lease and release, without surrender to the lord of the manor, is not sufficient to support ejectment by the releasee, even against the widow of the releasor (*Doe v. Webber*, 3 Bing. N. C. 922; 5 Sco. 189). As to proofs in actions by heir or devisee of copyholder, *ante*, pp. 1007, 1008.

BY JOINT TENANTS, TENANTS IN COMMON, &c.

Where the plt. declares on a joint demise under several lessors, evidence must be given of a joint interest in the premises; but, if the demise be several, evidence of either a joint or several interest will be sufficient (*Doe d. Marsack v. Read*, 12 East, 57). In ejectment brought upon the joint

demise of several trustees of a charity, it is not enough for the deft., who had paid one entire rent to the clerk of the trustees, to show that the trustees were appointed at different times, as evidence of their being tenants in common; for, as against their tenant, his payment of the entire rent to the common agent of all, is, at all events, sufficient to support the joint demise, without making it necessary for them to show their title more precisely (*Doe d. Clarke v. Grant*, 12 East, 221). As to the evidence of ouster in an action by one joint-tenant, or tenant in common, against another, see *ante*, p. 1003. It was at one time held that one tenant in common could not set up an outstanding term against an ejectment for a moiety by another tenant in common (*Doe v. Pegge*, 1 T. R. 739, n.). But this doctrine is overruled (see *Doe v. Staple*, 2 T. R. 684; *Goodtitle v. Jones*, 7 T. R. 43; *Doe v. Wharton*, 8 T. R. 2). Ejectment is maintainable by one of two tenants in common, who have agreed to divide their property, if the deft., who holds under both as occupier, pay rent under a distress to such co-tenant alone after such agreement, and it is no defence to such action that the deeds of partition between the co-tenants have not been executed (*Doe v. Mitchell*, 3 Moo. 229; 1 B. & B. 11). **Quære*, whether one of two coparceners, on whom the reversion had descended, can alone maintain ejectment for a breach of a covenant in a lease (*Doe v. Lewis*, 5 Ad. & E. 277). Where a person demised mines to a company, of which he afterwards became a partner, but was not in possession of the mines as one of the company: held, that he was entitled to recover them in ejectment against another partner of the company (*Francis v. Harvey*, 4 M. & W. 331).

BY PARSON.

It is incumbent upon a *parson*, who brings an ejectment for the parsonage-house, glebe, or tithes, to prove that the property sought to be recovered is church property; as, that the premises were occupied by a former incumbent, or the like (2 Ph. Ev. 258). The tithes and rectory are not the same; therefore an ejectment for a parsonage and glebe will not be supported by showing that the deft. entered and took the tithe belonging thereto (Lat. 61). The plt. must prove his lessor's admission, institution, and induction (B. N. P. 105 a; *Heath v. Pryn*, 1 Vent. 14; *Snow v. Phillips*, 1 Sid. 220); and he will not be required to show his patron's title (B. N. P. 105); nor need he prove that he has subscribed to the thirty-nine articles (*Powell v. Milbank*, 3 Wils. 355; S. C. 2, Bl. R. 851; 3 East 199, Accord). As to proof of entries in the books of a rector, see *post*, "WRITINGS," "TITHES." Where induction however, has not followed institution, the presentation must be proved (B. N. P. 105); and a verbal presentation will be sufficient (Ib.; *R. v. Eriswell*, 3 T. R. 723). If the presentation be by a corporate body, it must be under seal, and must be proved by proof of the seal (*ante*, "CORPORATION"). As to proof of institution and induction, *post*, "TITHES." The institution may be proved by the letters testimonial of institution, or by the official entry in the public register of the diocese, which ought regularly to record the time of the institution, and on whose presentation (*Gibson's Codez*, 813), and, in which case, it would be evidence of the presentation as well as induction (2 Ph. Ev. 257; *Irish society v. Derry* (Bishop of), 12 Cl. & Fin. 641). The letters of institution of a party reciting the cession of his predecessor, followed by induction, are evidence of the cession (*Doe v. Carter*, 1 R. & M. 238). The induction may be established by proof of the indorsement on the mandate, directed by the ordinary to the archdeacon, or by the return (if any) to the mandate, or by some person present at the ceremony (2 Ph. Ev. 257; *Chapman v. Beard*,

3 Anst. 942). The parson may bring ejectment against a yearly tenant of the glebe land, though the current year of the tenancy, created by his predecessor, is unexpired, and no notice to quit has been given (*Doe v. Carter*, Russ. & M. 237).

When the ejectment is by a lay impropiator, he must adduce strict evidence of title, by showing that the rectory belonged originally to one of the dissolved monasteries, and was granted by the crown to one under whom he claims (*Com. 651*); but, as deeds and muniments are liable to be lost, length of possession and old deeds conveying tithes have been held sufficient evidence of the title (5 T. R. 256, n.).

BY GUARDIAN.

Where the *guardian* in socage maintains ejectment, he must prove the seisin of the ancestor of the heir, that he has left an heir, and that he is under fourteen years of age (*Doe d. Rigge v. Bell*, 5 *T. R. 471); and that amongst the relatives, to whom the estate cannot descend, he [*1016] himself is the next of blood to such heir. The late act for amending the law of descent, by making lineal ancestors and others capable of inheriting, who could not before have succeeded as heirs, will make it difficult to find such a relation; and, if he be testamentary guardian, or be appointed by deed, he must prove that the ward is under twenty-one years of age (*Ad. Ej. 250*), and the due execution of the will or deed (2 Ph. Ev. 251). His own title as guardian must also be made to appear (1 P. Wms. 260; *Bac. Ab. Guardian, A*; 9 Mod. 142), and the seisin of the ancestor of the ward (2 Ph. Ev. 251). A guardian for nurture cannot maintain ejectment (*Vaug. 177*; 2 Wils. 129). As to an infant's and guardian's power to maintain an ejectment, see *Ad. Ej. 48*. Where the appointment is by will, it must be executed agreeably to 7 Will. IV. & 1 Vict. c. 26, s. 9 (see *post*, "WILLS").

BY TENANT BY ELEGIT.

In ejectment by a *tenant by elegit*, he must prove the judgment, the elegit taken out upon it, and the inquisition and return thereupon, by which the premises are assigned to him (*B. N. P. 104 a*); the examined copy of the judgment roll containing the award of elegit and return of the inquisition is sufficient, without proving a copy of the elegit and of the inquisition (*Ramsbottom v. Buckhurst*, 2 M. & S. 565; *Hammond v. Wood*, 2 Salk. 563). Since the 1st October, 1838, creditors are entitled to *all* their debtor's lands. It is not, therefore, necessary now to describe them in the sheriff's return by metes and bounds, but merely for the purposes of identity (*Sherwood v. Clark*, 15 M. & W. 764). So, the original writ of elegit is admissible, though there may be no award on the judgment roll (*Pack v. Tarpley*, 9 Ad. & E. 468). Should, however, the possession be not in the debtor, but in a third party, the title of the debtor must be proved to have determined (*Doe d. Da Costa v. Wharton*, 8 T. R. 2). The return of the sheriff must be correct. It was held pl. could not recover where it did not appear by the return that a moiety of the lands had been set out by metes and bounds (*Fenny d. Masters v. Durrant*, 1 B. & A. 40); and the return will also be void, if it amount in value to more than a moiety of the whole (*Den d. Taylor v. Abingdon*, 2 Doug. 474; Salk. 563; *B. N. P. 104*); although a third person be in possession of the land extended; it is sufficient to prove a *prima facie* title in the debtor, and it lies upon the tenants in possession to show that their title is anterior to the judgment (*Doe v. Owen*, 2 Cr. & J. 71).

Where the lessor of the plt. is vendee of the sheriff, under a *fi. fa.*, it is sufficient for him; in ejectment against the deft., in the first action to produce the *fi. fa.*, without proving the judgment, but it is otherwise as against a stranger (*Doe v. Murless*, 6 M. & S. 110). Where the sheriff's vendee is also the plt., at whose suit the writ was issued, and not a mere stranger, he must also prove the judgment, for he is privy to it, and if there be none the writ would be a nullity as against him (*Doe v. Smith*, Holt, 589; 2 Stark. 199; *Hoffman v. Pitt*, 5 Esp. 22). A sale by the sheriff without a written assignment passes no property, and the estate remains in the debtor, who may, therefore, eject the creditor in possession (*Doe v. Jones*, 9 M. & W. 372; *Doe d. Stevens v. Donstan*, 1 B. & A. 230). Where an assignment of a lease by deed taken in execution was made by the under-sheriff, in the name and under the seal of office of the sheriff, it was *held [*1017] unnecessary to prove his authority (*Doe v. Brown*, 5 B. & Ad. 243).

If the *fi. fa.* be, after the sale, set aside for irregularity, and the produce of the sale be directed to be returned to the termor, the termor, cannot maintain ejectment to recover his term against the vendee under the sheriff (*Doe v. Thorn*, 1 M. & S. 425; see also *Doe v. Murless*, 6 Moo. & S. 110). Where the term sold had been granted to the deft.'s father, and on his death intestate the deft.'s brother entered and took administration, and was possessed until his death, and on his death the deft. entered, and by indenture, to which deft. was a party, concerning other premises, it was decided that the deft. was the legal personal representative of his brothers: held, that this was *prima facie* evidence that the term was vested in the deft. (*Doe v. Murless*, *supra*).

The confession in the consent rule does not prevent the deft. from setting up by way of defence that the land is held on a public trust, and is, therefore, exempt from seizure and execution (*Doe d. Parr v. Roe*, 1 Q. B. 700).

BY CONUSEE OF A STATUTE MERCHANT OR STAPLE.

The conusee of a statute merchant must prove the obligation of the conusor, or a certified copy of the roll in the office of the clerk of the recognizance (B. N. P. 104; 2 Saund. 69 b). He must also prove the *capias si laicus*, and the return thereto (*Hammond v. Wood*, 2 Salk. 563). The return on the statute merchant may be in the Q. B. or C. P. (F. N. B. 304). The conusee of a statute staple must prove the bond of the conusor, or a certified copy; he must also prove the writ of *liberate*. The return on the statute staple must be in the Court of Chancery (F. N. B.; 2 Saund. 70 b). If he proceed against third parties, he must prove the title of the conusor; and, if such third party's interest proceed from the conusor, the plt. must show that it has determined (*Doe v. Wharton*, 8 T. R. 2).

In the foregoing actions by particular parties, the evidence has been considered with reference to cases where no privity exists between the deft. and the lessor of the plt., or those under whom he claims. We will now consider the requisite evidence in actions by particular persons where such privity does exist; as, in actions by landlord against his tenant, by mortgagees, and by lords of manors. In general, in such cases, instead of proving title, the claimant should show the existence and termination of the privity; for a privity will not be presumed to exist without proof, but, being proved, the presumption is in favour of its continuance (Ad. Ej. 267). Thus, if the deft., or those under whom he defends, be let into possession pending a ne-

gotiation for a purchase or a lease, proof must be given of the circumstances under which he was let into possession, and also of the breaking off of the negotiation, before the day of the demise laid in the declaration (lb.). In like manner, if he has become tenant at will of the premises, the lessor must show how he became so, and that the will was determined by demand of possession, or otherwise, and so forth (lb.).

BY LANDLORD.

The claimant in this case must prove the tenancy between him and *the deft., or those under whom he defends, and the determi- [*1018] nation of such tenancy, either by effluxion of time, a notice to quit, or breach of a condition of such tenancy.

Tenancy. As we have already seen, *ante*, p. 998, by proof of this, the claimant is superseded the necessity of establishing strict evidence of title; it being a general rule that a tenant cannot dispute the title of his landlord or his assignee (see *Doe v. Samuel*, 5 Esp. 174; *Grosvenor v. Woodhurst*, 1 Bing. 543; 7 Moo. 298; *Gouldsworth v. Knights*, 11 M. & W. 337). Nevertheless it is competent to a tenant to show that the landlord's title had expired subsequently to the demise (*England v. Slade*, 4 T. R. 682; *Doe v. Ramsbottom*, 3 M. & S. 516; *Doe v. Watson*, 2 Stra. 230; *Grosvenor v. Woodhouse*, 1 Bing. 38; *Phillips v. Pearce*, 5 B. & C. 433; 3 Stark. Ev. Ejectment, 424; see *Doe d. Grundy v. Clarke*, 14 East, 488).

A mere licensee is also estopped: thus, where a person fraudulently obtained leave to enter from a lessor of the plt., and then set up a title to the premises; it was held, that he could not defend an ejectment, but was bound to deliver up possession before disputing the title (*Doe v. Baytop*, 3 Ad. & E. 188); and the tenant's estoppel also binds the person admitted to sue as landlord (*Doe v. Mizen*, 2 Moo. & R. 56). A servant rightfully in possession may eject a person who claims under him without any proof of title in himself; nor can the deft. set up any title against his devisee (*Doe v. Buckmore*, 9 Ad. & E. 662; 1 P. & D. 448).

In ejectment by the reversioner (on the expiration of a building lease) to recover possession of a house, which adjoined one that the lessor of the plt. had sold to the deft., and the description of which in the surrender, being copyhold, was, "as now occupied by A. B. or his under-tenants," an under-lease granted during the existence of the original building lease, under which A. B. claimed the ground upon which both houses were built was received as evidence of the mode in which the property had been enjoyed (*Doe v. Jordon*, 4 C. & P. 146). The tenant cannot, also, in general, dispute the title of his landlord's assignee, if a due conveyance thereof from the landlord, and notice thereof to the tenant, be proved, and he remain in possession: for the estoppel holds in favour of the assignee, if it would obtain in favour of the landlord (*Rennie v. Robinson*, 1 Bing 147; 7 Moo. 539; *Doe v. Whitroe*, D. & Ry. 1; *Phillips v. Pearce*, 5 B. & C. 433; 8 D. & R. 43; *Gouldsworth v. Knights*, 11 M. & W. 337, &c.). In an action by the reversioner after an estate for life, the tenant, who has paid rent to the tenant for life, cannot dispute the title of the reversioner (*Doe v. Whitroe*, D. & Ry. 1); so it was held to extend to a claimant who came in under and received possession from the tenant (*Doe v. Mills*, 2 Ad. & E. 17). Where deft. has taken a renewal of his tenancy from a person claiming as devisee of his landlord, he is estopped from disputing the title of the claimant by showing the deviser's incapacity, if there was no fraud practised on the deft. by the claimant (*Doe v. Wiggins*, 4 Q. B. 367). If the lessor, who has

only an equitable title, grant a lease, he has, as against his lessee, a good title by estoppel: but if, after the lease, the lessor by the mortgage deed grant all his interest at law and equity to a mortgagee, the lessee may give in evidence this deed, and thus prevent the lessor from recovering in ejectment on a forfeiture of the lease (*Doe v. Edwards*, 6 C. & P. 208). A tenant, let into possession by mortgagor before the mortgage, subsequently [*1019] paid his rent to the mortgagee: held, in *ejectment by the mortgagee against the tenant, that the latter might defend himself by showing that there had been a prior mortgage, and that he had received notice from the prior mortgagee to pay rent to him, and had paid it accordingly, as the tenant did not thereby deny that the mortgagor who gave him possession had title, but simply that the lessee of the plt. held a derivative title (*Doe v. Barton*, 11 Ad. & E. 307; 4 Jur. 434). So also, a tenant who has been let into possession by the second mortgagee himself, may show such prior mortgage and notice; for the tenant thereby admits that his lessor, with regard to the first mortgagee, was in substance mortgagor in possession, not then treated as a trespasser, and had title to demise; and the tenant may go on to show that his lessor has subsequently been treated as a trespasser by the first mortgagee, whereby his (the lessor's) title and the tenant's rightful possession have been determined (*Ib.*). V. mortgaged land in fee to A.; afterwards, and while V. remained in possession, S., claiming by a title anterior to the mortgage, brought ejectment against V., and a verdict was taken against him by consent, subject to arbitration as to what lease S. should grant to V. in pursuance of the award made: held, that V. was estopped from setting up such lease as an answer to an ejectment brought by O. (*Doe v. Pickers*, 4 Ad. & E. 782). In ejectment by a mortgagee, deft. not being the mortgagor, but in reality defending for his benefit, cannot set up a prior mortgage executed by him (*Doe v. Clifton*, 4 Ad. & E. 813). Where A. conveyed lands in fee, with an agreement that he was to remain in possession during his life, A.'s widow cannot defend her possession in an ejectment at the suit of the alienee, by setting up the title of a party to whom the husband had previously mortgaged the land (*Doe v. Skirrow*, 7 Ad. & E. 157). Acting as overseers of the poor is evidence of their official character in ejectment brought by them (*Doe v. Barnes*, 8 Q. B. 1037).

With respect to the mode of proving the privity of estate or tenancy, mere proof of *payment of rent* by deft. to the claimant is strong *prima facie* evidence of it, and of the claimant's title (see *Fenner v. Duplock*, 2 Bing. 10). It is not, however, conclusive evidence thereof, and the deft. may still dispute the tenancy, where there is no proof that the claimant was his original lessor; as, by showing the payment was made under a mistake or misrepresentation (*Williams v. Bartholomew*, 1 Marsh. 541; 1 B. & P. 326; 7 Moo. 299; *Gregory v. Davidge*, 3 Bing. 475; 2 Stark. 230); or, in error (*Doe v. Barton*, 11 Ad. & E. 307); or that the lessor of the plt. received it as agent of another (*Doe v. Francis*, 2 Moo. & R. 57). Where a person gets possession under a lease void under the Statute of Frauds, payment and receipt of the rents will be evidence of a yearly tenancy, regulated by covenants, &c., of the void lease (*Doe v. Bell*, 5 T. R. 471). And a similar presumption arises when he holds over at an advanced rent (*Digby v. Atkinson*, 4 Camp. 275; *Hutton v. Warren*, 1 M. & W. 475). It is, however, a question of fact (*Johnson v. St. Peter*, Hereford, 4 Ad. & E. 520). In an ejectment for non-payment of rent, demises were laid in the names of three of five coparceners, and in the names of the husbands of two of them. The lease proved at the trial was one from the father of the coparceners to the person under whom the defendant derived, but no deduction of title from the father to the lessors of the plt. was proved. Payment of rent for three years prior to the

ejectment was proved to the three coparceners alone: held, such payment was sufficient evidence of title to maintain ejectment for non-payment of rent as against third persons (*Hyndman v. Bailey*, 8 Ir. Law R. 143).

In *an ejectment on the title, brought on the determination of an [*1020] old lease, the lessors of the plt., having given in evidence that lease, and proved payment of the rent under it to them by the defts., or persons in privity with them, produced a deed made within twenty years of the bringing of the ejectment, which recited that A., being seised in fee of the premises in question, had conveyed that fee by a former deed to B., the conveying party to the lessors of the plt. in the deed produced. In this deed both A. and B. covenanted with the lessors of the plt. for quiet enjoyment. The lessors of the plt. having given no further evidence of the former deed of conveyance from A. to B.: held, that the defts., setting up no title of their own, could not rely on the recitals in the deed produced by the lessors of the plt. to show an outstanding estate in A.: held, also, that proof of the determined lease, and of payment of rent under it to the lessors of the plt. is, until displaced, sufficient evidence of title in them to the reversion to sustain the ejectment (*Jones v. Curry*, 8 Ir. Law R. 257). Evidence that the lessor of the plt. received rent for the premises from A., who formerly occupied them, and also from the parish officers, is admissible, although the deft. does not claim under A. or the parish officers (*Doe v. Stacey*, 6 C. & P. 139). Payment of rent by a lessee to a lessor after the lessor's title has expired, and after the lessee has had notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless it be proved that, at the time of payment, the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired (*Fenner v. Duplock*, 2 Bing. 10). The effect of payment of rent, or an attornment, may be destroyed by the subsequent non-claim of rent for a number of years, and by showing a strong ground to suspect the title of the party to whom the payment or attornment was made, particularly if it was not given voluntarily, but to prevent the continuance of an ejectment (7 Moo. 289). The deft. should be served with a notice to produce his receipts for rent, and the service of such notice should be proved.

In ejectment, evidence that the shutters of the house claimed were repaired, and a washhouse built on the premises, and that this was paid by W. L. is evidence to go to the jury of the seisin of W. L. (*Doe d. Loscombe v. Cliford*, 2 C. & K. 448, Alderson).

If the demise be by deed, or in writing, it must be proved (unless admitted) by production of the original, or a counterpart, or one of the witnesses (see *Strother v. Barr*, 5 Bing. 136; also *R. v. Holy Trinity (Inhabitants of)*, 7 B. & C. 611; 1 Moo. & R. 444; and tit. "DEED," "WRITING"); and it is not necessary that he should have given notice to the tenant to produce the original lease (*Doe v. Davis*, 7 East, 363). If there be no counterpart in order to let in secondary evidence of its contents, notice to produce the original should be given; if not produced, an unstamped copy may be read (*Braythwaite v. Hitchcock*, 10 M. & W. 494). If deft. have possession of it, give notice to produce it. If the demise be by parol, any person who was present at the making may prove it if the deft. have not admitted it. But, if it should appear at the trial that at any time a written agreement had existed between the lessor and the party under whom the deft. came into possession, it must be produced by the plt. (*Fenn v. Griffith*, 6 Bing. 533); unless, indeed, it have not been signed, in which case the terms may still be proved by parol (*R. v. St. Martin's (Leicester)*, 2 B. & A. 210); or, by verbal admissions of the opposite party (*Howard v. Smith*, 3 Man. & G. 254; *post*, "SECONDARY EVIDENCE").

**Demises or Agreements for a future Lease.*] Where one is let into possession under a valid agreement for a future lease, as no interest in the land passes under such an agreement, no tenancy is thereby created, but on the payment and receipt of rent he becomes a tenant from year to year under the stipulations in the agreement (*Doe v. Amey*, 12 Ad. & E. 476). Very serious difficulties have arisen in the construction of instruments of this nature, as to whether they are to be considered as actual demises or agreements only for a future one. And it has been said these new distinctions have now been put an end to by the 8 & 9 Vict. c. 106, s. 3, which enacts, that "a lease required by law to be in writing of any tenements or hereditaments made after the 1st October, 1845, shall be void at law, unless made by deed (Ad. Ej.). But it is apprehended that those questions may still arise, for although the statute says that a lease for more than three years shall be void, unless it be made by deed, yet the question has still to be ascertained whether it is an actual demise or merely an agreement for a lease; if it be the latter, the fact of affixing a seal to it cannot make it a demise: for this reason, as well as that the statute only applies to leases to be made after the 1st of October, 1845, it has been thought advisable to retain the cases that have decided on these questions. Words of present demise, as "I demise," or future words conferring a right of enjoyment, as "shall hold and enjoy," are evidence of an actual demise (*Harrington v. Wise*, Cro. Eliz. 486; *Baxter v. Browne*, 2 Bl. R. 973; *Poole v. Bently*, 12 East, 168; *Wright v. Trezevant*, Moo. & M. 231); although there be a stipulation that a lease shall at a future period be executed (*Pinero v. Judson*, 6 Bing. 210; *Doe v. Ries*, 3 Bing. 178; *Pearce v. Chestyn*, 4 Ad. & E. 225; *Warman v. Faithful*, 5 B. & Ad. 1042). The use of the word "agree" will not exclude the inference of a present demise, unless there be something else to show a contrary intention (*Staniforth v. Fox*, 7 B. & Ad. 592, per Tindal, C. J.; and see *Morgan v. Bissett*, 3 Taunt. 72). A stipulation for a future lease "on the usual terms," was held compatible with an intent to make a present demise (*Doe v. Benjamin*, 9 Ad. & E. 644; *Curling v. Mills*, 6 Man. & G. 173). A stipulation that the tenant shall do some act upon the premises before the execution of a formal lease, is evidence of an intention to make a present demise (*Poole v. Bently*, 12 East, 168). So, a stipulation that the agreement shall be considered binding until one fully prepared can be produced (*ib.*; *Doe v. Groves*, 15 East, 244). An actual demise may be collected from the letters interchanged between lessor and lessee (*Chapman v. Bluck*, 4 Bing. N. C. 187, 193). Where the agreement was to be collected from mutual letters, which left some of the terms for future settlement, and contained no provision for possession before the date of the future lease, it was held not to amount to a demise (*Jones v. Reynolds*, 1 Q. B. 506). Where, on the face of the instrument, it was evident that a future lease was contemplated though not expressly provided for, and some of the terms of the tenancy remained to be ascertained, the instrument was held to operate as an agreement only, though there were words of present demise (*Morgan v. Bissett*, 3 Taunt. 72). A landlord and tenant, between whom there was a subsisting tenancy, agreed in writing for the letting of the farm, upon different terms, the rent to be fixed by valuation, and the tenant to find sureties for the payment of it, neither of which was done: held, that the instrument did not operate as a lease, nor alter the terms of the existing tenancy, although it contained words of present demise (*John v. Jenkins*, 1 C. & M. 227). But if the agreement ascertains the terms of the lease and there are

[*1022] words of present demise, it will operate as a lease (*Doe v. Ries*, 8 Bing. 182); although the agreement contain a stipulation for a future lease (*Warman v. Faithful*, *ante*, p. 1021). It is to be presumed that

the intention of the parties was to make an agreement only, if by holding the instrument to be a lease a forfeiture would be incurred (*Doe v. Clare*, 2 T. R. 739). An express stipulation for a power of distress until the lease is granted, will not make it operate as a present demise (*Bicknell v. Hood*, 5 M. & W. 104); and where there is a stipulation showing that something ulterior to the agreement is to be done by way of a regular lease, this is evidence of an agreement only (*Doe v. Smith*, 6 East, 530; *Rawson v. Eicke*, 7 Ad. & E. 451); and if the instrument show that a future act is to be done before the relation of landlord and tenant commences, this will be evidence that the instrument was not intended to operate as a lease (*Doe v. Ashburner*, 5 T. R. 163; see *Gore v. Lloyd*, 12 M. & W. 463; *Doe v. Clarke*, 7 Q. B. 211); and if it appear that the party agreeing to demise have no present power to lease, it will not be construed as a lease (*Haywood v. Haswell*, 6 Ad. & E. 265; see *Doe v. Foster*, 3 C. B. 215). But all doubt upon an instrument may be prevented by an express provision that it shall not operate as a present demise (*Perring v. Brook*, 1 Moo. & R. 510). When, however, a doubt does exist, the court must endeavour to collect the intention of the parties from the contents of the document, and if they see a paramount intention that it shall operate as a lease, they are bound by it, although there be conflicting expressions (*Pinero v. Judson*, 6 Bing. 210, per Tindal, C. J.; see also *Clayton v. Bartenshaw*, 5 B. & C. 41); and they will look to the nature of the property and at the instrument in connection with surrounding circumstances, but not to subsequent acts (*Doe v. Powell*, 7 Man. & G. 980). Where the deft. produced a paper which was properly stamped as an agreement, but which, during the trial, was relied upon as a release, and no objection was taken to the stamp: held, on motion in banc, that it was then too late to do so (*Doe v. Benjamin*, 9 Ad. & E. 644). An actual demise may be collected from two letters interchanged between the parties (*Doe v. Powell*, 7 Man. & G. 980); and the subsequent acts of the parties are admissible to show their intention (*Chapman v. Buck*, 4 Bing. N. C. 187).

Evidence of a yearly demise may be collected from the receipt and payment of yearly rent (*Doe v. Horn*, 3 M. & W. 339); and therefore the receipt of rent by the remainderman from the tenant holding under a lease of the tenant for life, after the death of the tenant for life, creates a yearly tenancy (*Sykes v. ———*, cited in *Right v. Daryl*, 1 T. R. 161; *Bishop v. Howard*, 2 B. & C. 100). So, a tenant will hold upon the terms of a lease where he is let into possession, and pays rent under an agreement for a lease (*Mann v. Lovejoy*, R. & M. 355; *Knight v. Bennett*, 3 Bing. 361; *Doe v. Stratton*, 4 Bing. 446); and the tenant shall hold subject to the conditions therein specified (*Doe v. Amey*, 12 Ad. & E. 476). A lease for which before 1st October, 1845, a writing was required, is, if made since that date void unless made by deed (8 & 9 Vict. c. 106, s. 3). So, also, if being in possession under such an agreement, he acknowledges that half a year's rent is due (*Cox v. Bent*, 5 Bing. 158; *Reynart v. Porter*, 7 Bing. 451; *Braythwaite v. Hitchcock*, 10 M. & W. 494). Where there is a general letting at a yearly rent, a yearly tenancy will be created, even when the rent is payable quarterly, and *any* quarter's notice to quit be agreed upon (*R. v. Hertsmonceaux*, 7 B. & C. 551); but if determinable at a quarter's notice, without more, it is a quarterly tenancy (*Kemp v. Derritt*, 3 Camp. 509). But where the letting is general, without any reservation *of annual rent, the [*1023] tenancy is one at will (*Richardson v. Langridge*, 4 Taunt. 128).

Where the tenant let into possession an under-tenant, and afterwards took a lease, with the terms of which the under-tenant was ignorant, he, in holding over, is not bound by the terms of that lease (*Torriano v. Young*, 6 C. & P. 8). Where a tenant of glebe lands remained in possession for eight months

after the death of the former incumbent, it was held, that after such a lapse of time the new incumbent had assented to the continuance of the tenancy on the same terms as before, and that a notice to quit was necessary (*Doe v. Somerville*, 6 B. & C. 126).

A lease for six months, and "so on for six months to six months," giving six calendar months' notice, is a demise for a year at least (*R. v. Chawton*, 1 Q. B. 247). A demise "not from one year only, but from year to year," is a tenancy for two years at least (*Doe v. Cartright*, 4 East, 29). So is a demise for a year and afterwards from year to year (*Birch v. Wright*, 1 T. R. 380), although there be a stipulation for less than half a years' notice to quit (*Doe v. Green*, 9 Ad. & E. 658). But a demise "for twelve months certain and six months' notice afterwards," was held to give the tenant liberty to quit at the end of twelve months, giving six months' previous notice (*Thompson v. Maberly*, 2 Camp. 573). Where a tenant enters under an agreement for a lease for seven years, which is never executed, and occupies during all that period, he is not entitled to notice to quit at the end of the seven years, though a notice would have been necessary to turn him out during the seven years (*Doe v. Stratton*, 4 Bing. 446). A person holding under a lease granted by parish officers before 59 Geo. III. c. 12, s. 19, is a tenant from year to year (*Doe v. Terry*, 4 Ad. & E. 374; *Doe v. Cockell*, *ib.* 478).

A tenancy at will arises when the person is in possession of the premises with the privity and consent of the owner, no express tenancy having been created, and no act having been done by the owner impliedly acknowledging such person as his tenant (*Ad. Ej.* 75); and such is a party who is let into possession pending a treaty for a purchase or a lease (*Goodtitle v. Herbert*, 4 T. R. 680; *Doe v. Browne*, 8 East, 165; *Doe d. Newby v. Jackson*, 1 B. & C. 448; *Doe v. Beard*, 13 East, 210; *post*, p. 1028); or under a lease or agreement for a lease which is void (*Litt. s.* 70; *Doe v. Stennett*, 2 Esp. 717; *Doe v. Fearnside*, 1 Willes, 176; *Doe v. Edgar*, 2 Bing. N. C. 503); or as a dissenting minister (*Doe v. McKeay*, 10 B. & C. 721; *Doe v. Jones*, *ib.* 718); or where a tenant continues in possession after the expiration of his term, negotiating for a new lease (*Denn v. Rawlings*, 10 East, 261; *Doe v. Wilson*, 11 East, 56; *Doe v. Chamberlayne*, 5 M. & W. 14); and it has been determined that in these cases the persons being lawfully in possession cannot be ejected until that possession is determined either by demand of possession or breaking off the treaty, &c., &c. (*Roe v. Strut*, 4 Nev. & M. 42; *Daniels v. Davidson*, 16 Ves. jun. 252; *Denn v. Rawling*, 10 East, 261; *Doe v. Jackson*, 1 B. & C. 408; *Doe v. Price*, 9 Bing. 326; *Doe v. Turner*, 7 M. & W. 226; 9 M. & W. 643; *Doe v. Thompson*, 1 Nev. & P. 215; *Doe v. Pullen*, 2 Bing. N. C. 749). But this possession may be turned into a tenancy from year to year by the landlord's receipt of rent from the person in possession, or by any other act amounting to an acknowledgment of a subsisting tenancy (*Doe v. Bell*, 5 T. R. 471; *Clayton v. Blakey*, 8 T. R. 3; *Thunder v. Belcher*, 4 East, 449; *Doe v. Browne*, 8 East, 165). The demand, when necessary, must be made before the day of the demise in the declaration (*Doe v. Herbert*, 4 T. R. 680). "It is not the agreement, but the letting into possession, that creates the tenancy; for the person suffered so *to occupy cannot on the one hand be consi-
[*1024] dered as a trespasser when he enters; and, on the other hand, cannot have more than the interest of a tenant at will, the lowest estate known to the law" (*Doe v. Stannion*, 1 M. & W. 700, per Parke, B.). Where A., an assessor for the land tax, signed an assessment, in which he was named occupier, and B., proprietor of a farm: held, evidence of a tenancy at will by A. under B. (*Turner v. Doe*, 9 M. & W. 643, in error). Where

one was let into possession under a contract to purchase, and his devisee took possession on his death, who, when the vendor demanded rent promised to pay : held, evidence of a tenancy at will (*Doe v. Rock*, 4 Man. & G. 30). Any thing in these cases amounting to a determination of the will, is equivalent to a demand of possession. Thus, an entry by the lord to take stone under circumstances that would have amounted to a trespass if the tenant had had a permanent interest (*Turner v. Doe*, 9 M. & W. 643). So, a threat to take measures to recover the possession (*Doe v. Price*, 9 Bing. 356; and see *Ball v. Cullimore*, 2 C. M. & R. 120); and where a purchaser having obtained possession refuses to complete his purchase, and assigned his interest, the assignment is a determination of the will without demand (*Doe v. Abbott*, Rosc. Ev. 421); and where a tenant at will died, and his heir entered and claimed the land as his own, held, that the devisees of the lessor might eject without notice or demand (*Doe v. Thompson*, 5 Ad. & E. 532). Where a man got into possession of a house without the privity of the landlord, with whom he afterwards entered into a negotiation for a lease, but disagreed about the value of the fixtures, Lord Ellenborough was of opinion that this, if any thing, was a tenancy at sufferance, and a notice to quit was unnecessary (*Doe v. Quigley*, 2 Camp. 505; see *Doe v. Lawder*, 1 Stark. 308; *Doe v. Pullen*, 2 Bing. N. C. 749). Where it was agreed, before all the purchase-money had been paid, that the vendee should have possession until a certain day, paying the reserved rent in the mean time, and that in case he did not pay the residue of the purchase-money on that day he should forfeit that which he had already paid, and not be entitled to an assignment of the lease; Lord Ellenborough held that this agreement operated like a clause of re-entry on a breach of covenant in a lease, and that the residue of the purchase-money not having been paid on the appointed day, the vendee's interest thereupon ceased, and he might be ejected without any notice (*Doe v. Sayer*, 3 Camp. 8); and the same rule applies to a third person under such circumstances who has come in as tenant to the vendee (*Doe v. Boulton*, 6 M. & S. 148). The demand may be made of the wife of the tenant at will upon the premises (*Roe v. Street*, 2 Ad. & E. 329).

Determination of Tenancy by Notice to Quit—When necessary]. Where the lessee underlet part of the premises, and then delivered up possession of the part remaining in his own occupation, without giving notice to quit to his sublessee, the landlord cannot entitle himself to recover by giving a notice in his own name to the sub-lessee, there being no privity existing between them, and the original tenancy never having been determined by the first lessee (*Pleasant d. Hayton v. Benson*, 14 East, 234). The representatives of a tenant from year to year are invested with every interest the tenant might have had in the premises, and are entitled to a notice to quit from the person under whom their testator or intestate held (*Doe d. Shore v. Porter*, 3 T. R. 13; *R. v. Stowe* (Inhabitants of), 6 T. R. 297; *Parker d. Walker v. Constable*, 3 Wils. 25; *post*, p. 1029). During the continuance of a yearly tenancy the landlord *mortgaged the premises to secure the payment of an annuity. The mortgage deed contained [*1025] a proviso that he should remain in receipt of the rents until sixty days after default made in payment of the annuity : held, that as against the tenant before default the mortgagor had sufficient interest to entitle him to determine the tenancy by notice to quit (*Doe d. Goldwin*, 1 Gal. & Dav. 463). And, if the landlord die pending the tenancy, yet the lessee is entitled to the same notice from the party to whom the interest in the premises has descended, though he be an infant (*Maddon d. Baker v. White*, 2 T. R.

159). In the common cases of tenancies of houses or lands from year to year, a notice to quit will be necessary to determine such tenancy, and the party cannot be ejected without such notice (*Doe d. Warner v. Brown*, 8 East, 165; 1 T. R. 195). As to lodgings, see *infra*. Though the lessor enter into an agreement not to determine the tenancy by notice to quit, yet he may still do it (*Doe d. Rigge v. Bell*, 5 T. R. 471). Where a tenant was let into possession before the execution of a mortgage, he will be entitled to a notice to quit from the mortgagee previous to ejectment being brought against him (*semble*, *Thunder d. Weaver v. Belcher*, 3 East, 449, *infra*). If there be a lease for a year, and, by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract, and a notice to quit will be necessary (*Right d. Flower v. Darby*, 1 T. R. 159). Where a rector succeeded to a rectory upon the death of the former incumbent, and defts. were then in possession of the glebe lands, having been tenants of the former incumbents, a notice to quit was held necessary; and, where the rector conveyed the lands to a trustee, for the purpose of securing an annuity, a notice from such trustee will also be necessary previous to his ejecting them (*Doe d. Cates v. Somerville*, 6 B. & C. 126; 9 D. & R. 100); the principle governing these cases being that the tenancy has been affirmed by the persons subsequently becoming entitled to the premises. So, if a tenant for life, under a limited power of leasing, grant a lease exceeding his power, the lease is void, and not capable of confirmation by the remainderman; but, if the remainderman accept rent, as rent, after the death of the tenant for life, it is an admission that deft. is his tenant, and a notice to quit will be necessary to determine the tenancy (*Doe d. Martin v. Watts*, 7 T. R. 83; 2 Esp. 500; *Roe d. Jordan v. Ward*, 1 H. Bl. 97; *Denn d. Brune v. Rawlins*, 10 East, 261).

Premises were demised under a written agreement, dated 4th August, 1845, "the tenancy to be from year to year from Michaelmas next," at the rent of 55*l.*, payable half-yearly, "except the last half-year, which portion of rent shall be paid on or before the 1st August in that year, and to be deemed then due for all legal remedies for recovering rent in arrear." Tenant "to allow the landlord or in-coming tenant, *in the last year*, to enter on, 1st May to make fallows and carry out the manure," for which compensation was to be paid, &c. Tenant to have "the use of the barns for stacking and threshing the crops *of the last year* till the 1st day of May after the tenancy:" held, that these stipulations did not necessarily import that the tenancy was to be extended beyond the first year; consequently, that the tenancy was determined by a notice, dated 24th March, 1846, to quit at Michaelmas that year (*Doe d. Plumer v. Mainby*, 10 Q. B. 473).

The only evidence of the terms on which apartments were hired consisted of the following receipt: "Received of P. L. C. one hundred and twenty-six pounds, for rent of furnished house from the 8th of May to the 1st of August instant," and a correspondence about the return of the money: held, that the jury were warranted in inferring that the hiring was weekly, and not quarterly (*Towne v. Campbell*, 3 C. B. 921). *Semble*, per Colman, J., that, if the hiring had been quarterly, a quarter's notice would have been necessary (*Ib.*).

The receipt of rent may be explained so as to rebut the implication arising out of a yearly tenancy (*Doe d. Lord v. Crago*, 12 Jur. 705; 17 Law J. 263, C. P.).

Where, therefore, the deft. occupied under a lease for lives from the plt. and the lease had determined by the deaths of the *cestuis que vie*, but the plt., in ignorance of such death, had continued afterwards to receive rent from the deft., held, that it was a question of fact for the jury, whether the rent

had been received as under the old lease in ignorance of its determination, or whether under a new agreement, by which a yearly tenancy might be implied (Ib.).

When Notice to Quit not necessary.] In general, no notice to quit is necessary to determine a tenancy of *lodgings*, unless the tenant expressly agree for such notice, or be a tenant from year to year or more (see 3 B. & C. 88; 4 D. & R. 493). Where A. took apartments in a dwelling-house at a rent payable half-yearly, and entered and paid half a year's rent, and before the expiration of the next half-year quitted possession, and at the end of that half-year paid a second half-year's rent; it was ruled, that a taking from year to year could not be inferred from these facts, but a taking for one half-year only, and held, that no notice was necessary, Abbott, C. J., observing, "According to the ordinary practice, lodgings are not usually let even for so long a period as a year, and we are now called upon to infer the existence of a contract continuing for two years at least, contrary to the general usage; the inference arising from these facts is, that the deft. considered himself tenant for one year, and no longer, and there being no evidence of an express contract creating a tenancy for a longer period than one year, I think that such a contract, which is certainly *contrary to [*1026] the general usage which prevails in letting lodgings, ought not to be enforced" (Wilson v. Abbott, 9 B. & C. 89). And in *Huffnell v. Armstrong* (7 C. & P. 56), Parke, B., observes, "I am not aware that it has ever been decided, that, in the case of an ordinary monthly or weekly tenancy, a month's or a week's notice must be given. The cases cited" (*Doe v. Hazell*, 1 Esp. 94; *Roe v. Ruffin*, 6 Esp. 4; *Doe v. Scott*, 6 Bing. 362: which merely decide that notices commensurate with the holdings suffice) "are not authorities in support of the proposition. A tenant who enters upon a fresh week may be bound to continue until the expiration of that week, or to pay the week's rent; but this is a very different thing to giving a week's notice to quit. The proposition contended for is this, that if a tenant commences a new week without giving notice, he is to be considered as contracting to hold, not only for that week but also for the following week; I am of opinion, in the absence of any usage to that effect, that in point of law a week's notice to quit is not implied as a part of the contract in the case of an ordinary weekly taking."—The weekly tenancy terminates on the day of the week corresponding to that of its commencement; that is to say, a party entering on a Monday may quit on a Monday.—"I cannot say a week has been exceeded by holding for six days and two fractions of a day" (Ib., per Parke, B.). No notice to quit is deemed requisite where the tenancy expires by effluxion of time, or the happening of a particular event specified in the terms of leasing; both parties being apprized when such period arrives, or the event happens, that, unless they come to a fresh agreement, there is an end of the lease (*Messenger v. Armstrong*, 1 T. R. 53; *ib.* 162; *Cobb v. Stokes*, 8 East, 359). Where a tenant has attorned to another person, or done any act disclaiming to hold of his landlord, he may be treated as a trespasser, and no notice to quit will be requisite (B. N. P. 96; *Doe d. Williams v. Pasquali*, Pea. 259; *Doe v. Whittlick*, Gow, 185; *Bower v. Mayor*, 1 B. & B. 4). But the act must be inconsistent with the relation of landlord and tenant (*Doe v. Stannion*, 1 M. & W. 695; *Doe d. Williams v. Pasquali*, *supra*; *Doe v. Cooper*, 1 Man. & G. 135, 138). Whether the act amount to a disclaimer is for a judge; whether the evidence proves a disclaimer is for a jury (Ib.; and see *Doe v. Evans*, 9 M. & W. 48). A lease for years not warranted, either at common law or by 32 Hen. VIII. c. 28, was made by A., tenant in tail to B. After A.'s death, C., the next entailee in remainder, de-

manded the arrears of rent accruing in C.'s time. After some negotiation, B. refused to pay the arrears to C., alleging that D., and not C., was entitled to the estate tail. Held, that no tenancy was created between C. and B., and C. might maintain ejectment against B. without notice to quit or demand of possession; that the setting up of the title of D. amounted to a disclaimer of the title of C.; and that, for the purposes of the action of ejectment, the entry confessed in the consent rule was sufficient to determine the lawful possession of B. (*Doe d. Phillips v. Rollings*, 4 C. B. 188).

The mere act of paying rent to a third party does not operate as a forfeiture of the lease (*Doe v. Parker, Gow*, 180). But, where a tenant pays rent to a third person, claiming to be landlord, and allows him to mark and cut the trees, the submission to these acts by the tenant is an acknowledgment of the title of the claimant (*Doe v. Grubb*, 10 B. & C. 824, per Tenterden, C. J.). Where deft., who held under a tenant for life, received on his death a letter from the lessor of the plt., claiming as heir, and demanding rent, to which the deft. replied, that he held the premises as tenant to S.; that he had never considered the lessor of the plt. as his landlord; *and that [*1027] he should be ready to pay this rent to any one who should prove to be entitled to it; but that, without disputing the lessor of the plt.'s pedigree, he must decline taking upon himself to decide upon his claim without more satisfactory proof in a legal manner: it was held that this was a disclaimer (*Doe v. Frowd*, 4 Bing. 557). *Quære*, as to the necessity of a notice in any case where there is not a tenancy admitted on both sides (*Ib.*, per Best, C. J.). Where a tenant at will died, and his heir entered and claimed the lands as his own: held, that the devisees of the lessor might eject without notice or demand (*Doe v. Thompson*, 5 Ad. & E. 532). Where a tenant said to his landlord, "I have no rent for you, for P. has ordered me to pay none:" held to be a disclaimer (*Doe v. Pittman*, 2 Nev. & M. 673). It is a forfeiture of a lease for a tenant to deliver up possession of the lease and premises, in fraud of his landlord, to a tenant claiming under a hostile title (*Doe v. Flynn*, 1 C. M. & R. 137). A mere verbal disclaimer may be a forfeiture; it is not requisite that any act should be done (*Doe v. Stannion*, 1 M. & W. 702, per Parke, B.). Where the ejectment is brought against several who hold separate tenements the plt. may recover against those who have disclaimed, and not against the others (*Doe v. Clarke, Peak*, Ad. Ca. 239). A definite term of years is not forfeited by an oral refusal to pay rent, on the ground that the land belonged to the tenant and not to the lessor (*Doe v. Wells*, 10 Ad. & E. 427; see Com. Dig. Forfeiture, A, 5). The court were of opinion, that a disclaimer by a yearly tenant was rather evidence of the determination of the will, which limits the duration of the estate, than of a forfeiture of the estate (*Ib.*; but see *Doe v. Flynn*, *supra*, where a forfeiture by disclaimer was considered to operate as a forfeiture of a long term of years, under a lease by deed). The disclaimer must be previous to the day of the demise in the declaration, and admission of a disclaimer made subsequent to it must, in order to determine the tenancy, amount to an admission that such disclaimer took place before the day of the demise (*Doe v. Cawder*, 1 C. M. & R. 398; *Doe v. Litherland*, 4 Ad. & E. 784). The admissions of the tenant in possession are evidence against one who defends as landlord (*Ib.*). A reply of a tenant to a demand for rent, "You are not my landlord," accompanied by a refusal to give up possession, has been held to amount to a disclaimer (*Doe v. Long*, 9 C. & P. 773). So, a reply to a similar demand by an agent, "My connexion with J. C., as a tenant, has ceased for many years," was held sufficient evidence of an antecedent disclaimer (*Doe v. Grubb*, *ante*, p. 1026.) Where the legal estate was in trustees, and the tenant had paid rent to the *cestui*

que trust, who had given notice to quit, on the receipt of which the tenant had said, "he did not think she would turn him out of possession, as she had promised he should continue on as tenant from year to year:" the court held, that assuming the deft. to be tenant to the trustees, there was a sufficient disclaimer to entitle them to recover without notice, and that if he were tenant to the *cestui que trust* the notice was sufficient (*Doe v. Evans*, 9 M. & W. 48).

Between mortgagee and mortgagor, after forfeiture of the mortgage, no notice to quit is necessary (*Birch v. Wright*, 1 T. R. 383; *Moss v. Gallimore*, Doug. 279; *Doe v. Gills*, 5 Bing. 421; see p. 1043); and it is the same in the case of under-tenants of the mortgagor (*Doe d. Shepherd v. Allen*, 3 Taunt. 78; *Keech d. Warne v. Hall*, Doug. 21); if they have been let into possession after the execution of the mortgage, and without the privity of the mortgagee (*Ib.*); and so with the assignees of a mortgagee (*Thunder d. Weaver v. Belcher*, 3 East, 449; but see *Evans v.*

**Elliott, supra*). If a lease be granted to a mortgagor prior to the [*1028] mortgage, the mortgagee has the same right against the lessee and those claiming under him that the mortgagor had, and no other than he had; and his remedy may be on the lease as assignee of the reversion so long as the lease is in existence, and the tenant acknowledges his title: if, however, the lease be subsequent to the mortgage, the mortgagee may treat the lessee and all those who may be in possession as trespassers, and bring ejectment (*Rogers v. Humphreys*, 4 Ad. & E. 299).

The attorney of the mortgagee, who was also the attorney of the mortgagor, applied to the tenant in possession for rent, to pay the interest due on the mortgage, and threatened to distrain; held, that the mortgagee thereby recognised the possession as legal, and that he could not maintain ejectment on a demise laid previously to such application (*Doe v. Hales*, 7 Bing. 322). The mere fact of the mortgagee having received interest on the mortgage down to a time later than the day of the demise in the declaration, does not amount to a recognition by him that the mortgagor was in lawful possession of the premises, till the time when such interest was paid, and consequently is no defence to the ejectment (*Doe v. Cadwallar*, 2 B. & Ad. 473). By mortgage deed of 11th January, 1836, it was covenanted to surrender copyhold property to the mortgagee in fee, as a security for 850*l.*, to be repaid on the 11th July following, with power of sale in default; there was also a clause that the mortgagor should, during his occupation of the premises, yield and pay to the mortgagee the yearly sum of 50*l.*, by equal half-yearly payments, on the 11th July and 11th January, &c.; and that it should be lawful for the mortgagee to have and use such remedies for distress as landlords have on common demises, provided that the reservation of such rent should not prejudice the right of the mortgagee to enter into and take possession of the premises covenanted to be surrendered, and eject the mortgagor at any time after default made in payment of the moneys thereby intended to be secured. In November, 1837, the mortgagee distrained for 50*l.* "being for rent due up to the 11th July last:" held, that the above reservation of rent and distress for rent had not created the relation of landlord and tenant between the parties, so as to entitle the mortgagor to notice to quit before ejectment (*Doe v. Olley*, 4 P. & D. 275; 4 Jur. 1084).

No notice is ever requisite where the relation of landlord and tenant does not subsist (see *Best*, C. J., 4 Bing. 557). The payment of rent will, in some cases, be evidence of a tenancy, so as to render a notice necessary; but not so if it be paid and received altogether on another account, and not strictly as between landlord and tenant (*Right d. Wells* (*Dean and Chapter*

of) v. Bawden, 3 East, 260, 276). Nor is it necessary where a person has wrongfully possessed himself of plt.'s property, though a negotiation as to terms had been attempted to be entered into, as he was only a tenant by sufferance (Doe d. Knight v. Quigley, 2 Camp. 505); but, if he be put into possession upon an agreement to purchase the premises, a notice might be deemed requisite (Right d. Lewis v. Beard, 13 East, 210); and it seems to be a general rule that a *reasonable* demand of possession is necessary where a party is let into possession under an agreement for a lease (13 East, 210; 3 Taunt. 148; *ante*, p. 1023). But, where T. C., who occupied premises as tenant at will to H., let B. into possession, he having previously requested H. to accept him as tenant, which H. refused, unless B. would find security; B. remained in possession for two years, negotiating with H., but having failed to find securities, H. brought ejectment: held, that no demand of possession was necessary (Doe v. Brett, 1 H. & W. 3). Where a party enters *into an agreement for a lease, and continues in possession for the [*1029] period during which the lease was to be granted, his tenancy ceases at the expiration of that period, without notice (Doe v. Stratton, 4 Bing. 446). It will not be necessary to give notice to a vendee to quit, who has agreed to pay the purchase-money by instalments, where the vendor was not compelled to convey, if default was made in the payment of any of the instalments (Doe d. Moore v. Lawder, 1 Stark. 308; Doe d. Leeson v. Sayer, 3 Camp. 8). Where, by the terms of a deed of copartnership, premises were to be occupied during the continuance of the partnership, and the partnership is dissolved, no notice to quit is necessary (Doe d. Waithman v. Miles, 1 Stark. 181). If A. let part of a house to a firm, consisting of himself and B., for carrying on the business of the firm and the partnership of A. and B. be dissolved, A. may bring ejectment against B. without notice to quit (Doe v. Bluck, 8 C. & P. 464). Where the lessor of the plt. claimed under an *elegit*, and inquisition issued in 1818, but founded on a judgment recovered prior to 1816; it was held, no notice need be given to a tenant who was in possession in 1816 (Doe d. Putland v. Hilder, 2 B. & A. 782). Where a tenant in possession died intestate, and his widow continued to occupy the premises for several years, paid rent to the landlord, and married a second time, when her husband entered into possession and paid rent; also, upon the death of the wife, the personal representative of the first husband took administration of his estate and effects, and brought ejectment to evict the second husband: held, that no notice to quit was necessary (Doe v. Bradbury, 2 D. & R. 706). Where a notice was given to a *feme sole*, previous to the expiration of which she married, no notice was considered necessary to be given to the husband (Lake v. Smith, 1 N. R. 174; Wilkinson v. Colley, 5 Burr. 2694). We have seen that the representatives of a deceased tenant are entitled to the same notice to which their tenant had a right, because the tenant's interest in the term vests absolutely in them (Doe v. Porter, 3 T. R. 13; Parker v. Constable, 3 Wils. 25; Maddon v. White, 2 T. R. 159; *ante*, p. 1024); but, where an agreement had been made that a tenant was to occupy premises during the life of the lessor, either by himself or by a tenant, agreeable to the lessor, and the tenant died, being himself possessed at the time of his death, it was held that his interest ended with his life, and that ejectment was well brought against his executrix, without any notice to quit (Doe d. Bromfield v. Smith, 6 East, 536). Where no notice is necessary, but one has been given, yet it is not binding, and the lessor of the plt. may proceed as if there had been none (Doe d. Godsell v. Inglis, 3 Taunt. 54). A tenant at sufferance, who has been turned out of possession by his landlord,

without demand of possession, cannot maintain ejectment (Doe d. Murrell, 8 C. & P. 134).

H. T., being seised in fee of certain premises, demised the same to his son W. T., for life, with remainder to the issue of W. T. as tenants in common in fee. In April, 1845, W. T. died, having by will appointed executors, who managed the estate for the infant children of W. T., and in the years 1845 and 1846 received rent from the deft., who had been in possession prior to the death of W. T. : held, that the acts of the executors did not bind the infant children ; and that the latter might maintain an ejectment against the deft. without any previous notice to quit or demand of possession (Doe d. Thomas v. Roberts, 16 M. & W. 779).

Time of giving and for Expiration of Notice.] If the holding be from year to year, it is necessary the notice be given half a year previous to that period of the year when the tenancy commenced (Right d. Flower v. Darby, 1 T. R. 159, 163 ; 8 East, 165) ; and the notice must be to quit at the expiration of that period (lb.) ; or, where the tenancy is for less than a year, at the end of such shorter period, or some corresponding period (Kemp v. Derrett, 3 Camp. 510). The half-year must be six calendar months, or 182 days (lb. ; Doe d. Harrop v. Green, 4 Esp. 199 ; Howard v. Wemsley, 6 Esp. 53 ; Gulliver d. Tasker v. Burr, 1 Bl. R. 596). If, however, the rent be payable on the usual quarter days, notice on one to quit on the next but one is sufficient (lb.) : therefore, a notice on *the 28th of September, to quit on the ensuing 25th of March, is sufficient (Roe v. Doe, 6 Bing. 574). If a house be taken " at twelve months certain, and six months' notice to quit afterwards," the tenancy may be determined by 6 months' notice to quit expiring at the end of the first year (2 Camp. 573). A notice to quit on one of two days is sufficient, if six months intervene previous to the expiration of the first day (Doe d. Mathewson v. Wrightman, 4 Esp. 5). A notice to quit at Lady-day, 1795, given at Michaelmas, 1795, will be good ; for it will be taken to mean 1796 (Doe d. Bedford v. Knightley, 7 T. R. 63 ; Ch. R. 11) ; and notice to a tenant from year to year, holding from Old Michaelmas, to quit at Michaelmas, will be good (Doe d. Hinde v. Vince, 2 Camp. 256), if it be a parol lease, but not if it be by deed (Doe d. Spicer v. Lea, 11 East, 312). The terms of the tenancy may require a less period than a half-year's notice ; as, if the tenant be a monthly or weekly one, a month or week's notice is sufficient (Kemp v. Derrett, 3 Camp. 510 : Doe v. Hazell, 1 Esp. 94 ; Doe v. Raffan, 6 Esp. 4 ; Wilson v. Abbott, 3 B. & C. 88 ; 4 D. & R. 693 ; 2 Camp. 573 ; see Hufnell v. Armstrong, *ante*, p. 1026). Where the notice was delivered on 27th September, " to quit at the expiration of the term for which you hold the same," which notice was served personally on the tenant, who observed, " I hope Mr. M. does not mean to turn me out ;" evidence, that it was the general custom in that part of the country where the lands lay to let the same from Lady-day to Lady-day, and that the deft.'s rent was due at Michaelmas and Lady-day respectively was receivable, and the judge directed the jury to presume that this tenancy, like other tenancies in that part of the country, was from Lady-day to Lady-day (Doe v. Lamb, Ad. Ej. 272). Where premises are taken under an agreement, by which " the tenant is always subject to quit at three months' notice," this constitutes a quarterly tenancy, which may be determined by a three months' notice to quit, expiring at the end of any quarter from the time of his entry (Kemp v. Derrett, 3 Camp. 510). But, on the letting of a house from " year to year : to quit at a quarter's notice," such notice must expire at the period of the year at which the tenancy commenced (Doe v. Donovan, 2 Camp. 78 ; 1 Taunt. 555). If a tenant hold over, and pay rent after the expiration of

his lease, notice to quit must be given with reference to the time of entry under the original lease (*Doe v. Samuel*, 5 Esp. 173). Thus, where the premises were demised for one year and six months from the 13th of August, and the tenant held over, a notice expiring on that day was held proper (*Doe v. Dobell*, 1 Q. B. 86; see also *Perry v. Lindley*, 3 Man. & G. 498); and the notice may be given for the end of the first year of holding over (*Doe v. Smaridge*, 7 Q. B. 957); and so a lease void under the Statute of Frauds will regulate the time of the tenancy (*Doe v. Bell*, 5 T. R. 472), and an alteration in the rent during the tenancy does not create a new one (*Doe v. Kendrick*, Ad. Ej. 129; *Doe v. Geekie*, 5 Q. B. 841). There is no distinction as to giving notice, whether the premises be houses or lands (*Right d. Flower v. Darby*, 1 T. R. 162). But, as to lodgings, see *ante*, p. 1025.) Where an incoming tenant enters upon different parts of the demised premises at different times, the giving half a year's notice to quit before the substantial time of entry is sufficient (per Lord Ellenborough; *Doe d. Bradford v. Watkins*, 7 East, 554; *Doe d. Strickland v. Spence*, 6 East, 120; *Doe d. Heapy v. Howard*, 11 East, 498; *Doe v. Snowden*, 2 Bl. R. 1224; and it is a question for the jury which is the principal and which the accessory subject of demise (*Doe v. Howard*, 11 East, 498). *Quære*, whether if the notice is sufficient

as to part only, the plt. may recover the whole of *the premises [*1031] in the demise (*Doe v. Rhodes*, 11 M. & W. 600). A holding from Michaelmas, *prima facie* signifies Michaelmas new style (*Doe v. Vance*, 2 Camp. 257). A lease of lands by deed, since the new style, to hold from the feast of St. Michael, must be taken to mean from New Michaelmas, and cannot be shown by extrinsic evidence to refer to a holding from Old Michaelmas; and a notice to quit at Old Michaelmas, though given half a year before New Michaelmas, is bad (*Doe d. Spicer v. Lee*, 11 East, 312; *Smith v. Walton*, 8 Bing. 235). But, under a parol lease, evidence will be admitted to explain a difficulty as to the commencement of the holding (*Doe d. Hall v. Benson*, 4 B. & A. 588; *Den d. Peters v. Hopkinson*, 3 D. & R. 507; *Furley v. Wood*, 1 Esp. 198). If a remainderman affirm a letting which he might have avoided, he must give a notice to quit, expiring at the period of the year the tenant entered (7 T. R. 83, 478; 2 Esp. 502; 1 H. Bl. 97). If a tenant hold under an agreement for a lease, at a yearly rent, whereby it is stipulated that the agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, giving the lessor's son power to take the house for himself, when he comes of age, the son must make his election in a reasonable time after he comes of age: the delay of a year is unreasonable, and the tenant cannot be ejected upon half a year's notice to quit, served after such delay (*Doe d. Bromfield v. Smith*, 2 T. R. 436).

Where there has been an express agreement, the time of giving notice should be regulated by it (*Doe d. Pitcher v. Donovan*, 1 Taunt. 555; 2 Camp. 78; *Kemp v. Derrett*, 3 Camp. 510). In some cases, it may be regulated by the custom of the place where the tenement is situated (*Timmins v. Rowlinson*, 3 Burr. 1609; 2 Sid. 20; *Roe v. Charnock*, Pea. 5). The presumption of law is, that the tenancy commenced when the tenant entered in the premises, though he took possession in the middle of the usual quarter-days (*Kemp v. Derrett*, 3 Camp. 510; but, if a tenant enter in the middle of a quarter, and afterwards pay for the time to the beginning of the succeeding regular quarter, from which time he pays half-yearly, it shall be presumed that his tenancy began from the first regular quarter-day (*Doe v. Johnson*, 6 Esp. 10; *Doe v. Stapleton*; 3 C. & P. 275). However, where the tenant entered in the middle of a quarter, under an agreement to pay rent quarterly, and for the half-quarter, it was left to the jury to say, whether the tenancy commenced from the quarter-day prior to the time when he

entered, or from the succeeding quarter; and the jury found that the tenancy commenced from the preceding quarter (*Doe v. Selwyn*, Ad. Ej. 107). A receipt for a year's rent up to a particular day, is *prima facie* evidence of a holding from that day (*Doe v. Samuel*, 5 Esp. 174).

Where the tenant purposely or inadvertently gives such information to his landlord as induces him to suppose the tenancy to have commenced at a particular time, the tenant is precluded from afterwards objecting to the notice for a mistake in that respect (*Doe d. Eyre v. Lambly*, 2 Esp. 636). When, also, the tenant, at the time of the service of the notice, assents to the terms of it, he will be precluded from showing it expires at a wrong time; but such assent must be strictly proved: and, in a case where the party made no objection to the notice at the time of its delivery, but said "I pay rent enough already—it is hard to serve me thus," it was held, that these circumstances were not sufficient to prevent him from showing the time when the tenancy actually commenced (*Oakapple v. Copous*, 4 T. R. 361). Where, however, the tenant is *personally* served with, and *reads* the notice, and does not object to the time he is required to resign possession, it will in general be presumed *against him that the notice is correct in that respect (*Doe v. Thomas*, 2 Camp. 647; *Doe v. Foster*, 13 East, 405; 2 Taunt. 109). But a notice to quit, not personally served upon the tenant, is not of itself even *prima facie* evidence of the tenancy having commenced at that period of the year at which the notice expires (*Doe v. Calvert*, 2 Camp. 388).

Where no specific time to quit was mentioned, but the notice was "to quit at the expiration of the current year," and a declaration in ejectment was served nearly a year afterwards, laying the demise half a year after the notice; and the tenant on being served with the declaration, made no objection to the notice to quit, nor set up any right to a longer possession: it was left to the jury, whether the tenant must not be understood as having admitted that the tenancy was determined by notice (*Doe v. Woombwell*, 2 Camp. 559). And where a notice was given to a weekly tenant to quit "on Friday," provided his tenancy expired on Friday, "or otherwise, at the end of his tenancy next after one week from the date of this notice;" upon an ejectment brought after a sufficient time had elapsed to cover a tenancy commencing on any day of the week, the notice was held sufficient (*Doe v. Scott*, 8 Bing. 362). As to landlord's waiver of irregular notice by tenants, see 1 Esp. 266.

Form of Notice.] It is not necessary that any particular form of notice be adhered to; any statement, however short, is sufficient, provided it mention the period at which it is intended the tenant should quit; and the period so mentioned must be the last day of the tenancy (*Doe d. Mathews v. Jackson*, Doug. 167; *Doe d. Morgan v. Church*, 3 Camp. 71). To quit "forthwith," or "from henceforth," or to quit generally, is bad (*Goode v. Howells*, 4 M. & W. 199, 201). But it seems a notice to quit, given by a tenant, "as soon as by law he might," would be good (*Ib.*, per Abinger, Ld. C. B.); and, if it be a parol lease, the notice need not be in writing (*Timmins v. Rawlinson*, 3 Burr. 1603; 1 Bl. R. 533): except it be specified so to be by agreement between the parties, or by the provisions of a power (*Ib.*; *Legg v. Benion*, Willes, 43; *Doe v. Crick*, 5 Esp. 196). The court listen with reluctance to objections to the form of a notice (*Doe v. Archer*, 14 East, 245). It must be positive and explicit; but a notice to quit "or I shall insist upon double rent," was held good; because this part of the notice evidently referred only to the penalty under 4 Geo. II. c. 28, though the terms of the statute were mistaken (*Doe v. Jackson*, 1 Doug. 175); other-

wise, if the words had been "*or else*," you agree to pay double rent (lb., per *Ld. Mansfield*). A notice, that on failure, the tenant would be required to pay double rent or value as long as he retained possession, is good (*Doe v. Goldwin*, 2 Q. B. 143). The notice will be good, if it state that the tenancy will expire in so many months' time from the date of the notice (*Doe d. Phillips v. Butler*, 2 Esp. 589); and, though a palpable mistake be made in the notice, as substituting one year for another, yet if, in other respects, it be good, the erroneous part will be rejected, and the notice will be deemed sufficient (*Doe d. Bedford v. Knightly*, 7 T. R. 63). A notice to quit on one of two days will be good (*Doe d. Mathewson v. Wrightman*, 4 Esp. 5). A notice to quit at "Michaelmas," will do for either Old or New Michaelmas-day, according to the period of the commencement of the tenancy (*Doe v. Vince*, 2 Camp. 256; *Doe v. Walker*, 2 Peak. Ad. Ca. 194; see *Furley v. Wood*, 1 Esp. 197; *Doe v. Benson*, 4 B. & C. 588; *Doe v. Perrin* 9 C. & P. 467). A notice to quit on the 24th of June, "agreeably to covenant," the covenant requiring a notice expiring at Michaelmas, is bad, [*1033] *and evidence is not admissible to show that the landlord understood it to mean Michaelmas (*Cadby v. Martinez*, 11 Ad. & E. 720).

A notice to a yearly tenant to quit the farm, &c., "situate at D., in the county of Y., which you now hold under me," the premises not being situate at D., but at H., an adjoining parish, was held not to be a material variance, the tenant not having shown that he held more than one farm, or that he was misled (*Doe v. Wilkinson*, 12 Ad. & E. 743); and, though the premises be wrongly described, yet, if the party upon whom the notice is served cannot be misled by it, it will be good (*Doe d. Cox*, 4 Esp. 185). A notice dated the 27th, and served on the 28th of September, requiring a tenant to quit "at Lady-day next, or at the end of this current year," will be understood to mean a six months', and not a two days' notice (*Doe d. Huntingtower v. Culliford*, 4 D. & R. 249). But see *Doe v. Morphett*, where this case was commented on (7 Q. B. 577). Where the tenancy of land began on the 2nd of February, and of houses on the 1st of May, a notice dated and served on the 22nd of October, 1833, to quit both land and houses, "at the expiration of half a year from this notice, or at such other time or times as your present year's holding of the premises, or any part thereof respectively shall expire after the expiration of half a year from this notice;" was held a sufficient notice to determine the tenancy of the houses on the 1st of May, 1834, and of the lands on the 2nd of February, 1835 (*Doe v. Smith*, 5 Ad. & E. 350). A notice to quit "on 11th October now next, or such other day as your tenancy may expire on," was served in June, 1840: held, not a good notice for 11th October, 1841 (*Mills v. Goff*, 14 M. & W. 72). A notice to quit "on 13th May next, or such other day as the current year for which you hold will expire," served in October, 1842, will not determine a Martinmas holding (*Doe v. Morphett*, *supra*). A notice to quit part of the premises will not be a good notice (*Doe d. Rodd v. Archer*, 14 East, 245). Where a house, lands, and tithes, are held under a parol demise, at a joint rent, a notice to quit the house, lands, and premises, with the appurtenants, has been held to include the tithes, and sufficient to close the tenancy (*Doe d. Morgan v. Church*, 3 Camp. 71). Where a notice, signed by the rector and churchwardens of a parish, was delivered to a tenant of lands, originally devised to the rector and churchwardens, and their successors, in trust, requiring him to deliver up the premises "to the rector and churchwardens for the time being," it was held bad for uncertainty; as the dest., by the terms of the notice, could not know to whom he was to deliver up the possession (*Doe d. Brooks v. Fairclough*, 6 M. & S. 40). A notice to quit to a tenant, by a wrong name, is not a good notice (*Doe v. Spiller*, 6 Esp. 70); but if he do

not return it, it will be a waiver of the misdirection (Ib.); and see *ante*, p. 1031, as to what will be a waiver of irregularity in notice. Where a tenant gives an irregular notice to quit, the landlord cannot treat it as a surrender (*Doe v. Milward*, 3 M. & W. 328).

By whom Notice is to be given.] The notice may be given by the lessor himself, or by any person interested in the premises, or by the lessor's agent or steward (*Roe d. Rochester (Dean and Chapter of) v. Pierce*, 2 Camp. 96); and no authority need be shown to warrant a person's giving notice who apparently acts under due authority; for, by bringing the action, the authority of the person is adopted and recognised (Ib.). Where, however, no authority is apparent, a ratification afterwards will not be sufficient, "as the tenant is entitled to such notice as he can rely upon with certainty *at the time it is given, and he is not bound to submit him- [*1034] self to the hazard of the party's ratifying the notice, under whose supposed authority it had been originally given" (per Lord Ellenborough, *Right d. Fisher v. Cuthell*, 5 East, 496, 499). Where a notice has been given by the agent of two joint landlords, a recognition by one of them will be sufficient (*Goodtitle d. King v. Woodward*, 3 B. & A. 689; *Doe d. Joliffe v. Sybourne*, 2 Esp. 877). But the authority of *Goodtitle v. Woodward* is doubted, and it has been held, that a subsequent ratification is not sufficient, unless given before the notice begins to run (*Doe v. Walters*, 10 B. & C. 626); nor is the bringing action a sufficient recognition; for the notice must be such as the lessee can act upon safely (Ib.; *Doe v. Goldwin*, 2 Q. B. 143). Joint-tenants must join in a notice to quit; for, when two of four persons, jointly interested in the premises, only give notice, the notice will be good merely as far as their own portion of the property may be concerned (*Doe d. Whayman v. Chaplin*, 3 Taunt. 120); and, where it purports to be given on behalf of himself and the other joint-tenants it is good for the whole (*Doe v. Summersett*, 1 B. & Ad. 135); and it seems a notice by one alone determines the whole, where the tenant holds under the joint demise of all, although the co-tenants do not concur in the notice (Ib. 140; see 2 Moo. & R. 434, n.). Where an agent gives the notice in the name of all, but by authority of one only, it is good for all (*Doe v. Hughes*, 7 M. & W. 189). But a notice required to be "under the hands of the lessors," is not good if signed only by two out of three (*Doe v. Cuthell*, 5 East, 491; *Doe v. Goldwin*, 2 Q. B. 142; *Doe v. Robinson*, 3 Bing. N. C. 367; *Doe v. Walters*, 10 B. & C. 626; *Doe v. Baker*, 8 Taunt. 421; *Alford v. Vickery*, 1 C. & M. 280). A receiver, appointed by the Court of Chancery, with a general authority to let the lands to tenants, has also authority to determine the tenancies by a notice to quit (*Doe d. Marsack v. Read*, 12 East, 57; *Wilkinson v. Colley*, 5 Burr. 2697; but a mere receiver of rent, as such, has no authority to determine a tenancy (*Doe v. Walters*, 10 B. & C. 633); but he has, if his authority be to receive *and let* (*Doe v. Mizem*, 2 Moo. & R. 56). Notice may be given by an infant (*Maddon d. Baker v. White*, 2 T. R. 159). As to who should give the notice in the case of an underlease, see *ante*, p. 1024.

Where a lease contains a proviso, that if either party should be desirous to determine it, it should be lawful for him, "his executors or administrators," so to do upon twelve months' notice to the other of them, "his executors," &c.: held, that the devisee of the land was entitled to give such notice (*Roe v. Hayley*, 12 East, 464). An agent of an agent cannot give notice (*Doe v. Robinson*, 3 Bing. N. C. 677). A verbal notice from the steward of a corporation is sufficient, without showing an authority under seal (*Roe v. Pierce*, *supra*; recognised in *Smith v. Birmingham Gas Company*, 1 Ad. &

E. 531). The demise was by the parish of M., without showing who they were, and the notice was given by an agent who acted for the persons who were churchwardens at the time of the demise: held sufficient, though they were not in office when the notice was given, the property not being vested in them in a corporate character (*Doe v. Foster*, 3 C. B. 215).

To whom and how Notice to be given.] Personal service of the notice is not, in general, necessary (*Doe v. Wrightman*, 4 Esp. 5). Service of a notice, by leaving it with a servant, at the dwelling-house of the tenant, though the dwelling-house be not on the demised premises, was held sufficient, such service affording a presumption *that the notice

[*1035] came to the hands of the tenant, the servant not being called.

It is not, it seems, necessary to prove that the tenant, in fact, received it (*Ib. n. (a)*; *Smith v. Clark*, 9 Dowl. 202; *Doe d. Griffith v. Marsh*, 4 T. R. 465); but, where a notice was left at the house of the tenant, and delivered to a servant, without any explanation, and no proof was adduced to show that it came into the hands of the tenant, Lord Ellenborough held it insufficient; because, if such practice were deemed sufficient, the tenant might be turned out of possession by a trick (*Doe d. Buross v. Lucas*, 5 Esp. 153). But, in a late case, it was held, that service on a servant, at the tenant's dwelling-house, was sufficient, although the tenant was not informed of it till within half a year of its expiration (*Doe d. Dunbar*, 1 Moo. & M. 10). Service at the tenant's dwelling-house suffices without proof that he received it, and whether he got it or not (*Ib. n. (a)*; *Smith v. Clark*, 9 Dowl. P. C. 202). A service upon the officer of a corporation will be a good service, when the lands are held by the corporation, but the notice must be addressed to the corporation (*Doe d. Carlisle v. Woodman*, 8 East, 227). The notice was deemed insufficiently served, when it was upon a relative of the lessee's upon the premises, although addressed to the original lessee (*Doe v. Levi*, Ad. Ej. 92). In the case of several tenants, a notice served upon one who resides upon the premises is presumptive evidence of the notice having reached the others (*Doe d. Bradford v. Watkins*, 7 East, 551; *Doe d. Macartney v. Crick*, 5 Esp. 196). Where a notice was misdirected, but served upon the tenant, and he made no objection, but kept the notice, Lord Ellenborough held him to be bound by it, as he might have repudiated it, had he chosen (*Doe v. Spiller*, 6 Esp. 70; *ante*, p. 1031). Where there are under-lessees, the notice must not be served upon them, but upon the landlord's immediate lessee (*Pleasant v. Benson*, 14 East, 234; *Roe v. Wiggs*, 2 N. R. 330). In whatever manner it may be served, if it can be shown that it came to the hands of the tenant before the six months previous to the expiration of his year of holding it will suffice (*Alford v. Vickary*, 1 C. & P. 280). Where A. had been tenant of certain premises, and, upon his leaving them, B. took possession, it was held, that in the absence of any evidence to the contrary, it might be presumed that he came in as assignee of A., although he had never paid rent, and that notice to quit was therefore rightly given to B. (*Doe v. Williams*, 6 B. & C. 41). In a case where A. appeared, and entered into the consent rule for part of the premises as tenant, and B. into a separate consent rule as to the whole of the premises as landlord for part in the possession of A., and as tenant for the residue, and it appeared that B. had been let into possession by C. (who had come in under a contract of sale, which had not been carried into execution), and had underlet part of the premises to A., and the lessor failed to prove service of a notice to quit on C. or A., but proved a service on B.: held, that the verdict was rightly entered for the plt. for all the premises (*Doe v. Strutt*, 2 Ad. & E. 332). Mr. Serjeant Adams, in his book on Ejectments, p. 93, appends

a note to this case, stating that the report is unsatisfactory, and may lead to conclusions respecting notices to quit not warranted by the general rules by which they are governed, and that, in his opinion, the relation of landlord and tenant had never been constituted between the lessor and C.; and that, therefore, no notice to quit need have been given to either C. or B., whom C. had no right to admit, or to A. to whom B. (being so admitted without right) had underlet, and that a simple determination of tenancy-at-will was all that was required, and that the court held *the will [*1036] to be sufficiently determined by the demand of possession by the *actual* occupier B., and as there was no privity between A. and C., B. having been let into the whole of the premises by C., and A. having taken part as tenant to B., the notice to B. determined the will as to the whole premises, and gave the lessor the right to recover the whole. Where a tenant from year to year died, and a notice was served upon the widow who remained in possession, and no proof was given that there was any personal representative of the testator, the notice was held sufficient (*Doe v. Perrott*, 4 C. & P. 230).

Mode of proving Notice.] The service of it, and the authority to serve it, should be proved by the party serving it. If there have been an attesting witness to the notice, he must be called, and his handwriting proved, or else his absence must be duly accounted for (*Doe d. Sykes v. Durnford*, 2 M. & S. 62; *post*, "WITNESS"). The notice itself must be proved to have been properly signed; proof of its merely being served on the tenant, and that he read it, without making any objection, will not be sufficient (*Doe d. Sykes v. Durnford*, *supra*). The notice itself may be proved by a duplicate original, or by the production of an examined copy, or by parol evidence, if there be no duplicate or copy (*Kine v. Beaumont*, 3 B. & B. 288). A written notice to quit may be proved by production of a copy, though no notice has been given to produce the original (*Doe d. Fleming v. Somerton*, 7 Q. B. 58). A notice should be served on the deft. to produce it, and the service of such notice proved; but this seems not to be absolutely necessary (2 B. & P. 41); secondary evidence may be given without calling the attesting witness, if the deft. refuses to produce the original (*Poole v. Warren*, 8 Ad. & E. 582). If it be in the possession of a third party, he should be subpœnaed to produce it. When the notice was given by an agent, it should be proved he was vested with his authority at the time of giving the notice. Where a notice to quit was given by a steward of a corporation, it was presumed, inasmuch as he was an officer of the corporation, that he had an authority to give the notice (*Doe v. Pearce*, 2 Camp. 96); but, where two or more joint-tenants are lessors of the plt., and a notice to quit is given by one or more, in the name of all, although they all afterwards join in the ejectment, it will not be presumed, from that circumstance, that an authority was originally given by the parties not joining in the notice to their co-tenants (*Right v. Cuthell*, 5 East, 491; see *Ad. Ej.* 274).

How Notice may be waived.] The paying and receiving money, *eo nomine*, as rent for a portion of a term of the tenancy, *after* the expiration of the period mentioned in the notice to quit, has been deemed a waiver of the notice, where the giving notice would have been a necessary step to commencing the action (*Goodright d. Carter v. Cordwent*, 6 T. R. 219); though the mere acceptance of rent for the occupation of the premises, subsequent to the time when the term ended, according to the notice, will not, of itself, waive the notice, but will be evidence for a jury (*Doe d. Cherry v. Batten*, Cowp. 242). The making a distress for rent, accrued after the expiration

of the notice to quit, is not a question for a jury; it is an act not to be qualified, as the acceptance of rent may be, but is a direct waiver of the notice (Zouch d. Ward v. Withingdale, 1 H. Bl. 311); but the bringing an action of covenant for such rent will be a waiver (Roe v. Minshull, B. [*1037] N. P. 96; 2 Selw. N. P. 677). So, a *recovery in an action for use and occupation for a period subsequent to the expiration of the notice (Birch v. Wright, 1 T. R. 387). A notice may be waived by a subsequent notice, for it recognises a tenancy subsisting after the expiration of the former (Doe v. Palmer, 16 East, 53). But where the second notice was given after the expiration of the first, and after the commencement of an ejectment which the landlord continued notwithstanding the second notice (Doe d. Williams v. Humphreys, 2 East, 237; Messinger v. Armstrong, 1 T. R. 54); when the object of the second notice was only the recovery of double value; it was held no waiver (Doe d. Digby v. Steel, 2 Camp. 117.) The receipt of rent by a banker, who is ignorant of any steps having been taken by his principal, to determine the tenancy, as by a notice to quit, is not a waiver of the notice (Doe d. Ash v. Calvert, 2 Camp. 387); though, if an authorized agent receive rent, due at Michaelmas, it is, *prima facie*, a waiver of a notice to quit at Midsummer (Ib.). The payment of rent due before, though made after the notice, is not a waiver (B. N. P. 96 b); nor the making a distress under the same circumstances (Ad. Ej. 139). Giving a notice to quit, and, at the same time, stating that the landlord would not, till the happening of a certain event, exercise his right, is not a waiver (Whiteacre d. Boulton v. Symonds, 10 East, 13). Where no notice was necessary but one was given, "to quit the premises which you hold under me, the term having long since expired:" held, a mere demand of possession, and not a recognition of subsisting tenancy (Doe v. Inglis, 3 Taunt. 54). If, at the end of a tenancy from year to year, the party accept another person as tenant, without any surrender in writing, such acceptance shall be a dispensation of any notice to quit (Sparrow v. Hawkes, 2 Esp. 505). A notice may be waived by the tenant who gives it as well as by the landlord; and where the tenant continued in possession after the expiration of the notice, under an alleged custom, it is a question for the jury, whether he intended to waive the notice, or merely acted in pursuance of the supposed right to continue for certain purposes after the end of the tenancy pursuant to the alleged custom (Jones v. Shears, 4 Ad. & E. 832).

Proof of the Determination of the Tenancy by Forfeiture.] To support ejectment on a forfeiture of a lease, by non-performance of covenant, if the covenant be to do an act, the lessor of the plt. must prove the tenancy, and give some evidence of the omission of the act; it does not lie on the defts. in the first instance to prove a performance (Doe v. Robson, 2 C. & P. 245). Where a particular of the breaches has been given, the proof must be according to the terms of the particulars (Doe v. Phillips, 6 T. R. 597); and, where the particulars rely on non-cultivation, it will not do to prove an improper course of husbandry (Doe v. Broad, 2 Man. & G. 523). A slight variance, if it do not mislead, is immaterial, as a variance in the amount of rent proved to be due, and that claimed in the particulars (Jenny v. Moody, 3 Bing. 3).

A clause of re-entry is to be construed strictly (Doe v. Marchetti, 1 B. & A. 720; per Tenterden, C. J.). The right of re-entry will appear on proof of the lease. In an agreement of demise, it was "stipulated and conditioned that the tenant should not assign," &c.: held, the lessor might maintain ejectment for the breach of this condition (Doe v. Watt, 8 B. & C. 308). Where a mortgagor and mortgagee joined in a lease, reserving a power of

re-entry to them, or either of them, for a breach of covenant; held, that a joint demise in the declaration was improper, because the estate revested *in the mortgagee only (*Doe v. Adams*, 2 C. & J. 232); and, where a lessee underlet, and in the underlease there was a proviso, that [*1038] in case of a breach of covenant the lessor and lessee might enter: held, that the lessee alone could take advantage of it (*Doe v. White*, 4 Bing. 276).

By 4 Geo. II. c. 28, s. 2, when half a year's rent is in arrear, the lessor may, without any formal demand or re-entry, serve a declaration in ejectment; or, in case no service can be effected, or no tenant be in possession, affix the same upon the door of the messuage; or, if the ejectment be not for a messuage, upon some notorious place of the lands, &c., and such affixing shall be deemed legal service thereof, which service and affixing shall stand in the place of a demand or re-entry; and, in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, if it shall be made appear to the said court, where the said suit is depending, by affidavit, or be proved upon the trial if the deft. appear, that half a year's rent was due before the declaration was served, and that no sufficient distress was to be found upon the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, in such case the lessor shall recover judgment, as if the rent in arrear had been legally demanded, and re-entry made.

If the breach of covenant be for non-payment of rent, the lessor of plt., if he proceeds at common law, must prove that he has complied with all the formalities required by it, as a demand of the rent (*Doe d. Chandless v. Robson*, 2 C. & P. 246). That the demand was of the precise rent due (1 Saund. 287); and that it was made on the precise day on which it became due (Co. Lit. 202); or that it was made on the land, and at a convenient time before sunset, &c. (see 1 Saund. 287; *Doe v. Paul*, 3 C. & P. 613); and these formalities must still be observed where there is a sufficient distress on the premises, unless the lease stipulates that they shall not be necessary (*Doe v. Masters*, 2 B. & C. 490). If he proceeds on the statute which does away with these formal proceedings at common law, he must prove the service or affixing the declaration, that half a year's rent was due before the service of the declaration, and that there was no sufficient distress upon the premises to answer the arrears of rent then due, and that the lessor had power to re-enter (*supra*). The plt. must, however, still prove a demand of the rent, though he proceeds under this act, if the lease expressly require it (*Doug.* 486; *Doe v. Shawcross*, 3 B. & C. 752; 5 D. & R. 711). Upon a lease, reserving rent payable quarterly, with a proviso, that, if the rent be in arrear twenty-one days next after day of payment, "being lawfully demanded," the lessor may re-enter, it was held that, five quarters being in arrear, and no sufficient distress upon the premises, lessor might re-enter without a demand (*Doe d. Scholefield v. Alexander*, 2 M. & S. 525; *Doe d. Shrewsbury v. Wilson*, 5 B. & A. 384). But this statute does not apply unless the proviso in the lease avoids it, as where the right of re-entry is to hold until the arrears are paid, in that case the common-law forms must be adhered to, and a formal demand of possession must be made (*Doe v. Bowditch*, 8 Q. B. 973; 15 Law J. 266, Q. B.; 10 Jur. 637). Under a proviso in the lease for the entry of the landlord, in case the rent should be in arrear fourteen days, and distress not found on the premises, he is entitled to recover in ejectment, on proof of half a year's rent due at Lady-day, and no distress on the premises on some day in May, the demise being laid on the 2nd of May, and the declaration served on the 6th of June (*Doe d. Smelt*

v. Fuchaue, 15 East, 286). *The insufficiency of the distress must be clearly established, if the plt. proceed under this act, and every part of the premises must be searched (see 7 T. R. 117; Rees v. King, 2 B. & B. 514; Forrest. 19); unless the doors are locked, for "distress which cannot be made without a trespass is no available distress within the act (Doe v. Dyson, Moo. & M. 77, per Tenterden, C. J.).

If the ejectment be for the breach of any other covenant, the claimant must show the covenant broken, by the same proof as in an action of covenant (see "LEASE").

If it be for *not repairing*, the non-repairs must be proved by a competent party, usually a surveyor. If a notice to repair has been served, such service should be proved, and deft. served with a notice to produce it, proving also the service (see *post*, "SECONDARY EVIDENCE"). If the covenant be to keep and leave the house in as good a plight as it was in at the time of making the lease, ordinary and natural decay is no breach of the covenant, the covenantor being only bound to do his best to keep it in the same plight, and therefore to keep it covered, &c. (Sheph. Touch. 169). Breaking a doorway through the wall of a demised house, into an adjoining one, amounts to a breach of covenant to keep in repair (Doe v. Jackson, 2 Stark. 293). Broken windows or doors are evidence of the breach to keep in repair (Co. Lit. 57 *a*; 2 Saund. 352 *a*, 7); but it should seem, in all cases, the non-repair must have existed a reasonable time. Where there is an express and unconditional covenant to repair, the tenant is bound to do so within a reasonable time, though the premises be destroyed by fire, or other accident (Al. 27; 6 T. R. 650, 750; Com. Rep. 626; 4 Taunt. 45; Sheph. Touch. 173). A covenant to keep in repair is broken, and the party may be ejected, for not repairing within the term (Luxmore v. Robson, 1 B. & A. 584). As to what is a waiver of a breach of covenant to repair, and when plt. bound by his notice to repair, see *post*, 1041.

If the breach of covenant be for *not insuring*, the insurance-officers in which the insurance should have been made should be searched, and it should be established that no insurance has been made there. In ejectment on a forfeiture for not insuring, the lessee having covenanted to insure in the joint names of himself and the lessor, and in two-thirds of the value of the premises devised, and the lessee had insured in his own name only, and, as contended, to a less amount than two-thirds of the value of premises, both parts of the lease remaining in the possession of the lessor, and an abstract only having been delivered by him to the lessee, which contained no mention that the insurance was to be in the joint names, though it stated that it was to be in two-thirds of the value of the premises, and the lessor of the plt. had previously insured the premises at the same sum as the deft.; it was held that, the conduct of the lessor being such as to induce a reasonable and cautious man to conclude that he was doing all that was necessary or required of him, in insuring in his own name, and to the amount insured, he could not recover for a forfeiture, though there was no dispensation or release (Doe v. Rowe, 1 R. & M. 343).

Where the ejectment is brought on a proviso of re-entry in case of breach of covenant, the court will compel a delivery of the particulars of the covenants and breaches to be relied on at the trial, and the proof of breaches must be according to the terms of the particulars (Doe v. Phillips, 6 T. R. 597); but where the particulars were for non-cultivation, it was held sufficient to show an improper course of husbandry (Doe v. Broad, 2 Man. & G. 523).

On a clause of re-entry, in case the tenant should assign, set over, or otherwise let the demised premises, it is not sufficient to prove the

*deflt. a stranger, in possession of the premises (Doe v. Payne, 1 Stark. 86); but see Doe d. Haidly v. Rickarby, where it was held that, if a person be found on the premises, appearing as the tenant, it is *prima facie* evidence of an underletting, sufficient to call upon deflt. to show whether the person so holding was either in the capacity of a tenant or a servant, and the declarations of such person are said to be evidence (Doe v. Williams, 6 B. & C. 41; 5 Esp. 4).

Where the terms of the lease were "not to set, let, or assign over the whole or part of the premises, without leave in writing," an under-lease was considered a forfeiture, and a parol license to let part of the premises does not discharge the lessee from the restriction of such a proviso (Roe d. Gregson v. Harrison, 2 T. R. 425). But a covenant "not to assign, transfer, set over, or otherwise do or put away the lease," was held not to extend to an under-lease for part of the term (Crusoe d. Blencowe v. Bugby, 2 Bla. 766; 3 Wils. 234). Covenant in a lease "not to let, set, assign, transfer, set over, or otherwise part with the premises thereby demised, or that present indenture of lease:" held, that a deposit with a creditor, as a security for money advanced, was not a "parting with," within the meaning of the covenant (Doe d. Pitt v. Laming, R. & M. 36; Doe d. Pitt v. Hogg, 4 D. & R. 225; 1 C. & P. 160). It is said, that a devise of the term by the lessee is not a breach of the covenant not to assign (Crusoe d. Blencowe v. Bugby, 3 Wils. 234; Doe d. Goodbehere v. Bevan, 3 M. & S. 361; Berry v. Taunton, Cro. Eliz. 331). Where a lease contained a proviso for re-entry, in case the tenant should devise, lease, grant, or let the demised premises, or any part or parcel thereof, or convey, &c., to any person whomsoever, for all or any part of the term, without the license of the lessor in writing, and the deflt., without such license, agreed with a person to enter into partnership with him, and that he should have the use of the back chamber, and some other parts of the premises *exclusively*, and of the rest jointly with deflt., it was held, a forfeiture had taken place, and the lessor was entitled to re-enter (Roe d. Dingley v. Sales, 1 M. & S. 297). But letting lodgings is not a breach of covenant not to underlet (Doe d. Pitt v. Laming, 4 Camp. 77). Any act, usually constituting a breach of covenant, has been held not to have effect, if done by compulsion of law. So, where a lessee who had covenanted not "to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," &c., gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold, held, no forfeiture of the lease, Lord Kenyon observing, "Judgments, in contemplation of law, always pass *in invitum*; and I see no difference between a judgment that is obtained in consequence of an action resisted, and a judgment that is signed under a warrant of attorney, since the latter is merely to shorten the process, and to lessen the expense of the proceeding" (Doe d. Mitchinson v. Carter, 8 T. R. 57, 61). So, an assignment under a commission of bankrupt is not a breach of a condition not to assign (Doe d. Goodbehere v. Bevan, 3 M. & S. 253). And so, where a lease contained a proviso for re-entry of the lessor, and the lease should be void on the lessee's assigning without the license of the lessor, and the lessee, in January, 1825, executed a deed, which purported to convey all his real and personal property to trustees, for the benefit of his creditors, and, in April, 1825, a commission of bankruptcy issued against the lessee, held, that the deed was an act of bankruptcy, and void, and that it did not operate as a valid assignment of the tenant's interest in the lease, and *therefore there was no forfeiture (Doe d. Lloyd v. [*1041] Powell, 5 B. & C. 308).

Where the clause of re-entry was in case the lessee should commit an act

of bankruptcy, whereupon a fiat should issue, and he should be "duly found a bankrupt," if the petitioning creditor's debt be insufficient there was no forfeiture (*Doe v. Ingleby*, 15 M. & W. 465).

Where a rent charge is granted, with power to the grantee, in case the rent shall be in arrear for a certain time, to enter and enjoy the lands charged, and to receive the rent, &c., for his own use, until satisfaction of the arrears, the grantee may, upon the rent becoming in arrear, maintain ejectment against the terre-tenant without proof of a previous demand of the rent (*Doe v. Horsley*, 1 Ad. & E. 766). It is doubtful whether one of several parceners can alone recover in ejectment on a forfeiture of a lease made by his ancestor (*Doe v. Lewis*, 5 Ad. & E. 277).

Waiver of Forfeiture.] The receipt of rent, as such, will be a waiver of the forfeiture, if the rent accrue after the forfeiture; but the receipt of money as a remuneration for the use and occupation of the premises, after the forfeiture, will not; it will be a question for a jury whether the money was taken as rent (*Goodright v. Cordwent*, 6 T. R. 219; *Doe v. Batten*, Cowp. 243). Acceptance of rent, however, will not operate as a waiver of the forfeiture, or a confirmation of the tenancy, unless notice have been given to the landlord that a forfeiture was incurred at the time, which notice is a material reasonable fact (*Roe d. Gregson v. Harrison*, 2 T. R. 425; *Goodright d. Walter v. Davids*, Cowp. 804; *Pennant's case*, 3 Rep. 64 b). If an agent, who has a general authority to receive rent, receives rent due from a tenant after the lessor knows that the lease has been forfeited by breach of covenant, such receipt of rent is evidence of a waiver of the forfeiture (*Doe d. Thompson v. Davis*, 10 Law T. 108, Q. B.). But where the proviso avoided the lease by neglect to repair three months after notice to do so, and notice was given accordingly on the first of January, receipt of rent due on the 25th of March was held no waiver. Bringing an action of covenant for rent accrued after forfeiture is a waiver; for, by bringing the action of covenant on the lease, he admits the debt, to be tenant in possession by virtue of that lease (*Roe d. Crompton v. Minshull*, B. N. P. 96). Making a distress on the premises for rent accruing after the forfeiture, is a waiver (*Zouch d. Ward v. Willingdale*, 1 H. Bl. 311; *Doe d. Taylor v. Johnson*, 1 Stark. 411; *Doe v. Williams*, 7 C. & P. 322). The making an insufficient distress for rent, the non-payment of which caused the forfeiture, will not be a waiver of the forfeiture (*Brewer d. Onslow v. Eaton*, 3 Doug. 2314; 6 T. R. 220). Where a lease contained a clause of re-entry in case the rent should be in arrear twenty-one days, and there should be no sufficient distress: held, that the landlord having distrained within the twenty-one days, and continued in possession after, did not waive his right of entry (*Doe v. Johnson*, 1 Stark. 411). Mere knowledge and acquiescence in an act, constituting a forfeiture, does not amount to a waiver; there must be some act affirming the tenancy. So, where a lessee exercised a trade on the demised premises, by which his lease is forfeited, the landlord does not waive the forfeiture, by lying by and witnessing the act for six years (*Doe d. Sheppard v. Allen*, 3 Taunt. 78; *Pennant's case*, 3 Rep. 64). A lessor, having a right of re-entry, on breach of covenant not to underlet, does not, by waiving his security on one underletting, also waive his right to re-enter on a subsequent underletting [*1042] (*Doe d. Boscawen v. Bliss*, 4 Taunt. 735). Where *there was a general covenant, on the part of the tenant, to keep the premises in repair, and a further stipulation that he would, within three months after notice given him, repair all defects specified in the notice, the giving a notice to repair "forthwith," was not considered a waiver of the forfeiture, and the party was held entitled to bring ejectment, even before the expiration of the

three months (*Roe d. Goatly v. Paine*, 2 Camp. 520); but, where the notice was, in a similar case, to repair within three months, it was held to be a waiver of the forfeiture till the expiration of the three months (*Doe d. Morecraft v. Meux*, 4 B. & C. 606; see *Doe v. Miller*, 2 C. & P. 348). In the case of a proviso to re-enter after three months' notice, an agreement to allow the tenant more than three months' time to repair, is a suspension and not a waiver of the forfeiture (*Doe v. Kindley*, 1 Stark. 411). If the breach be a continuing one, as the using rooms in a particular manner prohibited by the lease, the acceptance of rent after such user is not a waiver of the forfeiture incurred by the subsequent user (*Doe v. Woodbridge*, 9 B. & C. 376). And where, besides the general covenant to repair, there was a proviso that, if the lessee did not repair within two months after notice, the lessor might enter and do the repairs himself at the tenant's expense, it was held that the lessor could not proceed to eject on the general covenant after giving the tenant notice to repair under the above proviso (*Doe v. Lewis*, 5 Ad. & E. 277). Where a forfeiture by a tenant for years, in levying a fine, has not been taken advantage of by the reversioner, it cannot be taken advantage of, after the reversion has been conveyed away, so as to recover on the demises of the grantor and grantee of such reversion (*Fenn d. Mathews v. Smarth*, 12 East, 444). Forfeiture by insolvency is waived by accepting rent of the insolvent after his discharge, and the non-payment of a scheduled debt due to the lessor is not a continuing insolvency (*Doe v. Rees*, 4 Bing. N. C. 384). Where the lease is voidable at election and not void, the deft. may show that the forfeiture has been waived. A lease for lives is voidable only, by entry, though the condition be that the lease "shall be void" (1 Saund. 287 *d*, n.; *Doe v. Bancks*, 4 B. & A. 401; *Rede v. Farr*, 6 M. & S. 121; *Pennant's case*, 3 Rep. 64 *a*; *Doe v. Davis*, Cowp. 804; *Arnsby v. Woodward*, 6 B. & C. 519; *Roberts v. Davey*, 4 B. & Ad. 664). In an ejectment on the forfeiture of a lease wherein the lessee covenanted to insure in the joint names of himself and the lessor in two-thirds of the value of the premises demised, it appeared that the lessee had insured in his own name only, and, as contended, to a less amount than two-thirds of the value; both parts of the lease remained in the possession of the lessor, and an abstract only had been delivered by him to the lessee, which contained no mention that the insurance was to be in the joint names, though it stated that it was to be in two-thirds of the value. The lessor of the plt. had previously insured the premises at the same sum as the deft. It was held that the conduct of the lessor being such as to induce a reasonable and cautious man to conclude that he was doing all that was required of him, in insuring in his own name and to the amount insured, he could not recover for a forfeiture (*Doe v. Roe*, R. & M. 343). If the forfeiture be for non-payment of rent, the tenant, by 4 Geo. II. c. 28, may prevent it by tendering the rent. The statute is beneficial to the tenant as well as the landlord. It relieves the latter from the necessity of making a demand, with all the precision required at common law, and the tenant incurs no forfeiture until the declaration in ejectment is served upon him, and if at that time he is ready to pay the rent, although he did not tender it when it was due, it gives him the same *benefit as if he had tendered it at that time (*Doe v. Shaw*- [*1043] *cross*, 3 B. & C. 756, per *Holroyd, J.*). It is no objection at nisi prius in proceedings under 11 Geo. IV. & 1 Will. IV. c. 70, s. 36, that the declaration was not served within the ten days after the right of entry accrued (*Doe v. Brindley*, 4 B. & Ad. 84).

BY ASSIGNEE OF REVERSION.

In this case, after proving the forfeiture, as in ejectment by the landlord,

evidence must be given that the claimant is entitled to the reversion at the time the forfeiture was committed, and, if possible, of the mesne assignments from the original lessor (Ad. Ej. 278, 279). These mesne assignments, however, will be presumed, if the original lease be for a long time, and the possession of the assignee has continued for a considerable time (Earl v. Baxter, Bl. R. 1228; Ad. Ej. 279).

At common law, an assignee of the reversion could not maintain an ejectment upon a right of re-entry for condition broken; but this was remedied by the 32 Hen. VIII. c. 34. The statute, however, only empowers the assignee to bring an ejectment for a breach of such conditions as are incident to the reversion, or for the benefit of the estate (Co. Lit. 215 b; T. Raym. 250). The statute extends to persons only who have the immediate reversion, or remainder in fee-tail, or for a less estate (1 Saund. 322; 2 Saund. 252 b). A *cestui que use*, and bargainee of the reversion, are within the act; but persons coming in by act of law are not (Co. Lit. 215 b; Ad. Ej. 70). The assignee of the part of the reversion in all the premises demised, is within the act; but not the assignees of the reversion in part of the lands (Ib.). Copyhold lands are within the act (Glover v. Cape, Carth. 205); but not gifts in tail (Co. Lit. 215 a).

BY MORTGAGEE.

In ejectment by mortgagee against mortgagor, on a forfeiture of the mortgage, no notice to quit, or demand of possession, need be proved; he has only to prove the execution of the mortgage-deed (Birch v. Wright, 1 T. R. 378; Moss v. Gallimore, Doug. 279, 282; Doe v. Maissey, 8 B. & C. 767; Doe v. Giles, 5 Bing. 421); and, in an action against the tenant of the mortgagor, no notice to quit is requisite, except where the mortgagee has impliedly admitted him as his tenant (Keech v. Hall, Doug. 21; see, further, *ante*, 1027). The mere fact of the receipt of interest as such, since the date of the demise, is no recognition of a lawful possession by the mortgagor or his tenant, so as to make a demand necessary (Doe v. Cadwallader, 2 B. & Ad. 473). But the conduct of the mortgagee may make a notice necessary, by treating the occupier as his tenant (Rogers v. Humphreys, 4 Ad. & E. 313; Doe v. Hales, 7 Bing. 322). Notice to the mortgagor's tenant in possession will not alone create a tenancy between him and the mortgagor without attornment (Evans v. Elliot, 9 Ad. & E. 342). But it may be evidence, if not repudiated, of a yearly tenancy at the former rent (see Brown v. Storey, 1 Man. & G. 117). Where it was agreed that the mortgagor should pay rent to the mortgagee during his occupation, provided such reservation should not prejudice the mortgagee's right to enter and evict upon default, it was held that the mortgagee might enter and evict without notice to quit, though he had distrained for a year's rent (Doe v. Olley, 12 Ad. & E. 481).

An agreement, however, that the mortgagor may continue to hold [*1044] till a certain day fixed for payment operates *as a re-demise until that day (Wilkinson v. Hall, 3 Bing. N. C. 508). So, to hold until default in payment of an annuity (Doe v. Goldwin, 2 Q. B. 143; see also Doe v. Day, ib. 147). Payment of rent by the lessee of the mortgagor, under an authority to the mortgagee, will make no change in the tenancy (Wheeler v. Branscombe, 5 Q. B. 373). If the mortgagor make a lease subsequent to the mortgage, and the mortgagee consent to receive the lessee as his tenant, he will not thereby confirm the lease, but he cannot afterwards determine the lease without a notice to quit (Doe v. Rising, 8 C. & P. 566). The assignees of the mortgagee have the like privileges with the mortgagee with regard to the mortgagor and his under tenants (Thunder v. Belcher, 3

East, 449). Where the mortgagor is in possession, the production of the mortgage-deeds will substantiate the mortgagee's title, because a party cannot set up a title inconsistent with his own deed (Keech v. Hall, *ante*, p. 1043). Proof of the mortgage by a deed of release, which recites the lease for a year is sufficient without putting in the lease for a year itself (4 & 5 Vict. c. 21; Doe d. Pember v. Wagstaffe, 7 C. & P. 477). Where a deed of assignment of a mortgage by demise, to which the mortgagor, who was tenant in fee, and the mortgagee, were parties, recited the mortgage-deed, it was held in ejectment by the executor of the assignment of the mortgage, that this recital was sufficient evidence of title, without producing the mortgage-deed (Doe d. Rogers v. Brook, 3 Ad. & E. 513; see Doe d. Smith v. Webber, 3 Nev. & M. 746); but if there be under-tenants of the mortgagor in the occupation of the premises, the mortgagee must, in addition to the mortgage, also prove that they have paid rent to, or recognized the holding under, the mortgagor (Selw. N. P. 748; Birch v. Wright, 1 T. R. 378; Thunder d. Weaver v. Belcher, 2 East, 449). If the third person holds by a title adverse to that of the mortgagor, evidence of the mortgagor's title will be required.

If a third person be in possession of a title prior to the mortgage, the plt. must show a notice to quit (Thunder v. Belcher, *supra*). But neither the mortgagor, nor one claiming under him, can set up a title in a third person prior to the mortgage (Doe v. Vickers, 4 Ad. & E. 782; 6 Nev. & M. 437; Doe v. Clifton, *ib.* 809, 857). Trustees for public purposes are not exempt from the doctrine of estoppel, so as to set up an earlier mortgage by themselves (Doe v. Herne, *infra*; see Doe v. Gilbert, 2 T. R. 169). In ejectment by mortgagee against the assignee of mortgagor (under the Lord's Act), a letter written by the mortgagor to the plt. before the assignment is evidence against the deft., and it shall be presumed to be written at the time of its date (Doe v. Milburn, 2 M. & W. 853). A power given to a railroad company to mortgage, "the undertaking with all tolls," &c., will not enable the mortgagee to recover the railroad in ejectment (Doe v. St. Helen's Railway Company, 3 Q. B. 364); and if the mortgage of turnpike tolls do not include the toll houses and gates, the mortgagee cannot recover them in ejectment (Doe v. Gilbert, 2 T. R. 169; Doe v. Lediard, 4 B. & Ad. 137; see Doe v. Horne, 3 Q. B. 757). It is enough for the purpose of proving the execution of a mortgage by the trustees of a turnpike-road under 3 & 4 Geo. IV. c. 126, s. 134, to show that the trustees acted as such, and that there was an order for their appointment without showing the actual appointment (Doe v. Hares, 4 B. & Ad. 435). As to the effect of the Statute of Limitations, in the case of mortgages, see *post*, "*Defence*," p. 1051. In an action by mortgagee against mortgagor, it is not necessary to demand possession before action (Doe v. Maissey, 3 Moo. & R. 107; 8 B. & C. 767).

A second *mortgagee who has the legal estate, and has all the [*1045] title-deeds, but has not had any notice of the prior mortgage, may recover in ejectment against the first mortgagee (Goodtitle v. Morgan, 1 T. R. 755; Powell, 6th ed. 434). The assignee of the mortgage may maintain this action (Smartle v. Williams, 1 Salk. 245; 1 Lev. 353).

Ejectment by mortgagee against the widow of the mortgagor; the premises were copyhold, and the mortgagor died in possession in 1828, after which the widow continued in possession up to the time of action brought; the only title set up by the lessor of the plt. was an assignment of the copyhold by a common-law conveyance of lease and release: held, that without surrender to the lord, this was not sufficient title to support an ejectment, as by his own showing the plt.'s lessor had not any legal interest, but an equitable interest only (Doe v. Webber, 3 Bing. N. C. 922; 5 Sco. 189). In ejectment on the several demises of mortgagor and mortgagee, the deft. offered

to prove that seven or eight years back, and after the execution of the deed, he brought ejectment against the mortgagor (at that time in possession); that the cause was referred to arbitration, and that the award was in favour of the now deft., who thereupon entered under a writ of possession, and occupied the premises ever since; held, that these proceedings were not admissible evidence for the deft. against the mortgagee, although he was present at one meeting before the arbitrator. It not appearing that he took any part in the proceedings (*Doe v. Wibber*, 1 Ad. & E. 119). The mortgage was executed in 1815, from which time until the deft. obtained possession, the mortgagor had occupied the premises: held, that this, though a less possession than twenty years, entitled the mortgagee to recover against the deft., the latter having adduced no admissible evidence in support of his own claim (*Ib.*).

BY LORD OF MANOR.

In ejectment by the lord of a manor for forfeiture, it must appear that the forfeiture arose when he was lord, and that the tenant committing it was his tenant on the rolls of the manor (*Doe d. Jeffreys v. Hicks*, 2 Wils. 13; B. N. P. 108; *Doe d. Tarrant v. Hellier*, 3 T. R. 173; Ad. Ej. 44, 261). Proof of the admittance of the father and of the descent to the copyholder as son and heir, and payment of quit-rent by him, will not be sufficient evidence, the tenant must be himself admitted (Ad. Ej. 261); and the forfeiture must also appear to have been committed within twenty years; for, it is said, "the lord cannot enter for a forfeiture at the distance of more than twenty years" (*per Buller, J., Doe d. Tarrant v. Hellier*, 3 T. R. 173). But proof is not required of the presentment of the forfeiture, nor of the entry or seizure of the lord (*Doe v. Hicks*, 3 Wils. 13; *Doe v. Wilson*, 11 East, 56; Ad. Ej. 262). The deft. will not be allowed, having been admitted, and done fealty, to show that the legal estate was not in the lord at the time of admittance (*Doe v. Budden*, 5 B. & A. 626). If the lord bring ejectment for mines upon his manor, he must prove possession to have been in him within twenty years, because they are a distinct possession from the manor, and may be of different inheritances," (*per curiam Rich d. Cullen v. Johnson*, 2 Stra. 1142); "and a verdict, in trover, for lead dug out of the mine, is no evidence of possession, for trover may be brought on property without possession" (B. N. P. 102). Where a tenant incloses part of a waste for twelve or thirteen years, and is

seen by the steward of the lord of the manor, from time to time, [*1046] without objection made, it may be presumed to *have been made ~~with~~ with the license of the lord, and no action will lie by the lord without previous notice to throw it up (*Noe d. Foley v. Wilson*, 11 East, 56; *Noe d. Clarendon (Earl of) v. Williams*, 7 C. & P. 332). If land be seized absolutely by the lord, as forfeited *pro defectu tenentis*, a special custom must be proved, entitling him to do so, but no custom need be proved if he only seize *quousque*; and, if an absolute seizure be made, and the custom not proved, such seizure cannot afterwards be set up as a seizure *quousque*; the proclamations must also be proved to have been made (*Doe d. Tarrant v. Hellier*, 3 T. R. 162; *Lord Salisbury's case*, 1 Lev. 63; 1 Keb. 287).

Upon a question as to whether a slip of land between some old inclosures and the highway rested in the lord of the manor, or the owner of the adjoining freehold, evidence was received of acts of ownership by the lord on similar slips of land not adjoining his own freehold, in various parts of the manor (*Doe v. Kemp*, 7 Bing. 332). And where it was proved that the party under whom the lessor claimed held a court many years ago, and that the lessor himself held courts and appointed gamekeepers, this was held *prima facie* evidence that a manor exists, and that the claimant is lord,

without production of court rolls, or any documentary evidence that courts had been held (*Doe v. Heakin*, 6 Ad. & E. 495). If the admittance be in pursuance of a surrender, and not a voluntary grant from the lord, the legality of the title of the lord, or steward, who admits a copyholder is immaterial (*Doe v. Thompson*, 1 Nev. & P. 215). And a record, in the record book of the manor, of admittance to a copyhold, wherein a surrender of the same copyhold to the use of the will is recited is evidence of the surrender, the surrender being irregularly kept, and the steward not being able to find this one on the roll or elsewhere, although all the others were either preserved or recorded (*R. v. Thurscross (Inhabitants of)*, 1 Ad. & E. 126). The court rolls containing a presentment of an admittance upon a surrender out of court are *prima facie* evidence of the surrender as between the surrenderor and surrenderee without producing the original surrender, or inquiring into the sufficiency of the stamp upon it (*Doe v. Olley*, 12 Ad. & E. 481). The admittance to a tenement and doing fealty to the lord estops a copyholder in an action for a forfeiture, from showing that the legal estate was not in the lord at the time of admittance (*Doe v. Budden*, 6 B. & Ad. 626; 1 D. & R. 243). When ejectment is brought by the surrenderee of copyhold lands, he must prove the surrender to his use, and his subsequent admittance, and it is immaterial whether the admittance be before or after the day of the demise in the declaration (Ad. Ej. 46, 263). Where the lessor claims as heir, or under a grant of a reversion by the lord expectant on the life estate, proof of admittance is unnecessary (*Roe v. Loveless*, 2 B. & A. 453). Where a copyholder was convicted of a capital felony, but pardoned on condition of remaining two years in prison, and the lord do not do any act towards seizing the copyholds, it was held that at the expiration of the two years he might bring ejectment against one who had ousted him (*Doe v. Evans*, 5 B. & C. 584).

By Lord of Manor.] The presumption of law, that slips of waste land adjoining a highway belong to the owner of the adjoining inclosed land, may be rebutted by evidence tending to raise a contrary presumption (*Doe d. Harrison v. Hampson*, 4 C. B. 267; 17 Law J. 225, C. P.).

In an action, by a rector, to recover a slip of land lying between the glebe and a highway, in order to rebut the presumption of ownership arising from contiguity, it was proved, that the deft. and those under whom he claimed had occupied the spot in question for more than forty years, and during four or five successive incumbencies, without interruption, and that there were slips of land adjoining the piece in dispute, at either end, also lying between the glebe and the road, which were occupied adversely to the rector: held, that, the whole case on both sides resting on presumption, it was properly left to the jury to say, whether or not the evidence given on the deft.'s part rebutted the presumption of law on which plt.'s case rested (*Ib.*).

Mortgagee.] Mortgagee, under a special power in the mortgage deed enabling him to distrain for arrears of interest "in like manner as for rent," distrained after the date of the demise in the declaration, but for arrears due before such demise, the mortgagor having (without any express provision in the deed enabling him so to do) continued in possession: held, that such distress did not amount to a recognition of the mortgagor as tenant, so as to disable the mortgagee from bringing ejectment (*Doe d. Wilkinson v. Goodier*, 10 Q. B. 957).

**Evidence for Defendant.*

[*1047]

When deft. has a right to begin (see *ante*, p. 997).

In general.] Much of the deft.'s necessary evidence may be collected from the foregoing, and will consist in rebutting the plt.'s evidence, by calling fresh witnesses or cross-examining plt.'s. The consent-rule binds the deft. to admit everything in the declaration, save the title of the lessor of the plt. His only defence, therefore, is to show, under the general issue, that the plt. had no such title as gave him a right of entry at the time at which the right of entry is alleged to have been made to the nominal plt. The deft. need never show a better title in himself, or indeed in any other person; if he controvert, or show no title to exist in the plt., it will be sufficient (*Tregonwelt v. Strachan*, 5 T. R. 110; *Graham v. Peat*, 1 East, 246); or deft. may show that plt. has only an equitable estate (*Goodtitle v. Jones*, 7 T. R. 49; *Roe v. Read*, 8 T. R. 118; *ante*, p. 999). If a lessor having only an equitable title grant a lease, the lessee is estopped to dispute his title; but, if after the lease the lessor grant by mortgage-deed all his interest at law and in equity to a mortgagee, the lessee may give this deed in evidence in order to defeat an action by the lessor on a forfeiture of the lease (*Doe v. Edwards*, 6 C. & P. 208).

Where a party defends an ejectment as landlord, and the occupiers of the premises have suffered judgment by default, he cannot object that they have not received notice to quit from the lessors of the plt. (*Doe v. Creed*, 5 Bing. 327). But, where A. defends as landlord, and B. as tenant, B. is not precluded from proving an outstanding tenancy under the joint demise of the lessor of the plt., and A., who were tenants in common (*Doe v. Horn*, 3 M. & W. 333). One who defends as landlord cannot rely upon any title which the tenant would be estopped from setting up (*Doe v. Smythe*, 4 M. & S. 347).

In those cases where there is a privity between the parties, the deft. will not be allowed to rebut the plt.'s evidence of title by showing that the title of the claimant was originally defective and insufficient (*Sullivan v. Stradling*, 2 Wils. 208; *Driver v. Laurence*, Bl. R. 1259; *Parker v. Manning*, 7 T. R. 537; *Hodson v. Sharpe*, 10 East, 355; *Doe v. Mitchell*, 1 B. & B. 11). But there are cases where it was held, that the deft. might disprove the legal title of the party through whom both he and the lessor of the plt. claim. Thus, where the lessor claims under a lease from A. B. in 1818, and the deft. under a conveyance from A. B., in 1824, the deft. may show that A. B. in 1818, had no power to make such lease (*Doe v. Powell*, 1 Ad. & E. 531). But, where A., without title, entered upon land, and built a cottage, and afterwards accepted a lease, by indenture, from B., and the deft. claiming the land as his own paid A. twenty pounds to give up possession to him: held, in ejectment, on the demise of B., that A. had estopped himself from controverting the title of B., and that defendant was bound by the estoppel, having come in under and received possession from B. (*Doe v. Mills*, 2 Ad. & E. 17). Where the deft. fraudulently gets possession, by obtaining the license of the occupier, and then sets up an adverse title, the occupier may eject him, without proof of title (*Doe v. Baytup*, 3 Ad. & E. 188). The deft. may show, that the title of the lessor of the plt. has expired (*ante*, p. 1018), and, in ejectment for a forfeiture, he may show that his lessor has conveyed away all his legal estate by way of mortgage, though [*1048] the mortgagee *has never enforced his rights (*Doe v. Edwards*, 5 B. & A. 1065). The deft., one of the canons of St. George's chapel, Windsor, demised, by way of mortgage, his canonry, and all lands, messuages, &c. thereunto belonging, and all the rights, rents, profits, &c. belonging, and all the estate of the deft. in the premises. No estate specifically beloned to the canons in severalty, but the whole property of the college was vested in the dean and chapter, and was divided periodically in certain proportions amongst its members, and there were houses assigned for

residences for the canons; no given house being attached to each canonry, but, on a vacancy occurring, the several canons, according to seniority, had a right of choice of the vacant house, though the deft. had, in fact, retained the house into which he went on his installation: held, that ejectment would not lie for the canonry, nor for the house of residence, and that the deft. was not estopped by the deed from denying that the house of residence did not belong to the canonry (*Doe v. Musgrave*, 1 Sco. N. R. 451: 4 Jur. 631).

The nominal plt. in ejectment, may recover against a married woman who has entered into the common consent rule, though it appear on the trial that the lessor of the plt. is, and was at the time of the demise laid in the declaration, the deft.'s husband (*Doe d. Merigan v. Daly*, 8 Q. B. 934).

It is no answer to an action of ejectment founded on a twenty years' adverse possession, that such possession was in continuation of that of a sister who entered by abatement into the land to which her eldest brother (whose issue was alive) was entitled as heir, and who died more than twenty years before the ejectment was brought (*Doe v. Lawley*, 2 Nev. & M. 331).

In an action by the heir-at-law, deft. may prove the marriage void by a prior marriage, want of age, reason, or the non-observance of the solemnities of the marriage act (2 Ph. Ev. 235; see stat. 4 Geo. IV. c. 76; 6 & 7 Will. IV. c. 85, and 7 Will. IV. & 1 Vict. c. 22; see "CRIM. CON."). He may also show the illegitimacy of the children by want of access, or presumptive evidence of it, or other circumstances tending to show the husband could not, in the course of nature, have been the father of his wife's child (*R. v. Luffe*, 8 East, 206; *Doe v. Saul*, 4 T. R. 356).

Where a husband and wife are proved to be together, when in the order of nature the husband might have been the father of the child, if sexual intercourse did then take place, such intercourse is to be presumed, and it is incumbent on those who prove the illegitimacy of the child, to prove that such intercourse did not take place, by evidence affording an irresistible presumption that it could not have taken place, and not by mere evidence of circumstances which may afford a balance of probabilities against the fact (*Head v. Head*, 1 Sim. & St. 152; 1 Turn. 139; see *Banbury Peerage case*, 1 Sim. & St. 153); and, if the husband have access, the child will be legitimate, although others are carrying on a criminal intercourse with the wife; but opportunities of access, where the husband and wife are living apart, the wife in open adultery, is no conclusive evidence of legitimacy; such a state of things tends rather to rebut the presumption of intercourse (*Cope v. Cope*, 5 C. & P. 604; 1 Moo. & R. 269; and see *R. v. Mansfield*, 1 Q. B. 444); neither husband nor wife will be permitted to prove the non-access (*R. v. Stourton*, 5 Ad. & E. 180); but on an order of bastardy she will be competent to prove her connexion with the person whom she charges as being the real father of the child (*R. v. Luffe*, 8 East, 203). Where the question was as to the legitimacy of a child born of a married woman, since dead, neither hers nor her husband's declarations *that he was not the son of the husband, but of another man, are admissible [*1049] (*Cope v. Cope*, *supra*).

The deft. may also defeat the claim on him by showing a will (see "PROOF OF WILLS"). Where the plt. claimed as heir-at-law, and the deft. relied on a will, the plt. was permitted to prove in reply a subsequent will, devising the land to the lessor of the plt., for such a will operates only as a revocation of the former, and leaves the plt. entitled as heir (*Doe v. Gosley*, 2 Moo. & R. 243).

In ejectment by an heir-at-law against a deft. who claims under a lease

granted by an ancestor of A., the lessor of the plt., if such lease, being in the hands of the lessor of the plt., be produced by him on notice, it need not be proved by the subscribing witness (*Doe v. Hemming*, 2 C. & P. 462.)

Where the lessor of the plt. claims as a devisee, deft. may show that the will is void, by its being forged, or as being obtained by fraud or duress (*Doe v. Allen*, 8 T. R. 147); or by the incapacity of the testator to make a will; or he may show that it has been revoked (see "*WILL*").

Devisee.] In order to impeach a will on the ground of forgery, declarations of intention, &c., by the testator are admitted, and other collateral circumstances, to show the improbability of its genuineness (*Doe v. Allen*, 8 T. R. 147; see *Doe v. Hardy*, 1 Moo. & R. 521). Both before (see 34 & 35 Hen. VIII. c. 5, s. 14) and since 7 Will. IV. & 1 Vict. c. 26, s. 7, an infant under twenty-one years of age was and is disqualified from making a will; nor can a married woman make one except under a power, or when her husband has abjured the realm, or is otherwise civilly dead (*Co. Litt.* 133 a). Imbecility, produced by age or sickness, of which the devisee has taken advantage, will be enough to avoid a will (1 Will. Executors, 31; *Hacker v. Newborn*, Sty. 427; *Moneypenny v. Brown*, 8 Vin. Abr. 167); but not mere age or weakness of intellect (1 Wils. Executors, *supra*). The testator ought not only to have a sufficient memory to answer familiar and usual questions, but he ought to have a disposing memory, so as to make a disposition of his lands with understanding and reason (*Winchester's* (Marquis) case, 6 Rep. 23 a). On proof that the testator has been affected by habitual derangement, the party claiming under the will must show sanity and competency at the period when the will was made (*Attorney-General v. Parnter*, 2 Bro. C. C. 441). If the delirium arise from transient causes, slight evidence of restoration will suffice (*Brogden v. Brown*, Peak. Ad. Ca. 445); and the will itself may be evidence of such restoration. One made in a lunatic asylum was established on account of the reasonableness of its provisions (*M'Adam v. Walker*, 1 Dowl. 78; *Cartwright v. Cartwright*, 1 Phil. 90). When the evidence is contradictory the safest course is to try the question by evidence of collateral facts, as by correspondence, acts done with relation to property, and the circumstances attending the preparation and execution of the will itself (*Tatham v. Wright*, 2 Russ. & Myl. 21). Letters written to the testator and not acted upon, or indorsed, or answered by him, are not admissible evidence of his sanity (*Wright v. Doe*, in error, 4 Bing. N. C. 489). As to the revocation of a will, see *post*, "*WILLS*."

The deft. may show a disclaimer to take under the will (*Begbie v. Crooke*, 2 Bing. N. C. 70). But where the devisee of an estate refused to take it, saying, he was entitled as heir-at-law, and would not accept any benefit by the will of the devisor; it was held, that this was no such disclaimer as to prevent him from afterwards *bringing ejectment, and relying on his title as devisee (*Doe v. Smyth*, 6 B. & C. 112).

Ejectment by one tenant in common against his three co-tenants, and the D. and S. Railway Company, to whom the other three defts. had demised the premises in question. The three co-tenants defended as landlords, and the company as tenants; the usual special order was obtained. It was proved that rent had formerly been paid to all the tenants in common by other persons, but there was no evidence to show that any notice to quit had been given, or that the tenancy had been otherwise determined; held, that the railway company, who defended as tenants, were not precluded by the order admitting the landlords to defend, from insisting that the former tenancy still existed, and therefore that the legal title was not in the lessor of the plt. at the time of the demise (*Doe v. Horn*, 3 M. & W. 333).

A deft. in ejectment, under the usual consent rule, could not insist that a verdict shall be entered for him as to *part* of the premises. The plt. had a general verdict, and took possession at his peril (*Doe v. Rhodes*, 11 M. & W. 600). But since the R. G. 2 Will. IV. a deft. is entitled to a verdict on those counts which plt. does not prove, and where the consent rule specifies the premises for which the party defends, the deft. is entitled to a verdict for that part of the premises to which there is no title shown (*Doe v. Webber*, 2 Ad. & E. 448; *Doe v. Lewis*, 13 M. & W. 241; see *Doe v. Errington*, 4 Dowl. P. C. 602; *Doe v. Rhodes*, 11 M. & W. 600).

Where the mortgage was by lease and release, and the release recited that the releasor was legally or equitably entitled to the premises conveyed, and he covenanted that he was lawfully or equitably seised in his demesne of and in the premises, and otherwise well entitled to the same, and the legal estate was subsequently conveyed to him, and he afterwards for a valuable consideration conveyed the same to a third party: upon ejectment, brought by the mortgagee against such third party, it was held, that there being in the release no certain or precise averment of any seisin in the releasor, but only a recital or covenant that he was legally or equitably entitled, the deft. was not estopped from setting up the legal estate acquired by him after the execution of the release. It was also held, that the release did not operate as an estoppel by virtue of the words "granted, bargained, sold, aliened, remised, released," &c., because the release passed nothing but what the releasor had at the time, and he had not the legal title in the premises at the time of the release. It was also held, that the case did not fall within the rule that a mortgagor cannot dispute the title of his mortgagee; because the party claimed as a purchaser for a valuable consideration without notice a legal interest which was not in the mortgagor at the time of the mortgage, he having at that time an equitable interest only, to which his title was not disputed (*Right v. Bucknell*, 2 B. & Ad. 278).

M., being seised in fee, mortgaged to O., but remained in possession, and afterwards demised part to B., who also entered, after which M. mortgaged to H.; H. after this, received rent from B., and demised the other part to A.; afterwards, B. and A., on notice from O., paid O. rent. H. then brought ejectment (after notice to quit) against B. and A. It was held that B. and A. might both show in defence the first mortgage to O., O.'s notice to them, and their payment of rent to O.; for that, although B. could not dispute M.'s title at the time of the demise, he might show that H. had no derivative title, and he was not precluded from having paid rent *to H. under a mistake of the facts; that A., might show that M., at the time of the demise to him, was only a mortgagor in possession, and that M. had since been treated as a trespasser by the mortgagees, so as to determine M.'s right, and that O.'s notice to the tenant to pay him rent might, if received in evidence, tend to show that by so doing O. treated the mortgagor as a trespasser (*Doe v. Barton*, 11 Ad. & E. 307). Where a canon demised by way of mortgage "all the canonry of him, the said A. B., and all the lands, messuages, &c., thereunto belonging," he was not estopped by the mortgage-deed from showing that the house in respect of which the ejectment was brought, and which had been assigned to him on his installation as canon, and of which he still retained possession, did not belong to the canonry (*Doe v. Musgrave*, 1 M. & G. 625). Where A., having a defective title, mortgaged land in fee to O., and continued in possession, and afterwards a lease was granted to him by the real owner in pursuance of an award, it was held that A. could not set up such lease in answer to an ejectment brought by O. (*Doe v. Wickers*, 4 Ad. & E. 782).

Formerly, the deft. might also, in all cases, show that the claimant's right

of possession and entry is taken away by discontinuance, descent cast, or the Statute of Limitations (see Ad. Ej. 35).

Right of Entry barred by Statute of Limitations.] Before the passing of the 3 & 4 Will. IV. c. 27, the period of limitation in the action of ejectment was governed by 21 Jac. I. c. 16, s. 1, which enacted, "That no person shall make any entry upon any lands, &c., but within twenty years next after his right or title shall first descend or accrue; and, in default thereof, such person so not entering, and his heir, shall be utterly disabled from such entry." The king was not bound by this statute, nor were ecclesiastical persons (Ad. Ej. 46); but the statute, with these exceptions, applied to all persons having a right to enter, and therefore, if deft. could show that he, or those under whom he claimed, had been in possession for the last twenty years, *adversely* to the title of the claimant, and it appeared that the claimant had not been prevented from prosecuting his claim earlier by reason of some of the disabilities allowed by the second section (*post*), he would be barred of his remedy by ejectment (Ad. Ej. 46). With respect to what will constitute an adverse holding of this nature, it is laid down in Ad. Ej. 47, that an adverse possession will be negatived when the parties claim under the same title, if the possession of one party is consistent with the title of the other; when the party claiming title has never, in contemplation of law, been out of possession, and when the possessor has acknowledged a title in the claimant. Where a cottage is built on the lord's waste, though in defiance of him, and the possession of it remains undisturbed for twenty years, the lord cannot recover (*Doe d. Jackson v. Wilkinson*, 3 B. & C. 413; *Accord, Doe v. Clark*, 8 B. & C. 717). Whether adverse possession of an encroachment upon the waste of the lord, adjoining to premises demised to the party encroaching, for twenty years, shall be a bar to ejectment by him, seems to be undecided, because it may have been done for the benefit of the lord after the determination of the term demised (see *Doe d. Colclough v. Mulliner*, 1 Esp. 461; *Creach v. Wilmot*, 2 Taunt. 160; *Doe d. Challnor v. Davies*, 1 Esp. 461; *Bryan d. Child v. Winwood*, 1 Taunt. 208; *Attorney-General v. Fullerton*, 1 V. & B. 263; *Doe v. Rees*, 6 C. & P. 610; and see *Doe v. Fuller*, 1 Tyrw. & G. 17). It has been recently said, that wherever the tenant incloses some land adjoining the demised premises, and occupies it as parcel of them, such inclosure is presumed to be for the benefit of the landlord *and not adversely to him (*Doe v. [1052] Williams*, 7 C. & P. 332; *Doe v. Murrell*, 8 C. & P. 134; *Doe v. Jones*, 15 M. & W. 580). The Statute of Limitations will be no defence where the relation of landlord and tenant subsists, the possession under such terms never being considered adverse (*Doe d. Pellatt v. Ferrars*, 2 B. & P. 542); nor even if the tenant be one by sufferance (*Doe d. Stouter v. Hull*, 2 D. & R. 38); nor will the possession be adverse, as between trustee and *cestui que trust* (*Keen d. Byron v. Deardon*, 8 East, 248); and, though the adverse possession of a cottage for twenty years, built in defiance of the lord, will be a good bar, yet, if there be any acknowledgment of a tenancy having subsisted, the possession will not be considered adverse; as where, after a period of thirty years, sixpence rent was paid, it was held to be evidence that the occupation began by permission (*Doe d. Jackson v. Wilkinson*, 3 B. & C. 413; 5 D. & R. 273; 2 B. & P. 542; *Doe v. Clark*, 8 B. & C. 717). Where interest has been paid, the possession of the mortgagor for twenty years will not be considered adverse to that of the mortgagee (*Hatcher v. Fineaux*, 1 Raym. 741). Where premises were mortgaged in fee, with a proviso for reconveyance, if the principal were not paid on a given day, and in the mean time that the mortgagor should continue in pos-

session; upon special verdict it was found that the principal was not paid on the given day, but that the mortgagor continued in possession, and there was no finding by the jury, either that interest had or had not been paid by the mortgagor; it was held, that upon this finding it must be taken that the occupation was by the permission of the mortgagee, and consequently that, although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the Statute of Limitations (B. N. P. 104: Hall v. Doe d. Surtees, 5 B. & A. 687; see Doe v. Williams, 5 Ad. & E. 291; 296). The possession will not be adverse, where the possession of one party is not inconsistent with that of the other, as in the case of joint-tenants, parceners, or tenants in common, where the possession of one is, in contemplation of law, the possession of the other (Ford v. Gray, Salk. 285; 6 Mod. 44; Smales v. Dales, Hob. 120; Doe d. Barnett v. Keene, 7 T. R. 386; Doe v. Hulse, 3 B. & C. 757; but see 3 & 4 Will. IV. c. 27, s. 12); or, where a younger son enters by abatement on the death of his father, and dies seised, this possession is not adverse to the title of his elder brother (Co. Lit. 243 a; but see 3 & 4 Will. IV. c. 27, s. 13). The possession of a particular tenant is not adverse to him in remainder or reversion (Taylor d. Alkyns v. Horde, 1 Burr. 60; Fisher v. Prosser, Cowp. 218; Doe d. Milner v. Brightwin, 10 East, 583). Where acts are set up as evidence of adverse possession, it may be a question for the jury whether they were not mere trespasses, and not done in assertion of any supposed right (Doe v. Roberts, 13 M. & W. 520).

By the second section of the 21 Jac. I. c. 16, it was provided nevertheless, "that, if any person, having a right or title of entry, shall be, at the time of the said right or title first descended, accrued, come, or fallen, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond seas, then such person and his heir may, notwithstanding the twenty years be expired, bring his action, or make his entry, as he might have done before this act, so as such person, or his heir, shall, within ten years next after his and their full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of, and sue forth the same, and at no period after the said ten years." Where a party would take advantage of this second section, it must appear that his disability to enter existed when his title accrued, for no subsequent *disability will prevent the statute from running (Cotterell v. Dutton, 4 Taunt. 826; Doe d. Duroure v. Jones, 4 T. R. 300); [*1053] whether such disability be voluntary or otherwise, makes no difference (Ib.). "If a man, both of nonsane memory and out of the kingdom, come into the kingdom, and then go out of the kingdom, his nonsane memory continuing, his privilege as to being out of the kingdom is gone, and that of nonsane memory will begin from the time he returns to his senses" (Sturt v. Mellish, 2 Atk. 610, 614). Where an ancestor died seised, leaving a son and daughter infants, and, on the death of the ancestor, a stranger entered, and the son soon after went to sea, and was supposed to have died abroad, within age, it was held that "the daughter was not entitled to twenty years to make her entry after the death of her brother, but only to ten years, more than twenty years having elapsed since the death of the person last seised (Doe d. George v. Jesson, 6 East, 40); the word 'death' in the statute meaning and referring to the death of the person to whom the right first accrued" (per Lord Ellenborough, (Ib. 84). But, per Mansfield, C. J., "the daughter and infant heir of a *feme covert* has ten years after the disability ceases, not from the death of her mother" (Cotterell v. Dutton, 4 Taunt. 830; Sug. V. and P. 608, 609; but see now 3 & 4 Will. IV. c. 27, ss. 16, 17). In the case of parceners, if one be under a

disability within the meaning of the act, and the other be under no disability, but neglect to enter within the limited time, the disability of the one will be no preservation of the right of the other (*Doe d. Langdon v. Rowlston*, 2 Taunt. 445).

Where a jointress for life married again, and joined her second husband in levying a fine, who survived her, and held the land twenty years, this was held a bar to an action of ejectment by the reversioner, though the fine was void (*Doe v. Gregory*, 4 Ad. & E. 14; see "FINES AND RECOVERIES"). The vendee of land, who is let into possession, but who has never completed the purchase, has no adverse possession against his vendor (*Doe v. Edgar*, 2 Bing. N. C. 498), unless he refused to give up possession, or to pay interest on the purchase-money (*Ib.* 502). Upon the expiration of a lease for lives, the lessor granted another lease; at this time W. was in possession and continued so for twenty years, claiming to hold under the first lease, on the ground that it was still subsisting: held, that his possession under such claim was not adverse (*R. v. Axbridge*, 2 Ad. & E. 520). The declarations of a deceased occupier against his interest, tending to show his claim not to be adverse, are admissible (*Doe v. Harbrow*, 3 Ad. & E. 67).

But now the period of limitation in the action of ejectment is governed by the 3 & 4 Will. IV. c. 27, of which

Sect. 1, provides, that except where the context excludes such construction, the words used in the act are to be interpreted as follows:—

Land, means manors and all corporeal hereditaments and tithes (other than tithes belonging to spiritual or eleemosynary corporations sole), whether freehold, chattel, copyhold, or of any other tenure.

Rent, means heriots and all suits and services for which distress lies, annuities and periodical sums charged on land (except moduses and compositions belonging to such sole corporations as above).

Person through whom another claims, means the person by, through, under, or by the act of whom the claimant is entitled, as heir, [*1054] issue in tail, tenant by courtesy and in dower, successor, *special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and any person entitled to an estate, or interest to which the claimant became entitled as lord by escheat.

Person, means any body politic, corporate or collegiate, or a class of creditors, or other persons, as well as an individual; and every word importing the singular number shall extend to several persons or things as well as one: and every word importing the masculine gender only, shall extend to a female as well as a male.

Sect. 2. "And be it further enacted, that after the thirty-first day of December, one thousand eight hundred and thirty-three, no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same.

Sect. 3. "And be it further enacted, that in the construction of this act the right to make an entry or distress or bring an action to recover any land

or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person, who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipts of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument: and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by *reason of any for- [*1055] feiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

Sect. 4. "Provided always, that when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

Sect. 5. "Provided also, that a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.

Sect. 6. "And be it further enacted, that for the purposes of this act an administrator claiming the estate or interest of the deceased person of whose

chattels he shall be appointed administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person on the grant of the letters of administration.

Sect. 7. "And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

Sect. 8. "And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

Sect. 9. "And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent [*1056] reserved by such lease shall afterwards *have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

Sect. 10. "And be it further enacted, that no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon.

Sect. 11. "And be it further enacted, that no continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action.

Sect. 12. "And be it further enacted, that when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.

Sect. 13. "And be it further enacted, that when a younger brother or other relation of the person entitled as heir to the possession or receipt of the

profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

Sect. 14. "Provided always, and be it further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to made an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given.

Sect. 15. "Provided also, and be it further enacted, that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this act.

Sect. 16. "Provided always, and be it further enacted, that if at the time at which the right of any person to make an entry or distress or bring an action to recover any land or rent shall have first *accrued as aforesaid such person shall have been under any of the disabilities [*1057] hereinafter mentioned, (that is to say,) infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened).

Sect. 17. "Provided nevertheless, and be it further enacted, that no entry, distress, or action shall be made or brought by any person, who at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have at first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

Sect. 18. "Provided always, and be it further enacted, that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make

an entry or distress or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

Sect. 19. "And be it further enacted, that no part of the united kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his majesty), shall be deemed to be beyond seas within the meaning of this act.

Sect. 20. "And be it further enacted, that when the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the mean time such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

Sect. 21. "And be it further enacted, that when the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no *such entry, distress, or action shall [*1058] be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.

Sect. 22. "And be it further enacted, that when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

Sect. 23. "And be it further enacted, that when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be and be deemed to have been effectual as against any person claiming any

estate, interest, or right to take effect after or in defeasance of such estate tail.

Sect. 29. "Provided always, and be it further enacted, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years: and if such times taken together, shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will with the time of the holding of such two persons and such six years make up the full period of sixty years; and after the said thirty-first day of December, one thousand eight hundred and thirty-three, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

Sect. 34. "And be it further enacted, that at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit *respectively might [*1059] have been made or brought within such period, shall be extinguished.

Sect. 35. "And be it further enacted, that the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act.

Sect. 39. "And be it further enacted, that no descent cast, discontinuance, or warranty which may happen or be made after the said thirty-first day of December; one thousand eight hundred and thirty-three, shall toll or defeat any right of entry or action for the recovery of land."

The following cases have been decided on this statute:—

Sects. 2 and 3 have done away with the doctrine of non-adverse possession, and the question now is (except where the case comes within sect. 15), whether twenty years have elapsed since the right accrued, whatever be the nature of the possession (*Nepean v. Doe*, 2 M. & W. 894; *Cully d. Taylerson v. Doe*, 11 Ad. & E. 1008; *post*, p. 1060); and the effect of the act is to bind and transfer the estate, and not merely to bar the remedy (*Incorporated Society*, 1 Connor & Law. 84; 3 Dru. & W. 388). The application of sect. 2 is not restrained by sect. 3 to the cases therein enumerated, the 3rd sect. explaining the construction of the 2nd in such cases as doubts were likely to arise upon (*James v. Salter*, 3 Bing. N. C. 544; per Tindal, C. J.). So that statute does not prevent the tithe-owner from recovering tithes, as chattels, from the occupier, though there have been no perception for twenty years, but it is confined to adverse claims to the estate in the tithes (*Ely (Dean and Chapter of) v. Nash*, 15 M. & W. 617). The word rent in sect. 2, does not mean rent reserved on a demise, but rent distinct from the land, such as rent-charges, &c. (*Grant v. Ellis*, 9 M. & W. 113). A lessor may recover in ejectment within twenty years after the determination of the lease, though he has received no rent for twenty years and upwards before its expiration. The case falls within the latter branch of

sect 3, which in the case of an estate or interest in reversion provides that the right of action shall be deemed to have first accrued when it became an estate or interest in possession (*Doe v. Oxenden*, 7 M. & W. 131; 4 Jur. 1016). A parol admission is evidence of payment of rent notwithstanding sect. 14 (*Doe v. Beckett*, 4 Q. B. 601). Under section 2 (which limits the time for recovering lands by action to twenty years after the right accrues); sect. 34 (which extinguishes the title at the determination of such period), and sect. 7 (which enacts, that in the case of tenancy at will, the right of action shall be deemed to have accrued at the determination, or at the end of one year from the commencement of such tenancy), no title accrues to a party who was tenant at will, and held without interruption for twenty years after the expiration of the first year, but who had quitted possession before the act passed (*Doe v. Thompson*, 6 Ad. & E. 721; 2 Moo. & P. 656). As against the original landlord and those claiming under him, such party is without title, independently of sect. 15 (*Ib.*); nor can he, by virtue of the first-mentioned clauses, recover in ejectment, even against a stranger (*Ib.*). An annual quit rent payable at Michaelmas, was last paid in July, 1825, and a distress was put in in May, 1845, for six years' rent, which was held too late, the rent being then extinct (*Owen v. De Beauvoir*, 16 M. & W. 547).

Sect. 7 applies only to express trusts, therefore, where a vendor is let into possession without a conveyance or payment of rent, the vendor is barred after twenty years, unless the jury find that there was a tenancy [*1060] at will created between them within that period (*Doe v. *Rock*, 4 4 Man. & G. 30). Where A. in 1817 let B. into possession of land as tenant at will, and in 1827 A. entered upon the lands without B.'s consent, and continued in possession until 1839: held, that this entry amounted to a determination of the tenancy at will, and that B. thenceforth became tenant at sufferance, until, by agreement, express or implied, a new tenancy was created between the parties, and therefore, that, unless the fact of such new tenancy were found by the jury, an ejectment brought by A. in 1839 was too late, inasmuch as by sect. 7, his right of action first accrued at the expiration of one year after the commencement of the original tenancy at will, *i. e.* in the year 1818 (*Doe v. Turner*, 7 M. & W. 226).

A service of cleaning a church or ringing a bell is "a rent," within the 8th section of the Limitations Act, 3 & 4 Will. IV. c. 27, which has a retrospective effect, and applies to a tenancy from year to year, created previously to the passing of the act (*Doe d. Jukes v. Sumner*, 14 Law J. 337, Ex.; 14 M. & W. 39). A payment of rent by A. within twenty years, and an admission by deft. that he held under A., is sufficient payment to rebut the statute (*Doe v. Beckett*, 4 Q. B. 601).

By sect. 12 the possession of coparceners, joint tenants, or tenants in common, becomes separate from the commencement of the tenancy, and not from the passing of the act (*Culley d. Taylerson v. Doe*, 11 Ad. & E. 1108; 3 P. & D. 539). In 1799, A. and B. being tenants in common, B. sold his interest; the purchaser then entered into possession of the whole of the premises, and he, his heir, and the deft. (the devisee of his heir) successively continued in possession of the whole from 1799 to 1836. When the ejectment was brought, D. T., through whom the lessor of the plt. claimed, was heir to A.: held, that neither at common law, nor by the statute of Will. IV. had there been any disseisin of D. T., and that therefore his interest was not a mere right of entry, but was devisable by his will made in 1835 (*Ib.*). It seems a right of entry is not devisable without the aid of 7 Will. IV. & 1 Vict. c. 26 (*Ib.*). In 1788 estates were settled by marriage settlement to the use of the wife for life, with remainders to her issue, in tail,

with remainder to the settlor (whose heiress-at-law she was) in fee. In 1818, by deeds, to which the husband and wife, and their only son, R. G., were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for life, remainder to R. G. the son for life, remainder to his issue, in tail; remainder to J. F., his sister, for life, with other remainders over. The husband died in 1819, the wife in 1822, and R. G. in 1828: held, that inasmuch as the estate of J. F. was carved out of the estate of R. G. she had the same period for bringing an ejectment in respect of any estates comprised in the above deeds, as he would have had if he had continued alive, viz., twenty years from the year 1822, when his remainder came into possession (*Doe v. Edwards*, 6 M. & W. 295). W. B. seised in fee of land, by indentures of lease and release, bearing date respectively 2d and 3d September, 1819, and executed by himself only, conveyed same to R. T., with the proviso, that on payment by him to R. T., of 200*l.*, with interest, on the 25th March, 1820, the latter should re-convey the premises, with covenant, that in default of payment the mortgagee might peaceably, &c. enter, &c. the premises; and that therefore the mortgagor would execute any further assurance that might be necessary, &c.: held, that an estate in fee simple passed to the mortgagee immediately on the execution of this deed; and no interest having been paid on the mortgage money, nor any other act recognising the title of the mortgagee done for *twenty years from that date, [*1061] his remedy by ejectment to recover the land was barred by the statute (*Doe v. Lightfoot*, 8 M. & W. 553; 5 Jur. 966). A testatrix devised a customary tenement to John, without words limiting the inheritance upon her death; the dormant surrenderee, in whom the legal estate was, surrendered the fee to John, and John died more than forty years before the filing of the bill, having surrendered the tenement to a purchaser who had notice of the will of the testatrix: held, that the equitable title of the heir which accrued on the death of John, was barred by length of time (*Collard v. Hare*, 2 R. & M. 774). Ejectment brought by a remainderman more than twenty, but less than twenty-seven years since the tenant for life was last heard of, cannot be supported without other evidence from which the jury may infer that the tenant for life was alive within twenty years (*Slade v. Nepean*, 2 Nev. & M. 209).

E. being in occupation of land attorned to L., who claimed the fee, and had entered in the name of taking possession; the land was copyhold. After the attornment L. was not admitted, nor did he receive rent, or occupy, or in any way interfere with the land, the fee in which was several times sold, with the proper formalities, in the copyhold court, within the twenty years following: held, that L. (before the stat. 3 & 4 Will. IV. c. 27) was absolutely barred from bringing ejectment at the end of the twenty years, though E. continued in occupation until within twenty years of the ejectment being brought (*Doe v. Edwards*, 5 Ad. & E. 95; 6 Nev. & M. 633).

A *feme sole* seised in fee, married, and she and her husband ceased to be in possession or enjoyment of the land, and went to reside at a distance from it: They both died, at times which were not shown to be within forty years from their ceasing to occupy; the wife's heir-at-law brought ejectment against the person in possession within twenty years of the husband's death, and within five years of the passing of the 3 & 4 Will. IV. c. 27, but more than 40 years after the husband and wife ceased to occupy: held, that the heir-at-law was barred by the seventeenth section of the statute, though it did not appear when or how the deft. came into possession, and though proof was offered that the wife had levied no fine (*Doe v. Bramston*, 3 Ad. & E. 63). G., under whom deft. claimed, was let into possession twenty-two years before

action brought, by virtue of a contract with P. for the purchase of an allotment under an inclosure act, which provided that a purchaser let into possession of an allotment should have the same rights as the vendor; G. paid interest on a portion of the purchase-money for some years, but never completed the purchase: held, that even after a lapse of twenty years, his possession was not adverse to P.'s possession: held, also, that it did not lie in the mouth of G., or any one claiming under him, to raise as an objection to P.'s title that the commissioners of inclosure had made no formal award (*Doe v. Edgar*, 2 Bing. N. C. 496; 2 Sco. 732). A., thirty years ago, died seised of a cottage, leaving a son, B., and a daughter, C.; at his death, C., his daughter, then, unmarried, took possession of it, and afterwards married D., and after his death, W.; after her death, W. remained in possession sixteen years: held, that the son of B., who was the heir of C., as well as being the heir of A. and B., might recover in ejectment, although W., including the term he had occupied the cottage with his wife, had had more than twenty years' possession of it (*Doe v. Wing*, 6 C. & P. 538).

A., in 1819, agreed to purchase lands of B., and paid a deposit; A. was let into possession at Michaelmas, although there was no [*1062] stipulation in the agreement to that effect; he continued in possession, having paid no more purchase-money, nor any rent or interest, and in 1822 cut down timber, and in 5 Geo. IV. levied a fine with proclamations, and mortgaged the property, and then died, leaving it, subject to the mortgage, to his daughters: held, that there was no bar to B.'s recovery in ejectment, brought within twenty years after Michaelmas, 1839, as A., coming in under an intended purchase, was, in equity, owner of the land, with a liability to pay the purchase-money, and his cutting trees was consistent with his holding in that character, and not adversely to the rights of the vendor, to whom, at law, he was tenant at will (*Doe v. Caperton*, 9 C. & P. 112). Where the lessor of the plt. had purchased the reversion, subject to a lease for years, at a rent of 4*l.*, and to an annuity of 4*l.*, and the tenant in possession under the lease had paid the sum of 4*l.*, yearly, for upwards of twenty years, to the annuitant, until his death in 1830, and subsequently to his widow: held, that it is for the jury to consider in what character the tenant made such annual payment, and if, as agent for his landlord, the possession is not adverse, and the right of the person entitled to the possession is not barred by the stat. 3 & 4 Will. IV. c. 27. D. mortgaged land in fee to J., subject to a proviso of cesser, upon payment of the money secured, upon a day more than twenty years before the passing of 3 & 4 Will. IV. c. 27; within twenty years before the passing of the statute, D. acknowledged that the mortgage money was unpaid. On ejectment brought by the heir of J. within five years after the passing of the statute, the jury found that the mortgage money was unpaid: held, that the ejectment was not barred by sect. 2, D.'s possession not being adverse at the time of passing the statute, and therefore the lessor of the plt. had, by sect. 15, five years from that time to bring the action, though no proof was given that he had been in possession or received rent as co-tenant (*Doe v. Williams*, 5 Ad. & E. 291; 6 Nev. & M. 816). W. permitted J. to occupy land, of which he was seised in fee, for twenty years previous to J.'s death in 1831; W. died in September, 1833, and the deft., who was the son and heir-at-law of J., occupied until 1836. On ejectment brought by the devisees of W., it was found by the jury that the possession of J. was not adverse to W.: held, that the right of action in the devisees was not barred by the second and seventh sections, but was saved by the fifteenth section, being brought within five years from the passing of that act (*Doe v. Thompson*, 5 Ad. & E. 532; 1 N. & P. 215). By a marriage settlement a husband became entitled to the moiety of an estate in fee,

which moiety originally belonged to his wife. During the coverture the other moiety descended to the wife, as heiress-at-law to her brother; the wife afterwards died in the husband's lifetime without issue, and the husband, from the time of her death in April, 1815, until a sale of the estate in November, 1828, remained in uninterrupted possession of the entire property, without making any acknowledgment of the title of any other person: held, that this was a case falling within the fifteenth section of the statute, and that, notwithstanding the husband's possession of the moiety which descended to the wife might not be adverse, the heir-at-law of the wife, not having made his claim within five years after the passing of the act, was barred (*Ex parte Hasell*, 3 Y. & C. 617: 3 Jur. 1101). Where one tenant in common has been out of possession for twenty years prior to the passing of 3 & 4 Will. IV. c. 27, he is barred, by sects. 2 and 12, from bringing this action, but may maintain it under sect. 15, within five years of the passing of the act, if the other tenant in common has not been in possession adversely to [*1063] *him at the time of the passing of the act (*Culley v. Taylerson*, 11 Ad. & E. 1008). The lord of the manor is barred by the Statute of Limitations in entering for a forfeiture after twenty years (*Whitton v. Peacock*, 3 Myl. & K. 325). Mortgagees may make an entry or bring an action to recover the lands at any time within twenty years next after the last payment of any part of the principal or interest secured, though more than twenty years may have elapsed since the right of entry and action first accrued (7 Will. IV. & 1 Vict. c. 28).

When the Limitation begins to run.] A. was possessed of lands for more than twenty years, and died in 1817; his widow had possession from that time until her death in 1838; B. was the eldest son of A. and his wife: held, that though B. could not recover in ejectment, as the heir of his father, because more than twenty years had elapsed from the death of his father, yet that the jury might infer that the property belonged to B.'s mother, and survived to her on the death of his father, and descended to B. as his heir on her death in 1838 (*Doe v. Long*, 9 C. & P. 773). A., being tenant for life of a copyhold estate, and B., his daughter, being tenant in tail in remainder, joined in a recovery in 1778, and A. surrendered to the use of himself for life, remainder to the use of B. for life, remainder to the right heirs of the survivor; A. and B. shortly after surrendered the fee to a *bonâ fide* purchaser, the contingent remainder to A. being void: held, that as the surrender passed B.'s life estate, the claim to the fee by B.'s son did not accrue until her death (*Doe v. Roll*, 8 Ad. & E. 650). A. was tenant for life, with power of appointment; by will, attested by three witnesses, he appointed the land to B. for life, and after her death to C. in fee; B. was one of the witnesses to the will, and the appointment to her was therefore void. On the death of the testator the husband of B. entered, and held the land until his death, which was three years after the death of B.: held, that the statute did not begin to run against C. until after the death of B. (*Doe v. Blackhay*, 5 C. & P. 563; and see *Faussett v. Carpenter*, 5 Bli. N. S. 75).

Sect. 14. Whether a writing amounts to an acknowledgment of title within this section, is a question for the judge, and not for the jury, to decide (*Doe v. Edmonds*, 6 M. & W. 295). A party in possession adversely of land being applied to, by the person claiming title to it, to pay rent, and who offered a lease of it, wrote as follows:—"Although, if matters were contested, I am of opinion I could establish a legal right to the premises; yet, under all circumstances, I have made up my mind to accede to the proposal you made, of paying a moderate rent on an agreement for twenty-one years." The bargain subsequently went off, and no rent was paid, or lease executed:

held, that this letter was not an acknowledgment of title within this section (Ib.).

In 1767 the residue of a satisfied term of 500 years (created in 1766) was assigned to a trustee for H. to attend the inheritance in 1844; the administrator of the trustee brought ejectment on behalf of persons who claimed the beneficial interest through H., the defts. also claiming it under title derived through H. The owner of the legal interest in the term had never been in possession. No demand of possession had been made before action brought: held, that the action was not maintainable; for, if a tenancy at will existed as between the trustee and *cestui que trust*, it had not been determined by demand of possession; and if no tenancy existed such as to render necessary a demand of possession, then the action might have been brought twenty years before, and was consequently barred by stat. 3 & Will. IV. c. 27, ss. 2 & 3 (*Doe d. Jacobs v. Phillips*, 10 Q. B., 130).

The 3rd section of the statute 3 & 4 Will. IV. c. 27, does not apply to the case of a *cestui que trust* in possession under a trustee (*Garrard v. Tuck*, 18 Law J. 338, C. P.).

In 1801, D. being seised of land in fee, permitted his daughter J. and her husband M. to occupy as tenants at will. D. died in 1837, after the passing (24 July 1833) of stat. 3 & 4 Will. IV., c. 27, but before the expiration of the five years allowed by section 15. He devised the land to J. for life; remainder to W. in fee. He also devised to J. an annuity charged on other land. J. and M. occupied from 1801 to J.'s death in 1843. No rent being paid after J.'s death, M. continued in occupation. An ejectment brought in 1844 by W., the remainderman, against M.: held, that W. was not entitled to insist that J. and M. had held under the devise to J., but that M., although he had received the annuity on behalf of his wife, might rest his defence upon the occupation under the tenancy at will (*Doe d. Dayman v. Moore*, 9 Q. B. 555). Held, that sect. 15 was inapplicable, no step having been taken within the five years (Ib.). Held, that the action was barred, under sects. 2 and 7, by the lapse of twenty years from the end of one year after the commencement of the tenancy at will (Ib.).

R. C., the purchaser of land, was let into possession before execution of a conveyance. He let in his son as tenant at will; the son occupied and built a cottage on the land; afterwards, R. C. took a conveyance from the vendor; and some time after he mortgaged the land. The son continued to occupy the premises in all respects as at first, till his death, which happened within twenty-one years of his entry. The son's widow continued to occupy till the expiration of twenty-one years from her husband's entry: held, that an action of ejectment afterwards brought against her was barred by stat. 3 & 4 Will. IV., c. 27, ss. 2 and 7. For that the tenancy at will was not determined by the father's taking a conveyance; and that, if it had, in point of law, been so determined by that event, or by the mortgage, a tenancy by sufferance must be deemed to have commenced from such determination, there being no evidence of new tenancy at will; and the tenancy, altogether, had continued more than twenty years from the end of the first year (*Doe d. Goody v. Carter*, 9 Q. B. 863; 18 Law J. 305, Q. B.).

Three females being coparceners in tail, two of them suffered recoveries of their shares, but the third did not. They all married, and their husbands entered into an agreement for partition by deed of the lands held in coparcency, but for nothing more. No such deed appeared to have been executed, but the lands had been held according to the agreement from its date. An action being brought by the heir in tail of the parcener who did not suffer a recovery within twenty years after her death, and before the 3 & 4 Will. IV. c. 27, to recover her share, which had been held by the husband of one

of the other coparceners : held, that the possession was under the agreement, and not adverse (*Doe d. Millett v. Millett*, 12 Jur. 649 ; 17 Law J. 202, Q. B.). Held, also, that nothing could be presumed beyond what was contemplated by the agreement, which provided for a deed, and not for a recovery (lb.).

In 1784 premises were leased to H. J., for three lives ; H. J., by his will, devised all his estates and interest in the premises to his wife, A. J., her heirs and assigns. A. J., in 1793, conveyed the estate so devised to her son, R. J., and the heirs of his body, with a proviso, that if he should have no child living at his death, the limitation thereby made should cease, and the estate should revert to A. J., her heirs and assigns. In 1811, R. J. purchased the reversion in fee in the premises expectant on the lease for lives, which was duly conveyed to him, and at the same time an old satisfied term of 5000 years affecting the premises was assigned to a trustee for him to attend the inheritance. R. J. died in 1812, without issue, leaving his nephew, L. J., his heir-at-law and the heir-at-law of A. J. The lease for lives determined in 1835. For upwards of twenty years from the death of R. J. the premises were held adversely to L. J. : held, that his right of entry was barred thereby, and that he had not a new right of entry on the determination of the leases for lives in 1835 (*Doe d. Hall v. Mouldsdales*, 16 M. & W. 689).

That breach of the 3rd section of the Limitation Act, 3 & 4 Will. IV. c. 27, which relates to estates in reversion expectant on the determination of a particular estate, applies only to cases where another person than the reversioner is entitled to the particular estate (lb.).

Deft. had occupied land from 1824 : in 1831, upon demand of possession by the secretary of a canal company incorporated by act of Parliament, deft. said that the preceding secretary had told him to take possession of the land : held, first, that a valid authority to the secretary to create the tenancy in 1824, and to determine it in 1831, might be inferred, though there was no direct evidence of authority under seal (*Doe d. Birmingham Canal Company v. Bold*, 12 Jur. 350 ; 11 Q. B. 127). Held, secondly, that the tenancy being determined before stat. 3 & 4 Will. IV. c. 27, the right of entry commenced at that time, and, therefore, the ejectment was not barred (lb.).

Competency of Witnesses.

The party in possession is not a competent witness to support the title of the landlord (*Doe d. Forster v. Williams*, Cowp. 621 ; *Bourne v. Turner*, Stra. 632 ; *Doe v. Pye*, 1 Esp. 364) ; nor will he be competent to prove the possession of the premises to be in him, and not in the deft. (*Doe d. Jones v. Wilde*, 5 Taunt. 183 ; *Doe d. Lewis v. Bingham*, 4 B. & A. 672) ; nor does the statute 3 & 4 Will. IV. c. 42, render these persons competent.

The questions which arose formerly with regard to the competency of witnesses claiming an interest in the event of the trial *of an action of ejectment, can now no longer arise, for it is enacted [*1064] that no persons shall be excluded by reason of incapacity from crime or interest from giving evidence on any trial ; with a proviso that such privilege shall not extend to any lessor of the plt. or tenant of the premises sought to be recovered in ejectment (6 & 7 Vict. c. 85, s. 1) ; and these parties are now of course the only persons whose testimony is excluded : when there are several demises, and the evidence shows the title to be exclusively in one of the lessors, the other cannot be compelled to be examined as a witness for the deft., as all the lessors are jointly liable for the costs (*Fenn v. Granger*, 3 Camp. 178). But a joint deft. who has suffered judgment by default, is a good witness to prove the other deft. in possession (*Doe*

v. Green, 4 Esp. 198). In ejectment brought to determine a tenancy at a rack rent, a person interested in the reversion is not an incompetent witness for the plt. until it is known that he is interested in putting an end to the tenancy (Doe v. Cockell, 6 Nev. & M. 185). If A. is seeking to recover possession of a leasehold house in ejectment and it appear that after his lease was granted to him he became bankrupt, he cannot, in anticipation of a supposed defence that the deft. claims under his assignees, give in evidence the declarations of the assignees that they have no interest in the lease (Doe v. Bluck, 8 C. & P. 464).

A. having made a deposit of deeds to B., on an equitable mortgage, gave a schedule of the deeds, in which he described one as the deed of C. : held, that in an ejectment brought by B. against a person who came in under A., this admission by A. did not dispense with proof of the execution of this deed (Doe v. Penfold, 8 C. & P. 536).

When a vicar brings ejectment in right of his vicarage, a letter written by a former vicar is admissible in evidence for the deft., and a witness for the lessor of the plt. may be as ked as to what is inccribed on a tablet fixed up in a church (Doe v. Cole, 6 C. & P. 659).

When on the former trial of the title to the same property on an ejectment by the same lessors of the plt. against a different deft., the deft. gave in evidence a deed, the limitations of which were stated by the deft.'s counsel in court : held, that a copy of the short-hand notes of that statement was not receivable in evidence on the part of the same lessors of the plt. in a second ejectment against another party (Doe v. Ross, 7 M. & W. 102).

In ejectment, the only case in which a map of property is receivable in evidence is when it is undisputed that, at the time the map was made, the property belonged to the person from whom both parties claim (Doe v. Lakin, 7 C. & P. 481).

A former judgment in ejectment is evidence on another judgment where the lessor of the plt. and deft. are the same (Doe v. Seaton, 2 C. M. & R. 728).

In ejectment by a trustee the question was, whether certain freeholds passed under a mortgage deed ; for the affirmative, the deft. produced a deed containing an admission of that fact by the *cestui que trust* for life of the premises, under a devise from the mortgagor. It appeared that the *cestui que trust* by the deed procured the forbearance of a loan of 100*l.*, and the advance of 50*l.* more. Held, that the *cestui que trust* had an interest both ways, and that the evidence was therefore admissible (Doe v. Wainwright, 3 Nev. & P. 598).

The owner of a cottage divided into two parts, in 1808, put in two servants, H. and W., to occupy, which they did severally until *the owner's [*1065] death in 1824, without paying rent ; they continued to occupy until 1821, when H. died, having by his will demised his moiety to W. ; H. before his death took in L. to live with him, as his servant ; who, after H.'s death continued in possession : held on ejectment brought by W., that by proving L. to have come in under H. he had shown a *prima facie* title, and the deft. who defended under the landlord's rule, proposed to call L. as a witness, on the ground that he was not tenant in possession, but a mere servant : held, that L. was incompetent, as the deft. had admitted him to be tenant in possession by the rule (Doe v. Birchmore, 9 Ad. & E. 662).

Admissions.] Ejectment against T., the tenant in possession, and L., who came in to defend as landlord ; the lessor of the plt. having proved his title against L., the latter set up the title of the tenant T., who paid rent to the lessor of the plt., as tenant from year to year. In order to show the deter-

mination of T.'s interest, the lessor of the plt. produced an admission signed by T., after the commission day of the assizes, whereby he acknowledged having attorned to L., upon L.'s executing a writ of possession in a prior ejectment; held, that this admission was evidence against L. as well as T. (*Doe v. Sutherland*, 4 Ad. & E. 784).

Immediate Execution.] By the 11 Geo. IV. & 1 Will. IV. c. 70, s. 38, it is enacted, "that in all cases of trials of ejectment at nisi prius where a verdict shall be given for the plt., or the plt. shall be nonsuited for want of the deft.'s appearance to confess lease, entry, or ouster, it shall be lawful for the judge before whom the cause shall be tried to certify his opinion on the back of the record, that a writ of possession ought to issue immediately, and upon such certificate a writ of possession may be issued forthwith." The 1 Will. IV. c. 7, s. 6, as to speedy execution, does not affect the above clause. Under this act the judge has no discretion as to the time within which execution shall issue; but he must either grant a certificate for immediate execution, or let the case take its regular course (*Doe v. Dawson*, 4 C. & P. 589), though he will grant the certificate on an undertaking by the lessor of the plt. not to enforce it before a certain time (*Doe v. Hilliard*, 5 C. & P. 132); and the judge has sometimes required an affidavit before granting the certificate, stating the circumstances of the case, where the plt. is nonsuited in consequence of the non-appearance of the deft. to confess &c. (*Doe v. Dawson*, *supra*).

ELEGIT.

See "EJECTMENT," *ante*, p. 1016.

ENROLMENT.

See "DEED," CHANCERY, "BANKRUPT," "FINE,"

ENTRY.

See "EJECTMENT," *ante*, p. 1000, *et seq.*

EQUITY.

See "CHANCERY," "EJECTMENT."

*ESCAPE ON MESNE PROCESS. (a)

[*1066]

FORM OF REMEDY, p. 1066.

FORM OF PLEADINGS, p. 1067.

Declaration, p. 1067.

Plea, p. 1068.

(a) See 2 U. S. Dig. Tit. "Escape," p. 190; 1 Supp. U. S. Dig. p. 647; 1 Ann. Dig. p. 321; 113; 3 Id. p. 193.

PRECEDENTS, p. 1068.

EVIDENCE FOR PLAINTIFF, p. 1070.

In Action for Escape, p. 1070.

for not arresting Debtor, p. 1071.

for not assigning Bail-Bond, p. 1072.

Damages, p. 1073.

Admission by Under-Sheriff, p. 1073.

EVIDENCE FOR DEFENDANT, p. 1073.

Recaption, p. 1074.

ARREST on mesne process having been abolished by the 1 & 2 Vict. c. 110, except in the cases referred to in the third section, actions for escapes on mesne process are now less frequent than they formerly were.

Form of Remedy.

The only form of remedy by action against the sheriff or other officer, for an escape on mesne process, is case (1 Saund. 37, 38, n. 2; 2 Inst. 382; and see Williams v. Mostyn, 4 M. & W. 145; Brunswick v. Robertson, 2 P. & D. 269). It seems that case lies for an escape on an attachment for non-payment of money (Lewis v. Morland, 2 B. & A. 56; Brazier v. Jones, 8 B. & C. 124; 2 M. & R. 88; 9 Ad. & E. 840; Jackson v. Hill, 2 P. & D. 455; 10 Ad. & E. 477); and case lies for not arresting the debtor when the sheriff had an opportunity (Brown v. Jarvis, 1 M. & W. 704; Curling v. Evans, 1 Man. & G. 349). As to escape warrants, see 1 Anne, c. 6.

A sheriff is bound to keep prisoners in his custody after the return of mesne process, and before they are charged in execution and therefore where a party being in custody on mesne process went in charge of a sheriff's officer to the court of a revising barrister, after the return of the writ, it was held that the sheriff was liable for an escape (Williams v. Mostyn, 4 M. & W. 145; 7 Dowl. 38; see Price v. Belcher, 4 C. B. 866). A debtor arrested in the country on mesne process, brought himself by *habeas corpus* before a judge, in town, who committed him to Marshalsea; filed his petition to the Insolvent Debtor's Court, for his discharge under 7 Geo. IV. c. 57, which ordered his discharge as to the creditor's debt as soon as he should be in custody fifteen months: he then returned to the Marshalsea, and while there was brought by *habeas corpus cum causâ* before the Central Criminal Court, to plead to an indictment for perjury: he pleaded not guilty and traversed to the next sessions, but not giving bail he was committed to Newgate until discharged by due course of law. Subsequently he was bailed, whereupon the keeper of Newgate, without any fresh warrant, carried him back to the Marshalsea. After this, and before the end of fifteen months, he escaped. In case, for his escape, held that the debt's charge ceased when he brought the prisoner before the Central Criminal Court, and that as it had not been revived by any fresh warrant or commitment, the custody of the prisoner at the time was illegal; that the debt. therefore was not liable, and that *his conduct in receiving the prisoner did not stop the debt. [*1067] from saying that he had no right to detain him (Constant v. Chapman, 6 Jur. 666; 2 Gal. & Dav. 191).

Form of Pleadings.

Declaration.] The venue is transitory (Griffith v. Walker, 1 Wils. 336; Bac. Abr. Escape, S.). It is necessary to allege that the plt. had a cause of

action against the deft. in the original action, or deft. may demur (Gunter v. Clayton, 2 Lev. 85; 4 T. R. 611; 2 Saund. 150); and, in laying a time to such fact, in order to avoid an unnecessary statement of different days, it is advisable to insert the teste of the writ, or the day it issued; and the former is preferable. The subject-matter of the debt, and a promise to pay it, have been usually stated, but this seems to be unnecessary; and it suffices to allege generally that the plt. had a cause of action, without minutely stating it, as in an action against deft. himself (Com. Dig. Pleader, 2 P. 1, & E. 18; 8 T. R. 127). It is not necessary to state the precise sum due (Gunter v. Clayton, 2 Lev. 85): as to the statement of it see Nightingale v. Wilcoxson, 10 B. & C. 215. If the nature of the debt be stated, it must be proved as stated; as, if the declaration state the debt to be for goods sold, it must be so proved (2 Esp. Ca. 476); and if, in that case, it should appear they were sold on credit, it would be a variance (5 Esp. 102; see Pea. 117). Where it is expected that the sheriff will suffer judgment by default, it is often advisable to state the nature of the debt more fully, as some evidence may thereby be avoided (2 Ch. Pl. 738, n. (c)). When the party proceeds in an inferior court, it should be stated that the debt accrued within the jurisdiction, though the omission will be aided after verdict (Bentley v. Donnelly, 8 T. R. 127; 2 Saund. 109, n. 2; 1 Saund. 74, n. 1; Bac. Abr. Escape, A. 1; Read v. Pope, 1 C. M. & R. 302; 4 Tyrw. 403). The issuing and delivery of the process against the original deft. is next stated. This must agree with the facts; a material variance would be fatal. See the observation and cases collected (*ante*, pp. 307, 308), as to the statement of the writ in an action on a bail-bond, which will be here applicable. In addition to those cases, it has been held, that, where a *latitat* in trespass with an *ac etiam* was stated to be a *latitat* in a plea of trespass, the variance was held fatal (Gunter v. Clayton, 2 Lev. 85; B. N. P. 66). On the other hand, where it was stated that the plts. sued out an attachment of privilege, "by which said writ our said lord the king commanded the defts., &c., to attach A. B., &c., to answer the said plts. in a plea of trespass on the case, to the damage of the said plts. of 30*l.*, &c.," and the writ produced did not contain the words, "to the damage, &c.," it was held no variance (Cousins v. Brown, Moo. & M. 291). As to the statement of the indorsement for bail, see *ante*, p. 309. The allegation that the debt was sworn to is unnecessary, and should be omitted, as it requires proof as stated (Wilcoxson v. Nightingale, 10 B. & C. 202; in error, 4 Bing. 501; and see 1 Burr. 330).

If it be averred that J. S. was arrested "under a writ indorsed for bail, by virtue of an affidavit now on record," he must produce the affidavit in evidence (Webb v. Horne, 1 B. & P. 281; 2 Esp. 671). The production of an office copy will suffice (Casbun v. Reed, 2 Moo. 60). The declaration stated a writ "of the King;" on the trial, it appeared the writ was tested in the name of the Chief Justice, and with a proper date, but of Geo. the third, instead of Geo. the fourth: held, no variance (Elvin v. Drummond, 4 Bing. 278; 1 Moo. & P. 88; 12 Moo. 523). *Semble*, the allegation of a *judgment recovered in H. T. 2 Geo. IV., was proved by a [*1068] record of a judgment recovered in H. T. 1 & 2 Geo. IV. (Ben-nett v. Isaac, 10 Pri. 154).

As to the statement of the delivery of the writ to the sheriff, &c., see *ante*, p. 309.

In an action against the sheriff, it is usual to insert three counts in the declaration: 1st, for an escape; 2ndly, for not arresting the deft. when there was an opportunity; and, 3rdly, for not assigning the bail-bond on request, when, indeed, it is supposed there has been such bond; and, as each of these counts is substantially for a different cause of action, all may still be retained.

In the count for an escape, it must be alleged that the original deft. was arrested, and that the sheriff, against the plt.'s license, permitted the escape. An averment in this respect that the sheriff *voluntarily* permitted the escape, will be supported in evidence by proof of a negligent escape, and so *vice versa* (1 Vent. 217; 3 Keb. 55; 2 T. R. 126). In an action against a sheriff for not arresting the deft. when he had an opportunity, it should be alleged that the deft. was within the sheriff's bailiwick, and might have been arrested if the sheriff had chosen so to do, and yet the sheriff would not arrest. It is not necessary in such action to aver that the sheriff had notice of the deft.'s being in the bailiwick (5 D. & R. 95). In an action for an escape from custody on an attachment for non-payment of costs, pursuant to a decree in equity, a count alleging the suit "to have been commenced, and pending," is supported by proof of the order of attachment, the certificate of the Master's taxation, and of the decree itself (Blower v. Hollis, 3 Tyrw. 356; 1 Cr. & J. 393).

Plea.] The plea of the general issue will, in this action, in general suffice, as in other actions on the case (*ante*. "CASE").

The deft. pleaded, that before the alleged escape, and before the expiration of eight days from the arrest, he took a bail-bond, duly subscribed, with a condition according to the form of the stat., &c., and assigned it to the plt., which the plt. took; and the replication traversed, that any condition was subscribed according to the form of the stat., &c.; held, that the deft. did not support his issue by producing a bail-bond, which was regular in all respects, except that in the recital of the condition, the writ, &c. was said to be delivered "to the said ———;" and, that in the operative part of the condition, the words were, "if the said ——— do cause special bail, &c.;" the prisoner's name being omitted in these two places only (Holden v. Raphael, 4 Ad. & E. 228).

Precedents.

For an escape on mesne process.

[*Venue. Commencement, as ante*, "CASE."] For that whereas heretofore to wit on &c. (date of writ) one E. F. was indebted to the plt. in a large sum of money to wit the sum of £ for and in respect of divers causes of actions before then accrued to the plt. against the said E. F. and the said E. F. being so indebted the plt. on &c. (*State the issuing of the capias, the indorsement for bail, the delivery to the sheriff, and the arrest, and which may be done in the same way as ante*, p. 315, in a declaration on a bail-bond; after which, proceed as follows:) Yet the now deft. so being sheriff of the said county of

as aforesaid not regarding the duty of his office as such sheriff but contriving and intending wrongfully and unjustly to injure the plt. and to delay and hinder him in and from the recovery of his said debt afterwards to wit on the day and year last aforesaid

without the leave or license and against the will of the plt. voluntarily suffered [*1069] *and permitted the said E. F. to escape and go at large wheresoever he would out of the custody of the now deft. so being such sheriff as aforesaid the said debt for which the said E. F. was so arrested as aforesaid and every part thereof then and still being wholly unpaid to the plt. And the plt. in fact saith that the said E. F. did not cause special bail to be put in for him in the said court to the said action or otherwise obey the said writ according to the exigency thereof but therein wholly failed and made default whereby the plt. hath been and is greatly injured and delayed in the recovery of his aforesaid debt and is likely to lose the same and thereby also the plt. hath lost and been deprived of the means of recovering his costs and charges by him incurred paid laid out and expended in and about his said suit so commenced and prosecuted against the said E. F. as aforesaid amounting together to a large sum of money to wit the sum of £

Count for not arresting debtor when there was opportunity.

[*Proceed as pointed out in the preceding precedent to the end of the statement of delivery of writ to sheriff, and then as follows:*] And the plt. saith that the said E. F. at the time of the delivery of the said last-mentioned writ to the deft. so being such sheriff as aforesaid and from thence to wit for one calendar month then next following was within the said sheriff's bailiwick and the deft. as such sheriff at any time during that period could and might and ought to have taken and arrested the said E. F. by virtue of the said last mentioned writ at the suit of the plt. if he would so have done whereof the now deft. during all that time had notice yet the now deft. not regarding the duty of his said office but contriving and intending wrongfully and unjustly to injure the plt. and to delay and hinder him in and from the recovery of his debt last aforesaid did not nor would (at any time whilst the said last-mentioned writ was in full force although often requested so to do) take or cause to be taken the said E. F. as by the said last-mentioned writ he was commanded but therein wholly failed and made default and the said E. F. did not cause special bail to be put in for him in the said action in the said court of our said lady the Queen according to the exigency thereof or otherwise observe the requisition of the said writ but therein &c. (*Same as in the preceding precedent to the end.*)

For not assigning a bailbond.

[*Proceed as in the count, ante, p. 1068, to the end of the statement of the arrest, and then as follows:*] And the plt. further saith that the said E. F. being so arrested and in custody of the deft. so being such sheriff as aforesaid under and by virtue of the said writ he the deft. as such sheriff afterwards and before the return of the said last-mentioned writ to wit on &c. (*date of bail-bond*) took bail for the appearance of the said E. F. in the said court of our said lady the queen before the queen herself at the return of the said writ according to the form of the statute in such case made and provided and he the deft. on that occasion then to wit on the day and year last aforesaid took of the said E. F. and two other persons as his sureties or bail according to the form of the said statute a certain writing obligatory commonly called a bail-bond in the penal sum of £ lawful money of Great Britain conditioned for the said E. F. causing special bail to be put in for him to the said action in her said majesty's said court as required by the said writ. And although the plt. by his attorney in that behalf did afterwards and whilst the deft. was such sheriff as aforesaid to wit on &c. (*day of request, or about it*) request the deft. to assign the said bail-bond to him the now plt. being the plt. in the said action according to the form of the statute in such case made and provided and although the now plt. was then ready and willing and then offered to pay the now deft. the costs payable to him in that behalf according to the form of the said last-mentioned statute yet the deft. so being such sheriff as aforesaid not regarding the duty of his said office as such sheriff nor the statute in that case made and provided but contriving and wrongfully and unjustly intending to injure the plt. in this behalf and to hinder and prevent him from bringing any action or actions on the said writing obligatory and to deprive him of the means of recovering the damages (*if in debt, say, debt and damages*) aforesaid did not nor would at the said time when he was so requested as aforesaid assign the said bail-bond to him the plt. but on the contrary thereof then wholly refused and hath from thence hitherto wholly *neglected and refused so to do and by means of the premises last aforesaid he the plt. hath been and is hindered and prevented from bringing any action [*1070] or actions on the said writing obligatory and hath been and is deprived of the means of recovering the said damages (*if in debt say, debt and damages*) and is likely to lose the same. (*Conclude as usual.*)

See other forms, 2 Ch. Pl. 555. The Queen's Bench, Fleet, and Marshalsea prisons are abolished, as also the Liberty of the Rules; see 5 Vict. c. 22.

Case against sheriff for the escape of H. M. in execution upon a judgment at the suit of plt. Plea in bar, the coverture of plt. at the time of the accruing of the debt, for which judgment was recovered against H., and thence hitherto, held ill (*Morgan v. Cubitt*, 14 Law J. 287, Exch.). The attorney of the plt. has no authority to order the discharge of the deft. out of custody upon final process, except upon payment of the debt and costs, and the sheriff will be liable for an escape, if he discharge the deft. out of custody on the direction of plt.'s attorney, unless on these terms (*Connop v. Challis*, 2 Ex. 484).

It is a good plea under 5 & 6 Vict. c. 122, s. 23, that a fiat had issued under which the prisoner has been, by the proper court, declared a bankrupt; that he had been arrested while returning from his surrender, and that, on production of his summons, duly signed, the deft. had discharged him without averring that he had been duly declared bankrupt (*Norton v. Walker*, 6 D. & L. 204; 18 Law J. 234, Exch.).

Evidence for Plaintiff.

In Action for Escape.] In an action against a sheriff for an escape on mesne process, the cause of action in the original suit, the issuing and delivery of the writ to the deft., and the arrest, escape, and damage, must be proved.

There must be a debt due to the plt. by the party arrested at the time of the arrest (*Alexander v. Macauley*, 4 T. R. 611; *White v. Jones*, 5 Esp. 160); and the same cause of action must be proved as the plt. has stated in his declaration (*Parker v. Fenn*, 2 Esp. 476); though it need not be proved to have been for the specific sum mentioned in the pleadings (*Gunter v. Cleyton*, 2 Lev. 85; B. N. P. 66). Any evidence which would be admissible against the deft. in the original action will be evidence against the sheriff (*Gibbon v. Coggon*, 2 Camp. 188). An acknowledgment by the party after his arrest, but previous to his escape, will be evidence of the debt against the sheriff (*Sloman v. Herne*, 2 Esp. 695; *Rogers v. Jones*, 7 B. & C. 86; 5 D. & R. 484; *Williams v. Bridges*, 2 Stark. 42). See *ante*, p. 1067, as to variance in statement.

The *process* must be proved as alleged in the pleadings: as to what is a variance, see *ante*, p. 1067. Where it was alleged that the party was arrested "under a writ indorsed for bail, by virtue of an affidavit now on record," but no proof of the affidavit was produced at the trial, the Court of Common Pleas held, that the plt. had been properly nonsuited (*Webb v. Middlesex (Sheriff of)*, 1 B. & P. 281; 2 Esp. 671). But, where it was alleged that the writ was marked for bail "by virtue of an affidavit of the cause of action of the plt. in that behalf, before then made, and duly filed of record in this court, according to the form of the statute," it was held, a copy of the affidavit was sufficient to prove the averment (*Casburn v. Reid*, 2 Moo. 60). Where it was alleged, in a declaration against the marshal, that the party was arrested and gave bail, that afterwards bail above was put in before a judge at chambers, as appears by the record of the recognizance," that the party surrendered in discharge of bail, and afterwards escaped, this averment was held not to be proved by the production of the filazer's book, the entry therein importing that the recognizance was taken before a single judge, an examined copy of the entry of the recognizance of bail, stating that it was taken before the court at Westminster, having also been given in evidence (*Bevan v. Jones*, 4 B. & C. 403; *Wigley v. Jones*, 5 East, 440; *Bromfield v. Jones*, 4 B. & C. 380). Where the process has been returned and filed, an examined copy of the writ and return will be evidence of the issuing and delivery (B. N. P. 66; *Blatch v. Archer*, Cowp. 63; *Jones v. Wood*, 3 Camp. 229, 397; 1 Esp. 269). The return of *cepi corpus*, coupled with evidence of an answer received at the sheriff's office that no bail was executed, is evidence to go to the jury in an action against the sheriff for the escape (*Neck v. Humphreys*, 3 Ad. & E. 130). The plt. proved the arrest, by producing the return of *cepi corpus et paratum habeo*: [*1071] *held, that the latter words did not conclude the plt. from proving the escape, by parol evidence that the prisoner was at large after the return, and no bail lodged with the sheriff (*Ib.*). Where the writ has

not been returned, secondary evidence will be admissible, after due search at the Treasury Office, and proof of its having been delivered to the sheriff or under-sheriff, or at the sheriff's office, and notice given to produce the original (2 Ph. Ev. 222). A delivery to the deputy of a country sheriff in London, is a delivery to the sheriff (*Woodland v. Fuller*, 11 Ad. & E. 859).

As to what constitutes an arrest, see *post*, "MALICIOUS ARREST." A party arrested in an action, is in custody, under all writs delivered to the sheriff, if the first arrest be legal (*Collins v. Yuens*, 10 Ad. & E. 570). The plt. proved the sheriff's return of *cepi corpus* to the writ, and proved that the deft. in the former action did not put in bail above, and was not in the sheriff's custody at the return of the writ: held, the arrest, escape, and non-appearance according to the exigency of the writ, were sufficiently proved (*Fairlie v. Birch*, 3 Camp. 397). The return binds the sheriff both as to the fact and time of arrest (*Cook v. Round*, 1 Moo. & R. 512).

The *escape* must be proved, by showing directly that the party was in the custody of the sheriff or his officer, or else that the sheriff returned *cepi corpus*, and that the party was at large after the return of the writ (*Atkinson v. Matteson*, 2 T. R. 172; *Hawkins v. Plomer*, 2 Bla. 1048); or that the bail has not been put in and perfected; or that it has been put in, but of a term subsequent to the return of the writ (*Moses v. Norris*, 4 M. & S. 397; *Fairlie v. Birch*, *supra*). And the return *cepi*, coupled with an answer given at the sheriff's office, that "no bail-bond was executed," is evidence of an escape, though the return includes the words *paratum habeo* (*Neck v. Humphrey*, 3 Ad. & E. 130). It is an escape, for the gaoler to take the party out of prison, for however short a period, though he is never out of the gaoler's custody (*Williams v. Mostyn*, 4 M. & W. 145). Where the declaration alleged a taking in execution of A. and his wife, and an escape of both, it is enough to prove that A. alone was taken in execution for a debt of his wife before coverture (B. N. P. 65). Where the declaration was for an arrest, and the evidence proved a negligent omission to arrest, it seems the variance may be amended by the judge of assize (*Guest v. Elwes*, 5 Ad. & E. 118). The under-sheriff's admission of an escape is evidence against the sheriff (B. N. P. 66); and the party escaping may be called to prove a voluntary escape (Ib. 67); for, although the whole debt may be recovered in an action against the sheriff, yet in an action against the original debtor for the debt, he can neither plead in bar, nor give in evidence in reduction of damages the judgment obtained in an action against the sheriff (*Hunter v. King*, 4 B. & Ad. 210).

The sheriff must be connected with the officer who suffered the debtor to escape, or who refused to arrest him, by proving the issuing of a warrant from the sheriff's office to arrest the deft. (see *post*, "SHERIFF").

In an action for not *arresting debtor*, where those facts are put in issue, the original debt, the issuing of the writ, and delivery of it to the sheriff, must be proved, as *supra*. Whatever evidence would be sufficient to charge the debtor in an action brought against him by the plt. will be sufficient evidence of the debt against the sheriff in this action (*Sloman v. Herne*, 2 Esp. 695; *Gibbon v. Coggon*, 2 Camp. 188). An admission by the debtor will suffice (*Rogers v. Jones*, 7 B. & C. 86). Prove the issuing of the process, and delivery of it to the sheriff. If the writ be returned, give in evidence an *examined copy of it, and the return, or serve a notice to produce if it be in deft.'s possession, which it will be presumed to be on [*1072] showing a delivery of it to the under-sheriff, a breach for it, and that it does not appear to be returned (see "SECONDARY EVIDENCE"). The opportunity for the arrest must be fully shown, as also that the deft., or

under-sheriff, or bailiff, who has the execution of the writ, knew of the debtor's being within the bailiwick (2 Ph. Ev. 222). It is the officer's duty to search and make the arrest. The usual proof, in such action, is, that the bailiff was informed where the debtor was. Notice to the under-sheriff's agent in town, will not be sufficient notice to the sheriff (Gibbon v. Coggon, 2 Camp. 189). And it does not appear that the plt. is bound to give this notice to the sheriff (Dyke v. Duke, 4 Bing. N. C. 197; see Brown v. Jarvis, 1 M. & W. 713); and he is bound to execute the writ as soon as he can (Ib.; Randell v. Wheble, 10 Ad. & E. 719).

A sheriff is not liable under the Uniformity of Process Act, 2 Will. IV. c. 39, for neglecting to arrest on a *capias ad respondendum* within the four months, unless special damage accrue; and, *semble*, that he is in no case liable, unless it appears that he has been guilty of some default when the writ was returnable, either on his being ruled to return, or at the expiration of four months (Randell v. Wheble, 2 P. & D. 602; 10 Ad. & E. 719). Therefore, where a declaration alleged that a writ of *capias ad respondendum* was delivered to the sheriff to be executed against R. T., and that the sheriff did not arrest in a reasonable time, and that R. T. did not cause bail to be put in according to the exigency of the writ, whereby the plt. was injured, and likely to lose his debt: held, that the action was not maintainable, as it was consistent with the facts alleged that the sheriff might have arrested R. T., after the negligence averred, so as to enable the plt. to have proceeded with his original action as speedily as if the sheriff had made the arrest on the first opportunity (Randle v. Wheble, *supra*).

On a writ of *ca. sa.*, indorsed to be returned *non est inventus*, it is the duty of the sheriff to take the debt, if he surrenders, but not to search for him (Magnay v. Monger, 4 Q. B. 817).

The general issue in this action would seem to put in issue the breach of duty of the debt., in neglecting to arrest the debtor when he might have done so; and it admits the debt, and the issuing and delivery of the writ. It is no defence that the debtor was arrested the day after the return of the writ, though it may affect the damages (Barker v. Green, 2 Bing. 317; but see Brown v. Jarvis, 1 M. & W. 704). Nor is it any answer that the plt. never furnished the sheriff with any description of the debt., and after the delivery of the writ countermanded the arrest (Dyke v. Duke, 4 Bing. N. C. 197). As to the competency of witnesses, see 6 & 7 Vict. c. 85.

If the sheriff, having a writ of execution delivered to him, unnecessarily delay putting it in force, an action on the case lies against him at the suit of the execution creditor, though no actual pecuniary damage has arisen from the default. The measure of damages for such default is not necessarily the whole debt, but such a sum as the jury think equivalent to the real loss. If there has been no actual loss, still, in the case of final process, the plt. must have nominal damages. It is sufficient in such action, if the jury find that the sheriff could have executed the process and omitted doing so; it need not be expressly found that he ought to have executed (Clifton v. Hooper, 6 Q. B. 468).

In an action for not *assigning the bail-bond*, the original debt, and issue and delivery of the writ, must be proved, as *ante*, p. 1070. The [*1073] *arrest, and giving the bail-bond, must also be proved, together with the demand and refusal to assign the bond. Notice to produce the bail-bond should be given, and the service of such notice proved.

Damages.] The plt. is entitled only to such damages as he can show he has sustained. Any special damage sustained by the escape should be proved. If he have lost the whole debt, the jury must give him damages to that extent;

if he can still recover his debt, the damages may be diminished accordingly (Scott v. Henley, 1 Moo. & R. 227; Morris v. Robinson, 3 B. & C. 206); and no action lies unless there be proof of actual damage (Williams v. Mostyn, 4 M. & W. 145; Brown v. Jarvis, 1 M. & W. 704; see Barker v. Green, 2 Bing. 317, where it was held the plt. would be entitled to nominal damages; see also Wylie v. Birch, 12 Law J., N. S., Q. B. 260; Clifton v. Cooper, *ante*, p. 1072). Where the deft., instead of pleading not guilty, takes issue on some collateral matter, some damages, if alleged in the declaration, will be presumed (Brown v. Jarvis, *supra*; see *post*, p. 1083).

Admissions of Under-Sheriff.] An acknowledgment of an escape by an under-sheriff, will be evidence in an action against the sheriff (Yatsley v. Doble, 1 Ld. Raym. 190; B. N. P. 66); but, on proof that inquiry had been made at the sheriff's office for the bail-bond, and the clerk had answered that there was bail-bond, Lord Ellenborough held it insufficient evidence to support the action against the sheriff (Mendez v. Bridges, 5 Taunt. 325). The bailiff's general conversation with any indifferent person is not evidence against the sheriff; but, where a thing is carried on by one *quasi* principal, what he says, in the course of the transaction, has been held, on great consideration to be evidence against those he represents (per Lord Ellenborough, North v. Miles, 1 Camp. 390). So, the mere admission of a sheriff's bound bailiff is not evidence, until he be identified with the sheriff, and the privity existing between him and the sheriff be established in the particular transaction (Drake v. Sykes, 7 T. R. 113; North v. Miles, 1 Camp. 389). Declarations made by a sheriff, while the debtor is in custody, are admissible against the sheriff for an escape (Bowsher v. Calley, 1 Camp. 391, n.; *ante*, "ADMISSIONS"). The party escaping may be called to prove a voluntary escape (B. N. P. 66), for though the whole debt may be recovered against the sheriff, yet in an action against the debtor for the debt he can neither plead in bar nor give in evidence, in reduction of damages, the judgment obtained in the action against the sheriff (Hunter v. King, 4 B. & A. 210).

Evidence for Defendant.

By the New Rules H. T. 4 Will. IV., in actions on the case for an escape, the plea of not guilty shall only operate as a denial of the neglect or default of the sheriff, or his officers, but not of the debt, judgment, or preliminary proceedings; so that the default of the sheriff in suffering the escape, and the damage, are alone put in issue under this plea.

In an action against the sheriff for an escape on mesne process, he may show that, although no bail-bond was in fact taken, yet that bail was put in and perfected, or that the party rendered himself before the time for bringing in the body had expired (Pariente v. Plumtree, 2 B. & P. 35). Where deft. pleads that before the escape he took a bail-bond with a condition according to the statute, &c., which he assigned to the plt., and the replication denies that there was any such condition, the issue is not supported *by the deft.'s producing a bond in the condition, of which the pri- [*1074] soner's name is left in blank in two places (Holden v. Raphael, 4 Ad. & E. 228). The sheriff may also prove, in defence, that the deft. in the original action was rescued (May v. Proby, Cro. Jac. 419); or that he rescued himself by force (Fermor v. Phillips, Holt, 537). The fact of the rescue having been effected, must be proved; the mere return by the sheriff, of a rescue, is not conclusive (Adey v. Bridges, 2 Stark. 189). If the rescue have taken place after the party has been within the walls of a prison, it will not be an available defence, except it be by the king's enemies (B. N.

P. 63; *Alsept v. Eyles*, 2 H. Bl. 113). If the party escape by the prison taking fire, it will be a good defence (1 Rol. Abr. 808, D. pl. 6; B. N. P. 65); so he may show that the escape was by fraud and covin of the party really interested in the judgment (*Hiscocks v. Jones*, Moo. & M. 269). The sheriff may show that the party was arrested by the bailiff of a liberty on a mandate from the sheriff, in which case the bailiff alone is liable (B. N. P. 69; *Noy*, 27; 3 Wils. 309). It is a good defence that the bailiff who permitted the escape, was the bailiff appointed at the special instance and request of the plt. (*Ford v. Leche*, 6 Ad. & E. 699); and this may be given in evidence under the general issue; otherwise, if the plt. merely suggested the employment of a particular officer (*Ib.*; *Balson v. Meggat*, 4 Dowl. 557; see *Doe v. Trye*, 5 Bing. N. C. 573; see *Pascoe v. Vyvyan*, Dowl. N. S. 939). But it will be no defence to show, that plt. was cognizant of the escape, and yet proceeded to judgment, but had not charged the debtor, who returned to gaol in execution (*Ravenscroft v. Eyles*, B. N. P. 69). In an action against the sheriff for an escape in not taking a bail-bond, he may show that good bail was put in and justified, in the room of bail before put in, who, by the practice of the court, were a mere nullity (*Allingham v. Flower*, 2 B. & P. 246). The sheriff will not be liable if a bail-bond have been given for deft.'s appearance at the return of the writ, though deft. do not appear, as it is peremptory on him to take bail (*Posterne v. Hanson*, 2 Saund. 61; *Ellis v. Yarborough*, 1 Mod. 227; *Barton v. Aldeworth*, Cro. Eliz. 624); but it will be otherwise if he have not taken a bail-bond, or bail be not put in and perfected in due time (*Fuller v. Prest*, 7 T. R. 109; *Webb v. Mathews*, 1 B. & P. 225; *Atkinson v. Matteson*, 2 T. R. 176); and it will be no defence, if the sheriff have taken a bail-bond, if the deft. do not appear at the return of the writ, and the sheriff refuse to assign the bond (*Stamper v. Milbourne*, 7 T. R. 122; *Mendez v. Bridges*, 5 Taunt. 325); nor that the sheriff's officer refused to arrest the deft. in the original action, if notice was given him that the party was in this county (*Watson*, Shff. 128). But where the sheriff, having a writ against G. B., arrested M. B., who was the real debtor, and, at the time of contracting the debt, had represented himself as G. B., it was held, that the sheriff, having been informed of these circumstances, while the real debtor was in his custody, was not bound to detain him; and, therefore, no action could be maintained against the sheriff for an escape (*Moogans v. Bridges*, 1 B. & A. 647).

Recaption.] The sheriff may show that, though the party had been at large, yet he was retaken previous to the return of the writ (*Atkinson v. Matteson*, 2 T. R. 172; Rol. Abr. 808; *Whiting v. Reynell*, Cro. Jac. 657; and see *Stonehouse v. Mullins*, 2 Stra. 873); and, where the party escapes without the privity of the sheriff, he may be re-taken before or after the return of the writ (Com. Dig. Escape, E.; Anon. 6 Moo. 231; *Featherstonhaugh v. Atkinson*, Barnes, 373); *Atkinson v. Jameson*, 5 T. R. [*1075] 25; *see *Anderson v. Hampton*, 1 B. & A. 608; but see *Filewood v. Clement*, 7 Dowl. 507). There cannot be a recaption for the fees due to the sheriff after the party has been discharged out of custody, by consent of the plt. (*Willing v. Goad*, Stra. 909); and, where the sheriff had put in bail above, and discharged the deft. without a bail-bond, they may surrender him (*R. v. Butcher*, Pea. 226; *Evans v. Swete*, 2 Bing. 271; *Berchere v. Colston*, Stra. 876).

ESCAPE ON FINAL PROCESS.

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EVIDENCE FOR DEFENDANT, p. 1083.

Competency of Witnesses, p. 1085.

Form of Remedy.

Formerly the form of remedy by action, for an escape on final process, was debt or case (Cro. Jac. 289). At common law, no action of debt lay against a gaoler for an escape out of execution, but only an action on the case (2 Inst. 382); in which case the creditor might recover damages for the officer's misconduct. But the stats. of West. 2 and 1 R. 2, c. 12, gave an action of debt against the warden of the Fleet, sheriff, or gaoler, to recover at once the sum for which the prisoner was charged in custody (see 2 T. R. 132). Debt lay by these statutes, as well where the escape was negligent as where it was voluntary (2 Stra. 827; 2 H. Bl. 108); but it lay not against a sheriff for omitting to arrest a party on a *ca. sa.* when he had an opportunity; and, in that case plt. should declare in case (2 Bl. R. 1048; ib. 113). Debt was the most preferable form of remedy, as the plt. was entitled to recover the whole debt and the sheriff's poundage (*Bonafous v. Walker*, 2 T. R. 129; *Alsept v. Eyles*, 2 H. Bl. 113; 2 Bl. R. 1048). Whereas, in an action upon the case, he could recover such damages only as the jury were inclined to give (*Bonafous v. Walker*, 2 T. R. 130); and, moreover, in the action of debt, the Statute of Limitations was no defence (*Jones v. Pope*, 1 Sid. 306). But now by 5 & 6 Vict. c. 98, s. 31, if a debtor in execution escape out of legal custody, the sheriff, bailiff, or other person having the legal custody, shall be liable only to an action on the case for damages sustained by the person at whose suit the debtor was taken or imprisoned, and shall not be liable to an action of debt.

The sheriff's remedy against the party escaping, where he has sustained damage, is by action on the case against him for such damage (*Watson, Shff.*, 142). As to when the sheriff may retake the debt, see *ib.* 141.

*By 1 Anne, stat. 2, c. 6, s. 2, a remedy is given against sheriffs who permit the escape of persons who have been retaken on an [*1076] *escape-warrant* authorized by that act.

The marshal of the Queen's Bench prison is not liable to an action of escape for obeying the warrant of commissioners of bankruptcy in bringing before them a bankrupt confined in his custody, charged in execution in order to be examined on the second day of the meeting of the commissioners, though it is not the last day of examination (*Spence v. Jones*, 1 D. & R. 377; 5 B. & A. 705). Where a sheriff, in obedience to a warrant from a

commissioner of bankruptcy, brings a party whom he has in custody in execution for debt beyond the limits of his county, in order to be examined by the commissioner, he is bound to take such prisoner back again within a convenient time after the examination is over; but, during the time the prisoner is so necessarily beyond the limits of the sheriff's county, it is sufficient if he is accompanied and closely watched by the officer, and it is no escape by the sheriff that such prisoner is during that time allowed to go about with the sheriff's bailee to several places, and to dine and sleep at an inn (*Niass v. Davis*, 2 C. & K. 280; 11 Jur. 472, C. B.).

With respect to the party by whom this action may be brought, the proper person is the plt. or plts. in the original action. The nominal plt., in an action for mesne profits, may sue for an escape on a judgment therein (2 M. & S. 473). An executor may maintain the action for an escape in his testator's lifetime (*Berwick v. Andrews*, 2 Ld. Raym. 973; S. C. 6 Mod. 125). On an escape on a judgment obtained by plt., as administrator, he may sue in his own personal right (2 T. R. 126). The hundred may sue for an escape on a judgment obtained by them (Fitzg. 296). If, while the deft. be in custody of the sheriff, in an action at the suit of A., a writ be lodged in the office of the sheriff, at the suit of B., and the deft. escape, B., as well as A., may sue for the escape (*Barton v. Sutton*, 1 B. & P. 24; Salk. 273).

The action should be brought against the superior, and not the inferior, officer or gaoler who permitted the escape (see cases in *Watson*, Shff. 144, 145). The 59 Geo. III. c. 64, renders the warden of the Fleet liable for an escape in vacation. Where there are two sheriffs, who suffer an escape, and one dies, the action lies against the survivor; or if, pending the action, one dies, the action survives (*Cro. Eliz.* 625). If the old sheriff, at the expiration of his office, omit to turn over a prisoner, by assignment, to the new sheriff, he is liable for an escape (*Westley's case*; and see *Davidson v. Seymour*, Moo. & M. 34, 35, n.; 3 & 4 Will. IV. c. 99, s. 7; 3 Rep. 71 b; and see further, *Watson*, Shff. 145). By 3 Geo. I. c. 15, s. 8, in case of the death of the sheriff, the under-sheriff is liable for escape after that time. Neither the heir nor executor of the sheriff are liable (*Dy.* 271, 322 a; 1 Ld. Raym. 399; *Berwick v. Andrews*, *supra*; 1 Ch. Pl. 101). As to the late or present sheriff's liability, see *Harrison v. Paynter*, 6 M. & W. 387.

Form of Pleadings.

Declaration.] Great attention must be paid to setting out the proceedings accurately; it must be shown the escape was on final process; and, for this it is necessary to insert an allegation that a judgment was recovered. The mere averment of *quod cum recuperisset* has been held sufficient, without a *prout patet per recordum*, as the gist of the action is the escape, and the commitment only inducement (*Waites v. Briggs*, 2 Salk. 565; S. C. 1 Ld. Raym.

35; *Eden v. *Lloyd*, Cro. E. 877). The judgment should be stated [*1077] accurately, but it suffices if the judgment be substantially proved as stated. Where the plt. alleged that the judgment was recovered as of Trinity Term, "as appears from the record," and the proof was of judgment in Easter Term, it was, nevertheless, held good, as the words "as appears by the record" might be rejected as surplusage (*Stoddard v. Palmer*, 3 B. & C. 2; S. C. 4 D. & R. 624; *Purcell v. Macnamara*, 9 East, 157; *Phillips v. Shaw*, 5 B. & A. 435; S. C. 5 B. & A. 964). So, where a declaration stated, "that the plt., in E. T. 5 Geo. IV., recovered in K. B. against one H. W., as by the record appeared, that in T. T. in the same year such proceedings were had in the said court, that it was considered the plt. should have execution against the said H. W. for the damages aforesaid, as by the

record of the said last-mentioned proceedings still remaining in the said court appears, and therefore, on, &c., in T. T. in the same year, the said H. W. was committed to the custody of the marshal, in execution and escape," the original judgment was proved, and that a *committitur* issued thereon, but no judgment in *sci. fa.* was proved: it was held sufficient, the latter judgment being immaterial (*Bromfield v. Jones*, 4 B. & C. 380; S. C. 6 D. & R. 500). But though an allegation of this nature be merely inducement, yet, in some cases, strict proof of it will be necessary, as where, in a declaration for an escape, it was alleged, "that one S. S. was arrested and gave bail, and that afterwards bail was put in before a judge at chambers, as appears by the record of the recognizance," it was held, *plt.* was bound to prove bail put in as alleged, and that such allegation was not established by production of the filazer's book, wherein it appeared that the recognizance was taken before a single judge, when there also was produced an examined copy of the entry of recognizance of bail, by which it appeared that the recognizance was taken before the court at Westminster (*Bevan v. Jones*, 4 B. & C. 403; S. C. 6 D. & R. 483). And so, an allegation with a *prout patet*, &c., that the *plts.*, by the judgment of the court, recovered against the bail, is not proved by the production of the recognizance of bail and the *sci. fa.* roll, which latter concluded in the common form; as the proof was merely of an award or judgment of execution by the court, and not a judgment to recover (*Phillips v. Mangles*, 11 East, 516). Stating the judgment to be on certain "promises and undertakings," when it was only on a "promise and undertaking," would be a variance (*semble*, *Edwards v. Lucas*, 5 B. & C. 339; 8 D. & R. 98). Stating a judgment in K. B. to be recovered "in the Court of the Bench," would be bad (*Mill v. Pollon*, 1 Moo. 19; S. C. 7 Taunt. 271).

In an action against the sheriff, after stating the judgment, the writ, and delivery thereof to the *def.*, should be stated accurately. As to what a variance, see *ante*, p. 1067. Correctly stating the writ in substance will suffice. The word "damage," when the writ is damages and costs, is not a variance (*Phillips v. Bacon*, 9 East, 298.) The writ may be described as issued to the sheriff, naming him (*Batchellor v. Salmon*, 2 Camp. 525). Though it be stated that the *def.* was sheriff, after the return of the writ, it is no variance, though the *def.*'s shrievalty expired before the return (*semble*, 3 D. & R. 483). It is an essential fact to be established by the *plt.*, that at the time of the escape the *def.*, in the writ was in the legal custody of the sheriff, at the suit of the *plt.*, under the writ (*Duffy v. White*, 1 Alc. & Nap. (Ir.) 1; *Rogers v. Jones*, 7 B. & C. 86). The absence of an allegation to that effect would render the declaration bad on general demurrer (*lb.*).

In an action against the marshal or warden, the mode in which
 *the original *def.* came into their custody, if stated, should be cor- [*1078]
 rectly so. If he was in custody under a *committitur*, the same
 should be stated to be of record (*Wightman v. Malleus*, 2 Stra. 1226).
 According to the language of the entry of the *committitur*, a reference to the
 record of the *committitur* should be made, to avoid a special demurrer,
 though the omission of it would be cured by verdict (*Barnes v. Eyles*, 3
 Taunt. 512; 2 Moo. 561; *Turner v. Eyles*, 3 B. & P. 456; and see 3 D. &
 R. 597). Where a declaration alleged that the prisoner was by *habeas corpus*,
 brought before a judge of King's Bench, by him committed to the
 custody of the marshal, "as by the said writ of *habeas corpus*, and the said
 commitment thereon, now remaining in the said court, more fully appears,"
 such allegation was not proved by evidence of a commitment by a judge of
 King's Bench, but not filed of record (*Turner v. Eyles*, 3 B. & P. 456; *Wig-
 ley v. Jones*, 5 East, 440). If a prisoner be removed by *habeas corpus* from

the King's Bench to the Common Pleas, the plt. need not show a process in the Common Pleas against the prisoner (*Gambier v. Wright*, 2 Stra. 950; Com. Dig. Escape, C.).

In an action against the bailiff of the liberty of P., in the county of M., for the escape of a prisoner in execution, the declaration alleged a mandate by the sheriff of Y. to the deft., "as chief bailiff of the liberty of P., or his deputy," to take W. T. if found in his liberty, &c. The instrument produced in proof of the averment was in the form of a common sheriff's warrant, and was addressed by the sheriff to the keeper of the county jail, "the chief bailiff of P., his deputies, and J. D., my bailiffs;" and commanded them jointly and severally to take W. T., if found "*in my bailiwick*," &c., "that I may have the bodies," &c. The deputy of the deft. thereupon arrested and conveyed W. T. to the county jail, out of the liberty: held, that the averment was not proved, for that the precept was not a mandate to the deft. as bailiff of a liberty, but a warrant to him as sheriff's bailiff, and acted upon as such, though it was shown that the deft. when asked by plt. to return "the mandate," had obtained time to do so, and had not then set it up as a common warrant (*Jackson v. Hill*, 10 Ad. & E. 477).

A negligent escape may be given in evidence under a count for a voluntary escape (*Bonafous v. Walker*, 2 T. R. 131; 1 Vent. 211).

Plea.] The plea of not guilty operates as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings (R. G. H. T. 4 Will. IV.); so, that this plea would now seem to put in issue alone the default of the deft. in suffering the escape and the damage. Under it the deft. may show that the escape was by fraud and covin of the party really interested in the judgment (*Hiscock v. Jones*, Moo. & M. 269); or if he plead that it was by fraud and covin of a person unto whom and to whose use and benefit the judgment was assigned; this is proved by showing that the judgment was assigned to the use and benefit of that person, though the assignment was in form made to another (*Ib.*).

A retaking, or fresh pursuit, must be specially pleaded; according to 8 & 9 Will. III. c. 27, s. 6, "no retaking, or fresh pursuit, shall be given in evidence, on the trial of any issue, in any action of escape against the marshal, &c., unless the same shall be specially pleaded; nor shall any special plea be received, or allowed, unless oath be first made in writing, by the deft., and filed in the proper office, that the prisoner, for whose escape such action is brought *did escape without his consent, privity, or knowledge"

[*1079] (2 Bl. R. 1509; 1 Tidd, Pr. 703). A voluntary return of a prisoner after an escape, before action brought, is equal to a retaking, or fresh pursuit, and must be specially pleaded (*Bonafous v. Walker*, 2 T. R. 126). The plea must aver that the deft. did not know where the prisoner was during any period of his absence (*Davis v. Chapman*, 5 Bing. N. C. 457). And, in framing a plea of the recaption, or of the voluntary return of the deft., before action brought, it is necessary to allege that such recaption or return was before action brought; otherwise the plea will be defective on demurrer (*Stonehouse v. Mullins*, Stra. 873). If the declaration allege that the escape was voluntary, recaption, on fresh pursuit, is a good plea, without traversing that the escape was voluntary, as plt. may show, in his replication, that the escape was voluntary, if he mean to rely on that fact (1 Vent. 211, 217). In a plea of recaption, or of voluntary return of the deft. to custody before action brought, it is necessary for the sheriff to allege, that the deft. was detained in prison from the time of such recaption, or return, to the commencement of the action against the sheriff, or until the deft.'s legal discharge (*Chambers v. Jones*, 11 East, 406; *Meriton v. Briggs*, 1 Raym. 39; 1 B. & P. 413).

The words in a plea of forcible escape and subsequent return, "and from thence hitherto hath kept and detained, and still doth keep and detain him," are surplusage, and do not render an escape after the commencement of the suit, and before plea pleaded, admissible in evidence upon a replication *de injuriâ* (Davis v. Chapman, 2 Man. & G. 921; 9 D. 645). If the deft. plead no escape, he cannot give in evidence no arrest, for he admits an arrest by his plea (B. N. P. 67). It is no defence that the prisoner paid his debt to the deft. unless before the action brought he has paid it over to the plt. (Slackford v. Austen, 14 East, 468). If the prison take fire or be broken open by the king's enemies, by means whereof the prisoners escape, this will excuse the sheriff; otherwise, if broken open by the king's subjects (B. N. P. 66). The deft. may show that he discharged the prisoner by virtue of an order of the Insolvent Debtors' Court, under the general issue, and the order is sufficient evidence (7 Geo. IV. c. 57, s. 81; Saffery v. Jones, 2 B. & Ad. 598; see "INSOLVENCY"). To a declaration against the bailiff of a liberty, alleging an arrest under a mandate and an escape, a plea against the further maintenance of the action that after the commencement of the suit the sheriff had returned *cepi corpus*, pleaded by way of estoppel, was held ill (Jackson v. Hill, 10 Ad. & E. 477; 3 Jur. 976). A plea that the prisoner escaped without the knowledge of deft., and voluntarily returned, ought to aver that the deft. did not know where the prisoner was during any period of his absence (Davis v. Chapman, 5 Bing. N. C. 453; 7 D. 429; 9 Dowl. 645; 5 Jur. 654). Where the defts. pleaded that the plts. fraudulently and covenantously conspired with L. and others to arrest A. B. (a prisoner on final judgment within the rules, at the suit of the plts.), if he should go beyond the limits of the rules, and detain him beyond the limits, till the marshal should be served with process for the escape, and the proof was that one U., at whose suit the prisoner was detained on mesne process, by trick and contrivance caused the prisoner to be arrested at the suit of L., and detained beyond the limits of the rules, during which time U. served the marshal with the writ in the present action, and facts were proved to show a connection between U. and the plts.: held, that as the plts. adopted U.'s agency, by prosecuting this action, it was a question for the jury, whether the plts. were not a party to U.'s trick and *contrivance, although they did not personally interfere in it (Merry v. Chapman, 10 Ad. [*1080] & E. 516; 8 Dowl. 81). The plea alleged, that while A. B. intended and was about to return to the said rules, the plts. and others in collusion with them, in further pursuance of the fraudulent contrivance, &c., wrongfully caused A. B. to be arrested and detained until a writ could be sued out and served on the marshal in the action; and alleged, that had not A. B. been so collusively and illegally arrested and detained, he could have returned and been within the rules before the commencement of the suit: held, that the plts. were entitled to judgment *non obstante veredicto* (Ib.). The deft. pleaded that N. (the prisoner) drew a bill of exchange for money lost at *écarte* to M., payable to M., that M. indorsed it to the plt., who sued N., and obtained a judgment by confession, before the stat. 5 & 6 Will. IV. c. 31, and that the judgment was void in law: held on demurrer, that as the judgment was not void when obtained adversely by an innocent indorsee, the plea afforded no defence to the action (Lane v. Chapman, 11 Ad. & E. 966; 4 Jur. 846; see S. C. in error, 11 Ad. & E. 980). *Semble*, the deft. might avail himself of a judgment being void under the statutes against gaming, as a defence to an action for an escape (Ib.). 10 Car. & 9 Anne, do not include judgments obtained adversely, but those only given to secure money lost at play (Chapman v. Lane, 11 Ad. & E. 980). The deft. pleaded to an action of debt for an escape, that he sent his

warrant to G., who acted in the execution thereof under the direction of the plt., and as his special bailiff, that G., without the authority of the deft., permitted the deft., to go at large; that the deft. had no notice of the escape until the debtor voluntarily returned into custody. Replication as to so much of the plea as relates to G. having acted in execution of the warrant, that G. did not act under the direction of the plt., and as to so much of the plea as relates to the debtor having returned into custody, that the deft. of his own wrong suffered him to go at large. *Semble*, the plea was not double, and that the substance of the defence was the appointment of a special bailiff; also, that the replication was informal and ambiguous (*Pascoe v. Vyvyan*, 1 Dowl. N. S. 939).

Precedents.

For forms, see 2 Ch. Pl. 559. See various pleas and replications, 3 Ch. Pl. 262, 466.

Evidence for Plaintiff.

Judgment in Original Action.] The plt. must prove the judgment whereon the *ca. sa.* issued; as to proof of which, see *post*, "JUDGMENT." As to what a variance, *ante*, p. 1067.

Issuing and Delivery of Writ.] In an action against the sheriff, this must be proved, and may be so by an examined copy of the writ, with the sheriffs' return indorsed thereon (B. N. P. 66; 2 Ph. Ev. 281; Stark. Ev. 1346); though, where no return appears to have been made, after proof of a notice to produce, and that search has been made at the treasury, parol evidence of its contents will be admissible (*Watson*, Shff. 148; see *ante*, 1072, as to proof of issuing, &c., of writ; a delivery to a county sheriff's deputy in London is a delivery to the sheriff (*Woodland v. Fuller*, 11 Ad. & E. 859). *The indorsement of *non est inventus* is sufficient evidence of the delivery to the sheriff (*Blatch v. Archer*, Cowp. 63). See *ante*, 1072, as to variance.

The Arrest.] In an action against the sheriff, the arrest must be proved in the same manner as in escape on mesne process (*ante*, p. 1071). If the sheriff has returned *cepi corpus*, it may be proved by an examined copy of the judgment, writ, and return; but, if no return has been made, the warrant to the bailiff, and the arrest by him, may be proved (Stark. Ev. 1346); and it must appear that the party arresting was empowered with authority so to do (*Blatch v. Archer*, Cowp. 65). But the arrest will be good, though the party making it be not seen by the deft.; nor is any exact distance prescribed (Ib.). Where the party to be arrested is already in custody of the sheriff, at the suit of another creditor, the mere delivery of the writ to the sheriff is sufficient evidence of an arrest (B. N. P. 96; Salk. 274). By 8 & 9 Will. III. c. 26, s. 9, "if any person, desiring to charge another with any action or execution, shall desire to be informed by the marshal of the King's Bench, or warden of the Common Pleas, or his deputy, or by any other keeper or keepers of any other prison, whether such person be a prisoner in his custody or not, every such marshal, warden, or keeper, shall give a true note in writing thereof, to the person requesting the same, or his attorney, on demand; and, if such person be an actual prisoner in custody of such keeper, such note shall be taken as evidence of the fact (B. N. P.

68). If the deft. plead no escape, the fact of the arrest will be admitted (B. N. P. 67). Where a prisoner is in custody of the marshal, and is to be charged with a King's Bench execution, a rule is obtained from the marshal to acknowledge the deft. to be in his custody, and such acknowledgment is evidence of the arrest; and so, if the prisoner is in custody of the warden of the Fleet, and is charged with a Common Pleas or Exchequer writ, a *habeas corpus* is obtained, the return to which will be evidence of his being in custody (Stark. Ev. 1346; Pea. Ev. 422). The prisoner must be shown to be in the custody of the sheriff. If in the custody of a former sheriff, the assignment of the prisoner from him to the deft., by indenture, must be proved (Davidson v. Seymour, Moo. & M. 34), unless the predecessor's death occasioned the deft. to become sheriff, in which case he must at his peril take notice of all persons whom he finds in jail on execution (Westby's case, 3 Rep. 72 b; B. N. P. 66; Davidson v. Seymour, *supra*). When the declaration alleged a submission by the plt. and A. B. to arbitration, the award, attachment, and escape, it was held, that he must prove the submission (Brazier v. Jones, 8 B. & C. 124), though perhaps it would not be requisite if the plt. had only alleged the making of the rule of court for the attachment. So, where the declaration was in debt, against the bailiff of a liberty for an escape, alleging a mandate by the sheriff to the deft., "as chief bailiff of the liberty," to arrest T.; the plea traversed this allegation: held, that it was not supported by proof of a sheriff's warrant, in the common form, addressed to the deft., as *his* bailiff, even though the deft. had treated it as a mandate and not as a warrant, on a rule to return it (Jackson v. Hill, 10 Ad. & E. 477). As to connecting sheriff with act of his officer, see "SHERIFF."

If the commitment be by an act of a court of record, the record of it must be proved in the usual way, by an examined copy (Turner v. Eyles, 3 B. & P. 456). The sheriff is bound by the statement in his return, not only as to the fact of the arrest, but also as to the day on which it was made (Cook v. Round, 1 Moo. & R. 512).

**The Escape.*] The escape may be proved by persons who have seen the prisoner at large after the arrest, even for however [*1082] short a time, and either before or after the return of the writ (Hawkins v. Plomer, 2 Bl. R. 1049; Balden v. Temple, Hob. 202; Platt v. Locke, Plowd. 35; and see 1 Saund. 35 a; 2 Saund. 61 c, n. 4; and 8 & 9 Will. III. c. 26). The being out of the custody of the party arresting will be an escape, as where the bailiff of a liberty, after an arrest, removes the prisoner to the county gaol, situate out of the liberty, and delivers him into the custody of the sheriff (Boothman v. Surrey (E. of), 2 T. R. 5). If the sheriff carry a deft. in his custody out of the county, except in carrying him by the most convenient route to the county gaol, he will be guilty of an escape (Burton's case, 3 Rep. 44; Coulant v. Chapman, 2 Q. B. 771); or, if the prisoner, previous to his being taken to prison, be allowed to go about to settle his affairs, though in the custody of a bailiff's follower, it will be an escape (Balder v. Temple, Hob. 202; Benton v. Sutton, 1 B. & P. 27), as the prisoner is no longer in the custody of the party by whom payment of the debt might be enforced (Ib.). But the prisoner will not be deemed to be out of the custody of the sheriff, if he carry him to a lock-up house within his own bailiwick, and keep him there fourteen days before the return of the writ; and it will be no escape, though it might be otherwise, "if there were particular indulgence or favour shown to the deft., or if the place where he was kept were dangerous or insecure" (per Mansfield, C. J., Houl-ditch v. Birch, 4 Taunt. 610; Hard. 31). If the sheriff, before the return

of a *ca. sa.*, liberate the prisoner upon his paying the *money* indorsed on the writ to the *sheriff*, it will be an escape, the writ directing the sheriff to take and keep the body of the prisoner, so that he may have it at the return of the writ, to satisfy the *plt.* of his *damages, costs, and charges* (Slackford v. Austin, 14 East, 468; recognised by Abbott, C. J., Crozer v. Pilling, 4 B. & C. 31). The *plt.* is not estopped by a return of *cepi corpus* by the *def.* (Jackson v. Hill, 10 Ad. & E. 477). If an escape be voluntary, it must appear to be with the consent, or by the default of the marshal; but his allowing the rules of the prison is no default in him, because the law has given a sanction to it (per Buller, J., Bonafous v. Walker, 2 T. R. 131). Evidence, however, of a negligent escape will satisfy a count for a voluntary one (*Ib.*). A release by mistake is a voluntary escape (Filewood v. Clement, 6 Dowl. 508). Where a new sheriff is appointed, his predecessor ought to deliver over all the prisoners in his custody charged with their respective executions (3 & 4 Will. IV. c. 99, s. 7); and, if he omit any, it is an escape. But, if a sheriff die, the new one must, at his peril, take notice of all persons in custody, and of the several executions with which they are charged (B. N. P. 68). And so, where there are sheriffs *def.*s., and one die, the action will remain against the survivor, the tort being joint and several (Bennison v. York (Sheriffs of), Cro. Eliz. 625). By 8 & 9 Will. III. c. 27, s. 8, if the marshal or warden, or their deputies, or the keeper of any prison, after one day's notice in writing, given for the purpose, shall refuse to show a prisoner committed in execution to the creditor, or his attorney, such refusal shall be adjudged an escape (B. N. P. 68). If there be a judgment against two persons in execution, and one escape, the sheriff will be liable for the whole debt (Rol. Abr. Escape, F. 4); and so, where husband and wife are in custody, and the wife escape (*Ib.* 5; Whiting v. Reynell, Cro. Jac. 657; Sukliff v. Reynell, 2 Bulst. 320). If there be an escape, an action may be maintained, though the judgment on which it was founded be erroneous (Gold v. Strode, Carth. 148; 3 Mod. 324); but there will be no *escape if the sheriff permit the prisoner to go [*1083] out of his custody on the judgment being reversed (Watson, Shff. 139).

Damages.] The *def.*, in an action of debt for an escape, was liable for the whole debt and costs in the original action; the jury could not give less (1 Saund. 35, n. 1; Bonafous v. Walker, 2 T. R. 129; Robertson v. Taylor, 2 Ch. Rep. 454). But where the *plt.* sues in case (which he must now do, see *ante*, p. 1066), the jury may give such amount as they may think sufficient to cover the loss sustained or likely to be sustained by the *plt.* (Bonafous v. Walker, 2 T. R. 126). In the former case, the *plt.* cannot afterwards recover against the prisoner; in the latter, he can (*Ib.*; see 1 Saund. 38, n.); there must at all events be nominal damages (Clifton v. Hooper, 6 Q. B. 468). *Seem*, in an action against a sheriff for an escape, he stands in the same situation as the original debtor, and may reduce his liabilities by any equities which the *def.* would have had against the *plt.* (Evans v. Manero, 9 Dowl. 256; see *ante*, p. 1073). The *def.* has no means of reimbursing himself if the escape were voluntary (Watson, Shff. 149; see "ESCAPE ON MESNE PROCESS," *ante*, p. 1073).

Evidence for Defendant.

The sheriff may prove the escape to have been effected by the act of God, or the king's enemies (4 Rep. 84; B. N. P. 66). To support a special plea, *def.* may show that the party escaped against his will, and that, after fresh

pursuit, he was retaken before the commencement of the action (Bonafous v. Walker, 2 T. R. 126; 8 & 9 Will. III. c. 27); or that the party returned into custody previous to the action being commenced; though, in these cases, it must appear that he was in the custody of the sheriff when the action was commenced (Stark. Ev. 1349). The sheriff may show that the judgment was void, as being *coram non iudice* (B. N. P. 65; Carth. 148; Wats. Shff. 54). So, if the writ of execution be absolutely void, the sheriff will not be liable for an escape, but it is otherwise when it is only erroneous (Weaver v. Clifford, Cro. Jac. 3; Burton v. Eyre, ib. 288; B. N. P. 66).

An averment in an action for an escape that bail above was put in before a judge at chambers, "as appears by the record of recognizance," is not supported by evidence of an examined copy of the entry of the recognizance of bail, stating the recognizance to have been taken before the court at Westminster (Bevan v. Jones, 4 B. & C. 403). In an action against a sheriff, on the statute 8 Anne, c. 14, an averment that the *fi. fa.* issued out of the King's Bench is not proved by one issuing out of the Common Pleas (Sheldon v. Whittaker, 4 B. & C. 657). Where a declaration for an escape stated a judgment recovered in Easter Term, 5 Geo. IV., and a *sci. fa.* and award of execution in Trinity Term, and a commitment of the deft. *thereupon* to the custody of the marshal, it was held not to be necessary to prove the *sci. fa.* (Bromfield v. Jones, ib. 380; see also Edwards v. Lucas, 5 B. & C. 339).

It is a good defence to an action against a sheriff or gaoler, for the escape of a prisoner in execution, that he discharged the prisoner from custody by virtue of an order of the insolvent debtors' court, and he need not show that the proceedings upon which the order is grounded were properly taken, or that the insolvent was within the walls of a prison when he petitioned for his discharge (Saffray v. Jones, 2 B. & Ad. 598). The plt.'s attorney, as such, has no general *authority to order the discharge of [*1084] the deft. in execution, without payment of the debt. Therefore, in an action against the marshal for an escape, it was held that he could not justify the discharge of the deft. under the order of the plt.'s attorney, without showing either that the plt. had authorized the order, or that the deft. had been paid (Savory v. Chapman, 11 Ad. & E. 829; 4 Jur. 411). *Quære*, whether a plea that the amount for which the execution issued had been paid to the plt. or his attorney, would justify the marshal, if the plt. suing out execution had become bankrupt between the commitment and the order to discharge, and an action of escape were brought by his assignee (ib.). It seems that having this deft. arrested by the bailiff of a liberty on a *ca. sa.*, in the custody of the sheriff, out of the liberty, amounted to an escape in law (Hepworth v. Sanderson, 1 Moo. & S. 64; 8 Bing. 19). The sheriff is not guilty of an escape if he go out of the sheriff's custody on a writ of *habeas corpus* (or where he is in custody of the keeper of the Queen's prison), on a day rule, (8 & 9 Will. III. c. 26; see Rose v. Green, 1 Burr. 437; 2 Bac. Abr. Escape, B.; see 5 & 6 Vict. c. 22, s. 12, as to abolishing day rules); or of the order of a court of competent jurisdiction. If the deft. be discharged out of custody with the plt.'s consent, or by fraud of the plt., it is, of course, no escape as against him (Bac. Abr. Escape, E. 3; Hiscock v. Jones, Moo. & M. 269); but the consent must be given previously to or at the time of the discharge, in order to excuse the sheriff (Scott v. Bencock, 1 Salk. 271; Buxton v. Horne, 1 Show. 174). If the deft., after a negligent escape, return within the limits of a prison before an action is brought for the escape, or it seems if the deft. be prevented from returning before action brought, by a trick of the plt., practised for the purpose of fixing the gaoler with the escape (Merry v. Chapman, 10 Ad. & E. 516; 3 P. & D. 25; 8 Dowl. 81), the gaoler will be excused (Com. Dig. Escape; Bonafous

v. Walker, 2 T. R. 126; and see *Lenthal v. Lenthal*, 2 Lev. 109; *James v. Pierce*, ib. 132; 1 Vent. 269; *Pascoe v. Vyvyan*, 1 Dowl. 939). If he had no notice of the escape, or, having notice, that he used his best endeavours to retake the deft. (*Davis v. Chapman*, 5 Bing. N. C. 453; 7 Sco. 458; 7 Dowl. 429), and though the deft. again escape, after action brought for the escape, the gaoler is still excused. If the party who escapes were in unlawful custody, it is no escape in law (3 Bac. Abr. 122). The sheriff may show that the judgment or writ of execution was absolutely void, but not that it was erroneous (*Lane v. Chapman*, 11 Ad. & E. 966, 980; *Weaver v. Clifford*, Cro. Jac. 3; *Burton v. Eyre*, ib. 288; B. N. P. 60). Where the arrest is made by a sheriff's officer, chosen by the plt.'s attorney, who was present and controlling, the officer at the arrest, which was effected in an illegal manner: held that the sheriff was not liable for an escape (*Doe v. Tyre*, 5 Bing. N. C. 573). It has been doubted whether, if an action be brought against the deft. for an escape in execution, the sheriff stands in the same situation as the deft., and is entitled to all the equities which the deft. would have had against the plt., and may show the real merits of the case, and to what extent the deft. was liable, or whether the plt. is not entitled to recover against the sheriff the sum indorsed upon the writ (*Evans v. Manero*, 7 M. & W. 463). It seems clear, however, that the sheriff may go into the whole case to mitigate the damages, or at least the court would exercise an equitable jurisdiction over the matter (Ib.; per Parke, B.). The sheriff cannot excuse himself for a rescue of a person in execution by returning the rescue, as he can in case of a rescue upon mesne process (1 Rol. Abr. [*1085] 807; *Crompton v. Ward*, 1 Stra. 409; **Neal v. Mason*, 5 Burr. 2812; 1 Anb. Pr. 8th ed., 713; ib. 618), unless the rescue be by the king's enemies (B. N. P. 66).

If a court not having jurisdiction order an officer to discharge a prisoner, and the officer obey the order, he is liable for an escape (*Brown v. Compton*, 8 T. R. 423). The deft. cannot take advantage of any defects in the proceedings against the prisoner (*Burton v. Eyre*, Cro. Jac. 288). *Semble*, that the marshal may avail himself of the judgment being void under the statutes against gaming as a defence to an action for an escape (*Lane v. Chapman*, 11 Ad. & E. 966; see *ante*, p. 1074).

Competency of Witnesses.] A man who has been arrested is a good witness in an action against the sheriff for his escape (*Cass v. Cameron*, Pea. 124; *Rex v. Eyles*, 2 Ph. Ev. 281).

ESCROW.(a)

Formerly, under the plea of *non est factum*, deft. might show that the deed was delivered as an escrow, upon a condition not yet performed (B. N. P. 172); *Stoytes v. Pearson*, 1 Esp. 255). It is said, that, as this plea, in effect, denies the allegation that the deft. made his deed, the plea should conclude to the country (1 Salk. 274; see precedent, 3 Ch. Pl. 175). But *quære*, if it amounts to a traverse of the making of the deed, whether the deft. should not plead *non est factum* (Ib.). The plea must, it seems, state to whom the bond was delivered (Ib. n. 9). It is no escrow if delivered to the obligees (Ib.; and see *Hare v. Horton*, 5 B. & A. 715). When it was intended that the delivery should be conditional, and that the deed should not operate as

an effective deed from the moment of delivery, but remain as an escrow, evidence must be given to show that such intention was clearly expressed at the time of execution (Vin. Abr. Fait, M., Co. Lit. 36). It is not, however, essential that any express words should, to that effect, be used at the time; but it is a question for the jury, and they must draw their conclusion from all the circumstances (Murray v. Stair (Earl of), 2 B. & C. 88; 3 D. & R. 273). Where, previous to the entering into a composition-deed, it was agreed with the surety, that, unless all the creditors signed, it should be void, the surety, however, afterwards executed the deed, and delivered it to one of the creditors to be executed by the rest, it was held, this was a delivery of the deed as an escrow, and that, all the creditors not having signed, the surety was not bound (Johnson v. Baker, 4 B. & A. 440). The plt.'s possession of a deed in his favour is *prima facie* evidence of its not having been delivered as an escrow (Hare v. Horton, 5 B. & A. 715; see "DEED").

Form of Plea.

Delivery of the bond as an escrow.

And for a further plea in this behalf the deft. says that the said writing in the said declaration mentioned was made by the deft. as aforesaid to secure the repayment of a certain sum of money then lent by the plt. to one E. F. and delivered by the deft. to one G. H. as an escrow to be kept by him on this special condition that is to say that if the said E. F. should within the space of _____ months then next following secure the repayment of the said sum of money to the plt. by a mortgage upon certain freehold premises of the said E. F. situate at &c. that then and in that case the said writing obligatory *should be immediately discharged annulled and held for nothing and returned [•1086] and redelivered to the deft. but that in default of the said E. F. so securing the repayment of the said sum of money to the plt. by such mortgage as aforesaid within the aforesaid time then the said writing obligatory of the deft. should stand and be against him in full force and the deft. further says that within the space of _____ months from the time of the making and delivering of the said writing as an escrow to the said G. H. as aforesaid for the purpose aforesaid to wit on the _____ day of _____ A. D. _____ the said E. F. did secure the repayment of the said sum of money to the plt. by a mortgage upon the said freehold premises of him the said E. F. which said mortgage the plt. then accepted and received as a security for the repayment of the said sum of money so by him lent to the said E. F. as aforesaid whereby the said writing of the deft. so delivered to the said G. H. became and was wholly discharged annulled and vacated and so the deft. saith that the said writing is not his deed. And of this he puts himself upon the country &c.

ESTOPPEL.(a)

See "DEED," "ADMISSIONS," "EJECTMENT."

As to the form of plea of estoppel, see 3 Ch. Pl. 5. As to an estoppel on the ground of plt. having brought another action for the same cause, and a verdict against him, see Palmer v. Temple, 9 Ad. & E. 508; Carter v. Jones, 13 M. & W. 137; Hutt v. Morrell, 12 Jur. 215. To a declaration for unskilfully constructing a kitchen-range, the defts. pleaded by way estoppel, that they sued the now plt. for the price of constructing the range, and that he pleaded payment into court of 42*l*.; which the now defts. accepted in satisfaction: held, on demurrer, that the plea did not amount to an es-

(a) See 2 U. S. Dig. Tit. "Estoppel," p. 199; 1 Supp. U. S. Dig. p. 651; 1 Ann. Dig. p. 223; 2 Ann. Dig. p. 159; 3 Id. p. 199.

toppel, and afforded no answer to the action (*Rigge v. Burbidge*, 4 D. & L. 1, Ex.).

The plt. by indenture demised to the deft. for the term of ten years the dividends to be declared and made upon certain railway shares, at a certain yearly rent, payable half-yearly. In covenant upon this deed, the declaration alleged that the plt. was a member of the company, "and as such *was possessed of or entitled to* certain shares therein, to wit, equivalent to twenty shares of 100*l.* in amount, with the dividends payable thereupon: the declaration then set out the material parts of the deed, including the covenant to pay the rent, and alleged a breach of that covenant. The deft. pleaded "that the plt., at the time of the making of the said indenture, was not possessed of or entitled to the said shares," &c. Held, on special demurrer, that the deft. was estopped by his deed from pleading such plea; that the estoppel sufficiently appeared upon the pleadings (though by recital only); and that it was competent to the plt. to take advantage of it on demurrer (*Beckett v. Bradley*, 8 Sco. N. R. 843; 7 Man. & G. 994; 2 D. & L. 586).

As to replications to pleas of estoppel, see 3 Ch. Pl. 421; *McGrath v. Hardy*, 4 Bing. N. C. 782; *Wilson v. Butler*, ib.; *Darlington v. Pritchard*, 4 Man. & G. 783). Estoppel by acts in *pais*, see "ADMISSIONS;" *Lyon v. Reed*, 13 M. & W. 285; *Sanderson v. Colman*, 4 Man. & G. 209. In ejectment, see *Doe v. Wright*, 10 Ad. & E. 763.

Declaration, that by indenture between plts. and A. since deceased, of the first part; B. therein described as guardian of C. and *D. minors [*1087] and devisees under the will of E. deceased, of the second part; and deft. of the third part; after reciting that the parties of the first part, and B. in right aforesaid, were the owners of the closes, &c., therein-after described, subject to mortgage for 3500*l.*, the interest whereof was payable half-yearly at the office of W., and had agreed to let the same to deft., it was by the indenture expressed and purported that plts. and A., with the consent and approbation of B., did demise the closes to deft., his executors, &c., for seven years, yielding and paying therefore yearly during the demise 153*l.* 11*s.* at the office of W. aforesaid, in part of the interest on the mortgage by equal half-yearly payments. Covenant by deft. with plts. and A., their heirs, &c., to pay the yearly sum at the place and in manner before mentioned; and breach, non-payment of parcel of a half-yearly sum due since the death of A. Averment, that plts. and A., or any or either of them, never had any reversion in the premises purported to be demised. Plea, that the reversion of the demised premises, expectant on the determination of the demise, was, at the making of the indenture, and from thence to the death of A., in plts. and A., and from her death until making of the aftermentioned indenture was in plts., who before breach assigned the reversion by indenture to S. Verification. Replication, that no reversion in the supposed demised premises, expectant, &c., was at the time, &c., or from thence, &c., in plt.'s and A. or from her death until, &c., in plts. Conclusion to the country. Held, on general demurrer, that the recitals showed the lessors to have had only an equitable title: that, on the facts being disclosed on the face of the lease, neither party was estopped from denying that the lessors had a legal reversion. *Semble*, that the lessee was estopped by the recitals in the lease from averring that the lessors had a legal reversion (*Pargeter v. Harris*, 7 Q. B. 708).

It being one of the covenants in the agreement that the landlord of a certain public-house would accept the plt. as tenant, the declaration alleged that the landlord had refused so to accept him: held, that the plt. was not required to prove that the individual who acted as the landlord was the real owner of

the premises or his authorized agent (*Coldham v. Showler*, 2 C. & K. 261; *Erle*, C. P.).

In an action for the stipulated price of a specific chattel, the deft. pleaded payment into court of a sum which the plts. took out in satisfaction of the cause of action: held, that the deft. in that action was not estopped thereby from suing the plts. for negligence in the construction of the chattel (*Rigge v. Burbidge*, 15 M. & W. 598).

An averment or recital in a deed, in order to be an estoppel, must be direct and positive; and a recital in a deed that certain premises "were conveyed or intended to be conveyed," did not estop the party from showing by evidence that such premises were not conveyed (*Harries v. Cooper*, 10 Law T. 137, Ex.).

B., after mortgaging premises in fee, devised them by deed to deft. for thirty-one years. B. afterwards became bankrupt and died, and his assignees sold the premises to D.; and the mortgagee, being paid off by the direction of the assignees, conveyed to D. in fee, the assignees also being parties and joining in the conveyance. D., after receiving rent for two years, gave deft. notice to quit. Held, that the lease being good against B., by estoppel only, D. was not estopped by it in consequence of the assignees of B. having joined in the conveyance to him, and might bring ejectment and an action of debt for use and occupation (*Doe d. Downe v. Thompson*, 11 Jur. 1007, Q. B.).

All preliminary questions of fact on which the admissibility of *evidence depends are to be decided by the judge, and not by the [*1083] jury. In an action by the indorsee against the acceptor of a bill of exchange dated abroad, the deft. is not estopped from showing that the bill was drawn in England, and improperly stamped as an inland bill; and that is a fact to be determined by the judge (*Bennison v. Jewison*, 12 Jur. 485, Ex.).

An estoppel *in pais* in general need not be pleaded to make it obligatory, and it binds the jury as well as the parties, whatever be the form of pleading (*Freeman v. Cooke*, 6 D. & L. 187; 2 Exch. 654; 18 Law J. 114, Exch.).

Where a person wilfully makes a representation, intended to induce another to act upon the faith of it, or where (whatever be his intention) a reasonable man in the situation of that other would believe that it was meant that he should act upon it, and in either case that other does act upon it as true, and alters his position, there is an estoppel *in pais* to conclude the former from averring against the latter a different state of things as existing at the same time, and conduct, by negligence or omission, where there is a duty cast upon the person to disclose the truth, may often have the same effect (lb.).

But unless the statement was intended to induce the other to act on the faith of it, or was such that a reasonable person would act on the faith of it, there is no estoppel, although the other did in fact believe the statement, and was in fact induced to alter his position accordingly. The language used by the Court of Queen's Bench in *Pickard v. Sears*, 6 Ad. & E. 469; 2 Nev. & P. 488; and *Gregg v. Wells*, 10 Ad. & E. 90; 2 Per. & D. 296, must be understood with this qualification (lb.).

In trover by the assignees of a bankrupt against a sheriff, for the conversion of a bankrupt's goods seized under a *fi. fu.* against C. and D., it appeared that immediately before the seizure the bankrupt told the officer that the goods were the property of C., and immediately afterwards he contradicted the statement, and said they were the goods of D. The jury found that the goods were in reality the bankrupt's, but also that he represented

the goods to the officer as the goods of C., so as to induce the officer by that false representation, to seize them: held, that under the plea of not possessed, this finding did not estop the bankrupt, and the plts., as assignees, from complaining of the seizure of the goods as their own (Ib.).

The deft. appearing and consenting to an order for a writ to try the issue (two issues being joined) was held to be estopped from moving to set aside the writ, which directed the sheriff to try the issues, although he objected at the trial that the writ was warranted by the order (*Humblestone v. Welham*, 5 C. B. 195).

The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are conclusive evidence between them; so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by making a traverse on some other facts, if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though for the purposes of the cause he is bound by those that are material, ought not, it should seem, to be treated as confessions of the truth of the facts stated (*Boileau v. Rutlin*, 2 Exch. 665).

In an action by a *bona fide* indorsee against the acceptor of a bill of exchange, the deft. is estopped from pleading that the drawer and first indorser was an uncertificated bankrupt when the acceptance was given (*Braithwaite v. Gardiner*, 8 Q. B. 473).

Declaration in trespass for mesne profits, stating the entry and expulsion to have been on the 10th of December, 1844, and the expulsion and taking of profits to have been continued until the 10th of March, 1846. Plea, that the closes in which, &c. were not, nor was any of them, or any part thereof, the plt.'s *modo et formâ*. Replication to the whole of the plea, by way of estoppel, a recovery by the plt. against the casual ejector on a declaration in ejectment, stating the demise to have been on the 14th of October, 1845, for a term of twenty years; concluding with a prayer of judgment, if the deft., during that time ought to have been admitted against the said recovery, record, and preceeding, to plead that plea. Held, on special demurrer, that the replication was bad, as the estoppel, if any, applied only to part of the time of the trespasses complained of, and therefore should have been replied to part only of the plea (*Doe v. Wellsman*, 6 D. & L. 179; 2 Exch. 368; 18 Law J. 277, Exch.). *Quare*, if a judgment against the casual ejector can be pleaded, as an estoppel against the tenant in possession (Ib.).

The deft. in an action of trover, having obtained leave to plead, *inter alia*, not guilty, and not possessed, the court allowed him to add a plea by way of estoppel, that plt. interpleaded him in the Court of Queen's Bench, in respect of the same causes of action, and that the said Court of Queen's Bench gave judgment for deft. upon demurrer to plt.'s replication to deft.'s plea, which said judgment was afterwards affirmed by the Court of Exchequer Chamber (*Hutt v. Morrell*, 3 Exch. 240; 13 Jur. 215).

EVIDENCE.(a)

The Affirmative of the Issue must be proved, p. 1088.

Exceptions, p. 1088.

The Substance of the Issue need only be proved, p. 1090.

(a) See 2 U. S. Dig., Tit. "Evidence," p. 208; 1 Supp. U. S. Dig. p. 659; 1 Ann. Dig. p. 225; 2 Id. p. 163; 3 Id. p. 201.

Immaterial Averments, p. 1091.

Matters of Inducement, p. 1092.

The Evidence must be confined to the Issue, p. 1092.

Course of Evidence, p. 1096.

Who to begin, p. 1096.

Demurrer to, p. 1103.

AS TO "HEARSAY EVIDENCE," "PAROL EVIDENCE," "EVIDENCE BY ADMIS- SIONS," by "PUBLIC DOCUMENTS," &c., see the respective titles throughout the work.

The Affirmative of the Issue must be proved.] When the issue is joined in a cause, the affirmative averments it contains must generally be proved by the party making them; and the plt. and deft. are equally bound to prove such averments in their respective pleadings, provided they are material, or that they affect the grounds of the action or defence (*post*). Thus, if the plt. declares, that the deft. is indebted to him on his promissory note, and the making of the note is put in issue, the plt. must prove the affirmative of the issue, by giving evidence of the deft.'s signature to the note, as that proves his averment, "that the deft. did undertake to pay," &c. And, when the issue is joined on the whole declaration, as in cases where the deft. pleads the general issue, all the affirmative averments in the declaration must be proved in their order. In an action for a loss by barratry of the master, the plt. need not prove that the master was not the owner (*Ross v. Hunter*, 4 T. R. 33, 38). And, in an action on an agreement to pay the plt. 100%, in consideration of his not consigning any herrings to the London market, and in particular to the house of Messrs. M., it was held sufficient to prove that the plt. had not consigned any to that house, as it was for the deft. to show that herrings had been consigned to the London market (*Calder v. Rutherford*, 3 B. & B. 302; 7 Moo. 158). In an action against an attorney for letting judgment go by default, it lies on the deft. to show that there was good ground for doing so, and not on the plt. to shew there was a good defence to the action (*Godefroy v. Jay*, 7 Bing. 413).

Exceptions.] The above rule admits, however, of some exceptions; as, where the deft. pleads a wrongful act of the plt. in justification, the plt. must negative that act, and prove his whole case, before any evidence is offered in defence (*Rees v. Smith*, 2 Stark. 31). And, on a charge of nonfeasance or breach of duty, where the gist of the *cause of action stated in the *declaration is a negative, plt. must prove it, if the deft. put it in [*1089] issue by his plea, as no person is presumed to have acted illegally; therefore, the omission of a duty must be proved, though it involve a negative. In a suit for tithes in the spiritual Court, the deft. pleaded that the plt. had not read the thirty-nine articles; and, being called upon to prove that negative, deft. moved for a prohibition, and was refused (*Monke v. Butler*, 1 Roll. 83; 3 East, 199; *Rex v. Hawkins*, 10 East, 216). In an action upon 29 Geo. III. c. 26, for selling goods by auction in a place where the deft. was not a householder, some proof of the negative must be given by the plt. So, likewise, upon a breach of the covenant, that deft. did not leave the premises well repaired, this breach, though involving a negative, must be proved (1 Ph. Ev. 186). Where the plt. declared against the deft., who had chartered his ship, for having put on board a dangerous commodity (by reason of which a loss happened), without due notice to the captain, or any

other person employed in the navigation, it was held that the plt. was bound to prove this negative, namely, the want of notice (*Williams v. East India Company*, 3 East, 192). So, where the gist of a plea (not consisting of a traverse) is negatived, as the plea, *ne unques* executor, &c. (*Gilb. Ev.* 145). Where the issue is on the due election of the deft. as town councillor, plt., who showed that another, B., had a majority of votes, is bound also to show that B. was qualified to be elected (*R. v. Ledgard*, 8 Ad. & E. 538). In an action against carriers it lies on plt. to prove it, and not on deft. to show reasonable care (*Marsh v. Horne*, 5 B. & C. 327).

Where the law presumes the affirmative, the presumption must be disproved; as, if a bond be outstanding for twenty years, the law presumes it paid. If payment, therefore, be pleaded to an action upon such a bond, the plt. will have to negative that presumption (1 Ph. Ev. 187). Where a servant is in the habit of receiving money for, and paying it over to, his master, without vouchers, the presumption is, that he pays over all he receives; and, in an action against him for money had and received, the master must not only prove that he received the money, but also that he has not accounted for it (*Evans v. Birch*, 3 Camp. 10). The legitimacy of a child born in lawful wedlock being presumed, the party who denies it must disprove it (*Banbury Peerage case*, 2 Selw. N. P. 709). After the period of gestation, subsequently to a divorce *a mensâ et thoro*, the presumption is against the legitimacy, and access must be shown (1 Salk. 123). The party asserting the death of any person, must give evidence of it (*Wilson v. Hodges*, 2 East, 312; *ante*, p. 893); but the presumption of the continuance of life ceases after seven years from the time the person was last known to be living (*Doe d. George v. Pesson*, 6 East, 80; *Doe d. Lloyd v. Deakin*, 4 B. & A. 434). A person who went to see at a particular time, was presumed to have died at the end of seven years from that time (1 East, 80, 85). On a plea of coverture to an action of assumpsit, the deft. having shown that her husband went abroad twelve years before, was required to prove that he was alive within seven (*Hopewell v. De Pinner*, 2 Camp. 113; *Doe d. Banning v. Griffin*, 11 East, 293; *ante*, "ABATEMENT"). This period has been adopted from analogy to the statute of bigamy, and the statute concerning leases determinable on lives (1 Ph. Ev. 187).

If a particular fact lie more particularly within the cognizance of one party, that party must prove it, though a negative (*Rex v. Burdett*, 4 B. & A. 140; 5 M. & S. 211; 2 Russ. on Cr. 692). If deft., under his set-off, give in evidence promissory notes, dated before the *bankruptcy, he must [*1090] also show that they were obtained by him before (*Dickson v. Evans*, 6 T. R. 57). In an action on the game laws, though the plt. must aver that the deft. was not duly qualified, it will be for the deft. to prove that he was (*Spieries v. Parker*, 1 T. R. 144; *Jelfs v. Ballard*, 1 B. & P. 468; 2 B. & P. 307; 1 East, 650; *Rex v. Turner*, 5 M. & S. 206). In an action for practising as an apothecary without a certificate, according to 55 Geo. III. c. 194, the proof of the certificate lies on the deft. (*Apothecaries' Company v. Bentley*, 1 R. & M. 159; *ante*, p. 133). Where the deft. pleaded infancy, and the plt. replied a subsequent promise after full age, mere proof of a promise was held sufficient on the part of the plt., and that it lay on the deft. to show the incapacity, as being peculiarly within his own knowledge (*Borthwick v. Carruthers*, 1 T. R. 648). So, where, on conviction for selling ale without license, the only evidence given was that the party sold ale, and no proof was offered of his selling it without a license; the party being convicted, it was held, that the conviction was right, for that the informer was not bound to sustain in evidence the negative averment, and it was said that the party thus called upon to answer for such offence sustains no

inconvenience from the general rule, for he can immediately procure his license; whereas, if the case be taken the other way, the informer is put to considerable inconvenience (*R. v. Harrison*, Pal. on Con. 2nd ed. 45, n.). Where ejectment is brought on a breach of covenant to insure "in some office in or near London," it lies on the plt. to give some slight proof of the omission, though it would be otherwise in an action of covenant in which the deft. puts in affirmative plea that he has insured (*Roe v. Whitehead*, 8 Ad. & E. 571).

The Substance only of the Issue need be proved.] It is a general rule of evidence, that, if the substance of the issue, or the material facts contested by the pleadings, be established, it is sufficient; and that no proof is necessary as to such averment or parts of the issue as do not affect the grounds of the action or defence. Thus, the averment of a particular day in the declaration need not be proved, except in the action of ejectment, on penal statutes, or where it makes part of the contract on which the action is brought, as in suits on bonds, bills of exchange, or the like, and forms part of the contract itself. And, on the same principle, it is immaterial, in transitory actions, to prove the place stated in the pleadings, as no locality can be attached to such a contract. But, if the action be local, as where the land is concerned, proof must be given; therefore, in trespass, *quare clausum fregit*, or in ejectment, the description of the premises must be proved to be in the place stated, and a wrong county or parish is fatal (see "EJECTMENT," "TRESPASS"). And the same rule holds as to the proof of any specific number or quantity alleged in the pleadings; thus, in waste for cutting down twenty trees, proof of any smaller number cut down is sufficient (*Co. Lit.* 282 a; *Hob.* 53). On a count for a voluntary escape, the plt. may prove an escape through negligence (*Bonafous v. Walker*, 2 T. R. 126; see "ESCAPE," &c.). And, on a count on a policy for a total loss, proof of a partial loss is sufficient (*Gardiner v. Croasdale*, 2 Burr. 904). In assumpsit or debt on a simple contract, the plt. may prove and recover less than the sum demanded in the writ (*McQuillin v. Cox*, 1 H. Bla. 249). In slander, it is now allowed to be sufficient, if the plt. prove some material part of the words laid; and, if his count contain several additional words, he is entitled to a verdict on proving some of them (*Compagnon v. Martin*, 2 Bl. R. 790; see "SLANDER"). To a plea of tender, if the plt. *reply a subsequent demand of the sum tendered he must prove a demand of that exact sum, and [*1091] demand of a larger sum does not support the issue (*Rivers v. Griffiths*, 4 B. & A. 630; *Spyley v. Hyde*, 1 Camp. 181). If a plea in trespass aver two matters, either of which is a good justification, though both be put in issue by the replication, proof of one is sufficient (*Spilsbury v. Miclethwaite*, 1 Taunt. 146). It is sufficient if so much of a divisible plea of justification be proved as is sufficient to cover as much as the plt. proves of his declaration (*Radford v. Birly*, 3 Stark. 83), if the rest of the declaration be covered by the general issue (see "TRESPASS"). So, if to an action of assault the deft. plead arrest for felony, and a battery, by reason of resistance, if the plt. had not declared for the battery (*Atkinson v. Warne*, 1 C. M. & R. 827.) When the declaration, for a false return to a *fi. fa.* against the goods of two, averred that both had goods, it was held sufficient to prove that one had goods within the bailiwick (*Jones v. Clayton*, 3 M. & S. 349), for the averment is divisible. The same rule of law applies to criminal cases: so much of the indictment only need be proved, as charges the deft. with a substantive crime; as, when charged with composing, printing, and publishing a libel, he may be convicted only of printing and publish-

ing (*Rex v. Hunt*, 2 Camp. 583; *Rex v. Williams*, ib. 646; 2 East, P. C. 515).

The deft. pleaded that the plt. received a bill on an unlawful time bargain, the difference to be paid when the stock was below a certain price, to wit, &c. Held, that the price was immaterial (*Robson v. Fallows*, 3 Bing. N. C. 392). In replevin, the deft., who avows for rent arrear, is entitled to a verdict, though he prove less to be in arrear than he has alleged, as one instead of two quarters (*Harrison v. Barnby*, 5 T. R. 248).

A *videlicet* or *scilicet* frequently precedes a more precise statement of that which has already been alleged generally, and when certainty or particularity in pleading is required, the rule is sufficiently complied with by introducing the circumstances of time, place, sum, number, &c., under a *videlicet*, and then the statement need not be proved exactly as laid, unless in matters of description; but where the statement is material, the use of a *videlicet* will not dispense with the necessity of exact proof. But the omission of it altogether may impose the necessity of proof, even where the matter is wholly beside the merits (see *Dakin's case*, 2 Saund. 290 a, n. 1; *Cooper v. Black*, 2 Q. B. 915). But an amendment may be made at the trial (see "AMENDMENT," "VARIANCE").

As to *Immaterial Averments*, the rule is, that, if the whole of an averment may be struck out without destroying the right of action, it will not be necessary to prove it; but, if an essential part of the cause of action be lost thereby, the whole averment, though unnecessarily particular, must be proved (*Williamson v. Allison*, 2 East, 452). In an action against the sheriff, for taking the goods of a tenant without leaving a year's rent, the declaration averred a contract between the plt. and the tenant, as was necessary, and also stated some particulars of the demise relative to the time of payment, which were unnecessary; yet, as no part of the contract, being in its nature entire, could be struck out, the unnecessary averments became material to be proved (*Bristow v. Wright*, 2 Doug. 664; 5 T. R. 496; 2 East, 450, 452; 8 East, 9). But, where, in tort for a breach of warranty, the declaration averred that the deft. knew the goods to be unfit for sale, as this averment might be struck out without destroying the right of action, the plt. recovered without proving *the deft.'s knowledge (*Williamson* [1092] *v. Allison*, 2 East, 452). So, in an action for not obeying a subpoena, the allegation that the subpoena was shown to the deft. may be rejected (*Mullett v. Hunt*, 1 C. & M. 752).

Matters of Inducement.] Averments which are merely matters of inducement, need not be proved with such precision as those which relate to the gist of the issue (1 N. R. 210). In an action for double the value of goods, removed to prevent distress, a certain sum was stated to be in arrear, but proof of notice of distress for a less sum was held sufficient. Here the averment of rent in arrear was necessary, the amount immaterial; and the damages were to be measured, not by the quantity of rent, but the value of the goods (*Gwinnet v. Phillips*, 3 T. R. 643; 1 Ph. Ev. 195; see "VARIANCE").

The Evidence must be confined to the Issue.] Such evidence alone ought to be admitted as relates to the questions in issue, and supports the several averments in the pleadings. As it must be considered with reference to the subject-matter, its relevancy must depend entirely on the circumstances of each particular case. In a question between landlord and tenant, whether the rent was payable quarterly, it is obviously irrelevant to inquire what

agreements subsisted with other tenants, or when their rents were payable (*Carter v. Pryke*, Pea. 94). And, in an action against the acceptor of a bill of exchange, if his defence be that the acceptance is a forgery, evidence that the person suspected of forgery has forged the deft.'s name to another acceptance is inadmissible (*Balcetti v. Lerani*, Pea. 142; *Pea. Ev.* 111; *Viney v. Bans*, 1 Esp. 293; *Griffith v. Payne*, 11 Ad. & E. 131); and where the question was as to the quality of beer, the plt. cannot show the quality of beer supplied by him to others (*Holcombe v. Hewson*, 2 Camp. 391; see also *Spencely v. De Willot*, 7 East, 108). In order, however, to discover the knowledge or motives of a party, it seems sometimes necessary to admit evidence of other transactions. Thus, in order to prove that the acceptor of a bill knew the payee to be a fictitious person, or had given the drawee authority to make it payable to a fictitious name, the plt., an indorsee, offered evidence that the deft. had accepted similar bills before they could, according to their date, have arrived from the place of date; and the opinion of the majority of the judges in the House of Lords was, that such evidence ought to have been received (*Hunter v. Gibson*, 2 H. El. 288).

And if the collateral fact be material to the issue joined between the parties, evidence of it is admissible. In the case of libel, when the meaning is ambiguous, other similar libels on the plt. by the same deft. may be shown against him (see "SLANDER"). In an action for bribery, evidence of other acts of bribery by the deft. at the same time and place, are admissible to show the animus (*Webb v. Smith*, 4 Bing. N. C. 373). And the seditious object of a meeting may be shown by acts at similar meetings in other places, convened by the same person (*Bedford v. Birley*, 3 Stark. 93). Upon a question of skill and judgment evidence may be given of facts, which, although in other respects collateral, are, by means of the skill and judgment of the witness, connected with and tend to elucidate the issue (*Folkes v. Chadd*, 1 Ph. Ev. 276). When the question was as to whether there was unreasonable delay of a ship on the coast of Labrador, the insurer was permitted to prove the usage of the same trade in the fisheries of Newfoundland (*Noble v. Kennaway*, 2 Doug. 510). But the usage in one particular house, as *Lloyd's*, is not evidence against an insurer, unless it be shown he had usually effected *insurances there (*Gabey v. Lloyd*, 3 B. & C. 793); and the same rule applies to criminal cases: [*1093] thus, on an indictment for forgery and coining, proof that the witness has passed other forged notes or other counterfeit coin, is admissible (*Rosc. Ev.* 58, 66, and "CRIMINAL EVIDENCE"), and in questions of intent evidence of other similar transactions is admissible (*Ib.* 71).

Evidence of customs in other manors, &c., is, on the same principle, admissible; and the custom of one manor or parish cannot be given in evidence to explain the customs of another (*Somerset (Duke of) v. France*, 1 Stra. 661; *Cowp.* 807; 2 Doug. 512; 12 East, 63; 3 Gwill. 396). Yet, where all the manors in a certain district are held by the same tenure, and a question relating to an incident of the tenure arises in one of the manors the usage prevailing in any of the others is admissible in evidence (*Champion v. Atkinson*, 3 Keb. 90; *Somerset (Duke of) v. France*, *supra*). So, where in each of several detached manors called by the common name of "accessionable manors," and parcel of the possession of an ancient earldom and duchy, it appeared there was a peculiar class of tenants answering such description, to whom tenements were granted under similar words, it was held that evidence of the mineral and other rights enjoyed by those tenants in one manor might be received to show what were their rights in another (*Rowe v. Brenton*, 8 B. & C. 758). But mere continuity or identity of the leet or parish wherein two manors are situate, or payment of a chief-rent by one to

the other, will not let in such evidence (*Anglesea v. Hatherton*, 10 M. & W. 218). The custom of tithing in one parish is not evidence of the custom in another, unless the custom is laid as the general custom of the country (*Fur-neaux v. Hutchins*, Cowp. 808); and where, by the custom of the country, half a river belongs to the lords of the manors on each side, proof of a custom in one manor is evidence of the same customary right in the other, being evidence of a custom prevading one common district of manors (*R. v. Ellis*, 1 M. & S. 662). In an action where the defence was a modus for a particular farm in a township, and the witnesses proved a uniform payment for fifty years of a certain sum in lieu of tithes, they were asked, in cross-examination, whether other tenements in the township did not pay a similar sum; which was allowed, for this question was not put by the deft. to prove a modus for a particular farm, but by the plt., to prove a composition prevading the district of which that farm was a part (*Blundell v. Howard*, 1 M. & S. 292).

Acts of ownership done in one close have been admitted to show a right to another, when a reasonable probability is previously established that the whole land had been formerly in one owner, and all subject to the same burdens (1 B. & C. 219). In trespass, where the trees in question grew in an extensive and undivided belt, contiguous to a number of closes of several owners, one of which was the deft.'s, and the plea was, that the place in which they grew was the soil and freehold of the deft., and the plt. replied that the trees were his trees and freehold, evidence was admitted of acts of ownership in other parts of the belt, submitted to by the owners of the other adjoining closes as evidence of a general right throughout the whole belt, which might be presumed to have formerly belonged to one owner (*Stanley (Sir T.) v. White*, 14 East, 332). But leases granted by the lord on other parts of the waste are not admissible to prove the soil and freehold of a certain portion of common land in the lord, unless it be first shown that the *locus in quo* formed part of one entire waste, to which such acts of ownership were applied (*Tyrwhitt v. Wynne*, 2 B. & A. 554). And acts of ownership by the *pro-
[*1094] prietors of a canal, done in one part of the banks, were not evidence of right over other parts; because, as the canal passed through the lands of different persons. there was no unity of ownership, or distinct unity of character previously established (*Hollis v. Goldfinch*, 1 B. & C. 205; 2 D. & R. 316); and where the question was whether some waste land between some old inclosures, and the highway was vested in the lord of the manor or the owner of the adjoining inclosure, it was held that evidence might be received of acts of ownership by the lord of the manor, on similar slips of land not adjoining his own freehold in various parts of the manor (*Doe d. Barrett v. Kemp*, 2 Bing. N. C. 102; 2 Sco. 9; 1 Hodges, 231). So, where the plt. claims the whole bed of a river between his lands and the deft.'s, acts of ownership over the river just below the deft.'s are admissible, for the evidence need not be confined to the precise spot of the trespass (*Jones v. Williams*, 2 M. & W. 326). So, acts of ownership over part of a wood though uninclosed or in part of a continuous fence are evidence as to the whole (*Ib.* 331). In proof of the boundary between the manors A. & B., evidence is admissible of the boundary between A. & C., C. being a manor abutting on B., separated from A. by a natural boundary, which continued between A. & B. (*Brisco v. Loman*, 8 Ad. & E. 198). Under a lease of all minerals under a tract of waste land called M. mountain, working a mine under one part of the surface of it, is evidence of possession of the whole subject of demise, so as to entitle the lessee to sue in trover for ore taken by a wrongdoer from another part of it (*Taylor v. Parry*, 1 Man. & G. 604). In trespass, for breaking and entering plt.'s mine, and taking coals, &c., evidence of working by the plt. in other parts of the same mine, within eight

yards of the place of the alleged trespass, coupled by a statement of the deft. that he had got the coal, and was willing to pay for it, held evidence of plt. being in possession of that place where the trespass was committed (*Wild v. Holt*, 9 M. & W. 672; 1 Dowl. N. S. 876).

And, on the principle of the necessity of confining the evidence to the issue, the character of either party cannot be inquired into, in a civil suit, unless put in issue by the nature of the proceedings (*Bing. N. P.* 298); as, in ejectment brought by the heir-at-law to set aside a will, for the fraud and imposition of the deft., evidence of the deft.'s good character is not to be received (*Ib.*; see 1 Camp. 207, 209). But, in an action for slander, the plt. has been allowed to give evidence of his previous good character (*King v. Waring*, 5 Esp. 13; see "SLANDER"). In an action for a malicious prosecution, the deft., after having first proved circumstances of suspicion relative to the particular transaction, has been permitted to give evidence of the general bad character of the plt.; because this was evidence of a probable cause for the prosecution, which was the question in issue (*Rodriguez v. Tadmire*, 2 Esp. 720; *Newsam v. Carr*, 2 Stark. 69). In an action for a libel, the deft. may not prove the plt. guilty of the crime imputed to him, unless he have put it in issue by a special justification (2 Stra. 1200, 2 Selw. N. P. 986, n. 6); but, in mitigation of damages, evidence that the plt. at the time was generally suspected of the crime imputed is admissible (*Leicester (Earl of) v. Walter*, 2 Camp. 251; ——— *v. Moor*, 1 M. & S. 284); but general evidence of the plt.'s bad character is not (11 Pri. 235; see "SLANDER"). So, in an action for crim. con., the deft. may prove, in mitigation of damages that the wife had been previously connected with other men, or the husband with other women (*B. N. P.* 27, 296, 4 T. R. 641); or that she made the first advances (1 Selw. N. P. 25; *Elsam v. Fancett*, 2 Esp. 562; see "CRIM. CON."). In actions for seduction, *also similar evidence is received (*Bamfield v. Massey*, 1 Camp. 460; 2 Camp. 519; see "SE- [*1095] DUC-TION"). The party against whom such evidence is given may rebut it, but with this distinction: if evidence be offered of general bad character, it may be met with evidence of general good character; but, if particular instances of bad conduct are established, they are not to be answered by evidence of general good character, but by disproving the facts alleged (*Bamfield v. Massey*, *supra*; but see 2 Ph. Ev. 205; 2 Stk. Ev. 371). Evidence of good character, however, cannot be given by the plt. in actions of crim. con. and seduction, until evidence to impeach the character has been offered by the deft. (*Ib.*). And, where the plt.'s witnesses, on cross-examination, deny the questions of imputation, the plt. is not allowed to give evidence of his good character (*King v. Truman*, 3 Esp. 116; see *Bates v. Hill*, 1 C. & P. 100). So, in an action of slander, imputing dishonesty to the plt., he cannot adduce evidence in the first instance of good character (*Cornwall v. Richardson*, R. & M. 305).

Evidence of damages is admissible, though not expressly involved in the issue: thus, plt. may give evidence tending to increase or diminish the damages. Therefore, in an action for breach of promise of marriage, plt. may give evidence of deft.'s fortune (*James v. Biddington*, 6 C. & P. 589; see "DAMAGES," and the respective titles throughout the work). Special damage cannot be proved unless it be alleged with certainty in the declaration (see "SLANDER," "TRESPASS," and other titles). Thus: where, in consequence of an irregular distress, the plt. alleged that he lost lodgers, he was not allowed to go into evidence of it, as he had not stated who the lodgers were (*Westwood v. Conne*, 1 Stark. 172; 1 Saund. 234, b. n. 5). So, where in an action for false imprisonment, if plt. have not actually paid a bill of costs to his attorney, in respect of his imprisonment, he must allege his

liability to pay, and must not aver that he has paid him (*Pritchett v. Boevey*, 1 C. M. & R. 775; see "IMPRISONMENT"). But, in assumpsit for not giving plt. possession of premises demised by deft., plt. may show his subsequent loss of business, though only alleged generally, and though the plt.'s business is not mentioned in the pleadings, for such damage is the necessary result of deft.'s breach of contract (*Ward v. Smith*, 11 Price, 19).

It is not necessary to prove facts of which the court will take judicial notice. Thus: the privilege of the house of commons (*Stockdale v. Hansard*, 9 Ad. & E. 9); nor the order or course of proceedings in parliament (*Lake v. King*, 1 Saund. 131); nor the existence of war with a foreign state (*R. v. De Berenger*, 3 M. & S. 67); nor the existence of a foreign state, if it be recognised by the British government, otherwise it must be proved (*Tagla v. Barclay*, 2 Sim. 213; see *Berne (City) v. England (Bank of)*, 9 Ves. 347); nor that the common law of England is in force in Ireland (*R. v. Nesbett*, 2 D. & L. 529); nor that a particular day of the month fell on a Sunday, nor the number of days in any month (*Hewison v. Shackelton*, 2 Dowl. 48; 1 Rob. All. 528); nor the festival days appointed by the calendar (*Brough v. Perkins*, 6 Moo. 81); nor the articles of war which are printed by the king's printer (*Bradley v. Arthur*, 4 B. & C. 304; *R. v. Withers*, cited 5 T. R. 446); nor is it necessary to prove the different counties and palatines in England (2 Inst. 227; *Deybell's case*, 2 B. & A. 248); nor the superior courts and their jurisdiction, their course of proceeding, nor the privileges of their officers (*Treganey v. Fletcher*, 1 Ld. Raym. 154; *Dobson v. Bell*, 2 Lev. 176; *Ogle v. Norcliffe*, 2 Ld. Raym. 869); nor [*1096] the beginning *and end of term (*Eastwick v. Cooke*, 2 Ib. 1557).

But the court will not take judicial notice of the rules and practice of the court of bankruptcy (*Van Sandau v. Turner*, 6 Q. B. 773); nor the rules of the poor law commissioners (*R. v. Dolgelly Union*, 8 Ad. & E. 561); nor a book called the rules and regulations for the government of the army (*Bradley v. Arthur*, 4 B. & C. 304); nor the nature and jurisdiction of inferior courts (*Moravia v. Sloper, Willes*, 37); nor foreign laws, not the seals or proceedings of foreign courts (*Mostyn v. Fabricas*, Cowp. 174; *Henry v. Adey*, 3 East, 221; *Ganer v. Lanesboro*, Pea. Ca. 17); nor the laws of the colonies (*Wey v. Vally*, 6 Moo. 194); nor the law of Scotland (*Mall v. Roberts*, 3 Esp. 163); nor that Dublin is in Ireland (*Kearney v. King*, 2 B. & A. 303); nor that a particular town is within a certain diocese (*R. v. Sampson*, 2 Ld. Raym. 1379); nor the local situation of a town or street in a county (*Deybell's case*, *supra*; *Humphreys v. Budd*, 9 Dowl. 1000); nor that part of the Tower is within the city of London (*Browne v. Thompson*, 2 Q. B. 789); and the king's proclamation can alone be proved by production of the Gazette (*Van Omeron v. Dowick*, 2 Camp. 44).

When a bill of particulars has been delivered, the plt. will be precluded from giving evidence of any demand not contained in his particular: see "PARTICULARS."

No evidence need be adduced to prove facts admitted on the pleadings or record, or by payment of money into court, see "ADMISSIONS," "PAYMENT OF MONEY INTO COURT."

When the jury are sworn the junior counsel for the plt. opens the pleadings, and if the proof of the issue rests on the plt. the leading counsel states the case.

Course of Evidence.

After the jury are sworn the junior counsel opens the plt.'s pleadings and the leading counsel states the case to the jury.

Where several defts. appear by several counsel, it is a matter for the discretion of the presiding judge whether he will allow more than one counsel to be heard (*Nicholson v. Brooke*, 2 Exch. 213; 12 Jur. 681). *Seem*, that where one defence alone is relied on, the better rule is, that one counsel only ought to be heard (*Ib.*).

Who is to begin.] The party who has to prove the affirmative of the issue is entitled to begin. Where the general issue is pleaded, or issue is joined on any averment of the plt., his evidences are first adduced; and after the witnesses have been examined in support of the plt.'s case the deft.'s counsel is heard, but, where issued is joined on any averment of new matter by the deft., as a release in assumpsit, or right of way in trespass, the deft. has the right of being first heard (*Tidd*, Pr. 908). Where there are several issues, some of which are to be proved by the plt. and others by the deft., the plt. is to begin and give evidence of those which are to be proved by him; the deft. is next to offer evidence to establish the issues on his part, and, at the same time, controvert the proofs of the plt.; then the plt. is entitled to adduce testimony for disproving or answering the affirmative evidence of the deft.; afterwards, the deft.'s counsel has the right to a reply, limited to the evidence adduced, in answer to his affirmative; and, finally, the plt.'s counsel has the right to a general reply upon the whole case (*Jackson v. Hesketh*, 2 Stark. 521; 1 Stark. Ev. 382). But if, in trespass, the general issue be pleaded only as to the force and arms, &c., and a special plea as to the rest, the proof of the issue upon the special plea lies on the deft., who is entitled to begin (*Ib.*). The opposite party cannot interpose with evidence for the purpose of excluding testimony which is *prima facie* admissible; such evidence if not obtained by cross-examination, must be postponed as part of *the objecting party's case: thus the plt. having tendered an [*1097] examination of deft. taken before bankruptcy commissioners, the deft. was not permitted to call witnesses to prove, before the examination was read, that it was inadmissible because incomplete (*Jones v. Fort, Moo. & M.* 196). But if secondary evidence of an instrument be tendered, evidence to disprove the possession of it may be given immediately (*Harvey v. Mitchell*, 1 Moo. & R. 366): where by pleading or notice the defence is known, plt.'s counsel is bound to open the whole of his case in chief, unless some specific fact be adduced by the deft. to which the plt. can give an answer, and he cannot go into general evidence in reply (*Rees v. Smith*, 2 Stark. 31). Where the plt. relied on *prima facie* evidence arising from possession in support of his title to a mine, which title was in issue, it was considered that the plt. was not entitled to support his case in reply by general evidence of his title (*Rowe v. Brenton*, 3 Moo. & R. 139, 281). If the deft. traverse and also specially justify, the plt. may reserve his case on the special pleas, until the deft. has proved them, or he may enter upon the disproof of them in the first instance; but in that case he will not be allowed to give further evidence of the same kind in reply (*Brown v. Murray*, R. & M. 254, and note). Where a set-off was pleaded to an action on several bills of exchange, the plt. was allowed to prove the balance in the first instance, and then after the deft. had proved his set-off, to prove further sums due, so as to exceed the set-off (*Williams v. Davies*, 1 C. & M. 464).

Where counsel offers evidence for one purpose, which is rejected, he will not, after the trial, be permitted to rely upon it as admissible for another purpose (*R. v. Grant*, 5 B. & Ad. 1081), nor can he complain of misdirection upon a point which he has waived at the trial (*Robinson v. Cook*, 6 Taunt. 336). If evidence be admitted without objection as relevant to the issue, it cannot be objected to as inapplicable after the judge has begun to sum up

(Abbott v. Parsons, 7 Bing. 563). If the judge should omit to submit a point which the counsel considers material, he ought to be reminded of it (Mayor v. Chadwick, 11 Ad. & E. 584, 585; Wedge v. Berkeley, 6 Ad. & E. 663). The parties to the action are bound by the views taken of their respective cases, and the mode of conducting them, by their counsel at the trial; and the party against whom the verdict goes cannot move for a new trial, upon grounds omitted to be enforced at the trial (see Doe v. Needs, 2 M. & W. 129; Henn v. Neck, 3 Dowl. 163; Short v. Kalloway, 11 Ad. & E. 28). A judge is not bound to put questions to the jury not distinctly raised by the issue on the record, even though the verdict may turn upon them; nor are the jury bound to answer them. But, by consent of all parties, it is discretionary in the judge to put them, and it may be proper to do so, as where it is desirable to know on which of several grounds the verdict is given (Walton v. Potter, 3 M. & Gr. 311).

In ejectment where several defts. defended in the same right, but by different attorneys and counsel, only one counsel was permitted to address the jury (Doe v. Tindal, Moo. & M. 314); so in trover, where the defts. pleaded jointly (Perring v. Tucker, Moo. & M. 392); so in debt on bond, plea *non est factum*, for there could not be a verdict for one against the other deft. (Mason v. Ditchbourne, 1 M. & R. 462, n.). But in actions *ex delicto*, where the defts. appeared and pleaded by separate counsel and attorneys, a separate cross-examination and address were allowed (R. v. Williamson, 3 Stark. 162); but one counsel only was allowed to examine those witnesses who were subpoenaed by both defts. (Massey v. Goyder, 4 C. & P. 162); and even in assumpsit (Ridgway v. Phillips, 1 C. M. & R. 415); but it [*1098] would seem that one of the defences in this case was misjoinder of *defts. as partners (3 Dowl. 154): where there are two defts. in an issue out of chancery, whose interests are at variance with each other, each deft.'s counsel may address the jury and prove his case separately and in succession. The witnesses of each may be cross-examined by the co-defts.' as well as the plt.'s counsel; and the plt. will have the general reply (Phillips v. Willett, 2 Moo. & R. 319). When it is ordered on an issue out of chancery that the "third party shall be at liberty to attend the trial," his counsel cannot call witnesses or address the jury, but he may cross-examine and suggest points of law (Wright v. Wright, 7 Bing. 458). And counsel for a party not entitled to a separate address or examination will be heard on a legal objection (Poole v. Siddon, Rosc. Ev. 180). Where a party appears in person, he must examine the witnesses as well as address the jury (Shuttleworth v. Nicholson, 1 M. & R. 254). The deft.'s counsel, in addressing the jury, has no right to ask them if they are satisfied that the deft. is entitled to a verdict as the case stands, without calling witnesses (Moriarty v. Brooks, 6 C. & P. 684). The plt. cannot call upon deft. to elect upon what count or demise he will rely (Swinburn v. Jones, 1 M. & R. 322; Doe d. Bassett v. Mew, Rosc. Ev. 181).

The leading counsel has a right to interpose and take the examination of a witness out of the hands of his junior; but after one counsel has brought the examination to a close, a question cannot be regularly put to a witness by another counsel on the same side (Doe v. Roe, 2 Camp. 280).

All the counsel, on both sides, are usually heard on any point of law which arises incidentally, and leading counsel making the objection or submitting the point alone replies. Where the point discussed, however, is on a right to begin, only one counsel at each side can be heard (Rawlings v. Desborough, 2 M. & R. 70; but see Bastard v. Smith, ib. 132). Counsel cannot be heard on the objection of a witness to answer a question (R. v. Adey, 1 M. & R. 94). It is questionable how far counsel can be heard on a point

of law for a party who conducts his own case in person (*Shuttleworth v. Nicholson*, ib. 254; *Moscatti v. Lawson*, ib. 454); it is a very objectionable practice (*Stones v. Byron*, 4 D. & L. 393, per Alderson, B.); such a party cannot also give evidence as a witness.

It has been resolved by the judges that in cases of slander, libel and other actions, where the plt. seeks to recover actual damages of unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the deft. (*Carter v. Jones*, 1 Moo. & R. 284; 6 C. & P. 64, ib.). It has been held that this applies to "personal injuries, as assaults, libels," &c. (*Wootton v. Barton*, ib. 518); or to actions for "malicious injuries where the amount of damage is not matter of calculation, but is liable to be increased by matter urged in aggravation" (*Reeve v. Underhill*, 1 M. & R. 440). The rule is thus laid down by Lord Denman, C. J.: "In actions for libel, slanders, and injuries to the person, the plt. shall begin, although the affirmative issue is on the deft." (*Mercer v. Whale*, 5 Q. B. 462; 14 Law J. 267; 1 Dowl. N. P. C. 246; 9 Jur. 576); and this rule is declaratory of a principle applicable to all actions, for wherever the record shows that something, even damages, is to be proved by plt., he ought to begin even in an action *ex contractu* (9 Jur. 455); but where the damages are ascertained or merely nominal, there the deft. must begin (Ib., per Pattison, J.). Therefore, where, in covenant for dismissing an articulated clerk, the deft. pleaded misconduct, and the plt. replied *de injuriâ*, the plt. must begin (*Mercer v. Whale*, *supra*; *Edwards v. Matthews*, 16 Law J., N. S., Ex. 291; *Both v. Milnes*, *15 M. & W. 669; *Chapman v. Rawson*, 8 Q. B. 673). On an [*1099] interpleader between the assignees of a bankrupt and a judgment creditor, where the issue was whether the deft. was entitled under a *fi. fa.* as against the plts.: held, that as the judgment against it was admitted, the plt. ought to begin (*Edwards v. Matthews*, *supra*). In an action on a promissory note, the defendant pleaded several pleas, as to part, the proof of which lay on him, and also a plea of payment of money into court, as to the residue; to which the plt. replied damages *ultra*: held, that the plt. was entitled to begin (*Both v. Milnes*, 4 D. & L. 52, Ex.; 15 L. J. 354, Ex.). In a declaration in trespass, the deft. justified setting up an affirmative right in himself, which right the replication traversed at the trial; the plt.'s counsel claimed the right to begin; the judge asked if he would undertake to proceed for substantial damages, which he declined; the deft. was then allowed to begin (*Chapman v. Rawson*, 8 Q. B. 673; 10 Jur. 287; 15 L. J. 225, Q. B.). In an action of debt for goods sold, in which the deft. pleads her coverture, and the plt. in his replication denies the coverture, and there be no other issue, the deft. must begin (*Woodgates v. Potts*, 2 Car. & Kir. 457, Parke). In replevin and cognizance for rent, plt. pleaded discontinuance of receipt for twenty years, and no distress within twenty years after right accrued; to which plt. replied that there was a distress within twenty years and issue; plt. must begin in order to show when the distress was made (*Collier v. Clarke*, 5 Q. B. 467). In trespass *q. c. f.*, where the deft. pleaded a custom to divert water which was traversed by the plt., the deft. was allowed to begin, though the plt.'s counsel asserted his intention to ask for heavy damages (*Bastard v. Smith*, 2 Moo. & R. 129). Had the plt. however traversed the custom, and new assigned excess, he would then have had a right to begin (Ib. 132); and in covenant for damages, though unascertained, the deft. is to begin (*Reeve v. Underhill*, *supra*). So in trespass *de bonis*, where the real question is the rateability of the plt.'s house (*Burrell v. Nicholson*, ib. 304). It has also been held, that where any affirmative proof lies on the plt. to show what damages he is entitled to, he has a right to begin (*Absolam v. Beaumont*, 1 Moo. & R. 441, n.). In an action

of trespass for shooting a dog, where deft. justified to prevent it from trespassing, the plt. was held entitled to begin, though the deft. offered to admit the value of the dog; for the plt. may have damages beyond that amount (*Cann v. Facey*, *Rosc. Ev.* 176). So in a case of trespass for breaking into the plt.'s house, where the issue was on a plea of leave and license, it was held that the plt. was entitled to begin (*Mills v. Stephens*, *ib.*). There are other cases where the criterion has been held to be, not on which side the affirmation lies, but rather which side will be entitled to a verdict, if no evidence be offered. Thus in an action by indorsee against acceptor, plea that the bill was for the drawer's accommodation, and that plt. did not give any consideration to the drawer; replication that it was indorsed to the plt. by the drawer; for a good consideration: held, that as a consideration is presumed, the deft. must begin by proving the want of it, or some suspicious circumstance to throw the proof on the plt. (*Mills v. Barber*, 1 M. & W. 425; *Lewis v. Parker*, 4 Ad. & E. 838). In an action for an unworkmanlike execution of a contract, deft. pleaded that it was executed in a workmanlike manner, upon which issue was joined: held, that plt. should begin, as it was not to be presumed that the work was bad (*Amos v. Hughes*, 1 Moo. & R. 464). So, where in an action on a life policy, the plt. averred that the deceased had led a temperate life, which was traversed by the plea: held, that the plt.

was to begin, although it was contended that intemperance was not [*1100] *to be presumed (*Huckman v. Fernie*, 1 M. & W. 505; *Rawlins*

v. Desborough, 2 Moo. & R. 70; *Geach v. Ingall*, 14 M. & W. 95; *Ashby v. Bates*, 15 M. & W. 589). Where an issue on the sanity of a person is directed by chancery, the court will presume that the person ordered to be plt. is to begin (*Frank v. Frank*, 2 Moo. & R. 314). When the declaration set out a policy conditioned to be void in case of misrepresentation as to the habits and health of the deceased, and averred that there was no misrepresentation, plea that there was an untrue statement in this: to wit, that the habits of deceased were prejudicial to health; and his health was unsound. Replication *de injuriâ*: held, that the deft. was to begin (*Pole v. Rogers*, *ib.* 287). In an action on a life policy the declaration averred that a certain statement by the insured that he had not been afflicted with certain disorders which were named (amongst which was rupture) was true. The defendant pleaded that the statement was untrue, in this, to wit, that the insured had been afflicted with rupture, concluding with a verification. Replication *de injuriâ*. Held, that the plaintiff was entitled to begin (*Ashby v. Bates*, 4 D. & L. 33, Ex.; 15 L. J. 349, Ex.). Where there are several issues, any one of which calls upon the plt. for proof, he has a right to begin as to all (*Rawlins v. Desborough*, 2 Moo. & R. 328); and where, in an action of libel, judgment has been suffered by default as to part, the plaintiff must begin, although the deft. plead affirmatively as to the residue (*Wood v. Pringle*, 1 Moo. & R. 277). In an action on a bill and on an account stated; plea, payment to the first, and *non assumpsit* to the second count: held, that deft. must begin unless the plt. have some evidence to offer, besides the bill, of the account stated (*Smart v. Rayner*, 6 C. & P. 721). In replevin the plt. has the same right as in other actions (*Curtis v. Wheeler*, Moo. & M. 493). And the deft. has a right to begin, although he is bound by rule of court to admit the plt.'s case (*Thwaites v. Sainsbury*, 5 C. & P. 69). Where the general issue is not pleaded, but issue is joined upon some collateral matter, the proof of which rests upon the deft., his counsel begins after the pleadings are opened, and he has the general reply (*Cotton v. James*, Moo. & M. 275). The deft. begins, where in an action of trespass the general issue is pleaded only as to the coming with force and

arms, and a justification as to the rest (Jackson v. Hesketh, 2 Stark. 518). In trespass against a constable; plea, a justification only: held, his counsel admitting a demand of a copy and perusal of the warrant (24 Geo. II. c. 44) is entitled to begin (Burrell v. Nicholson, 1 M. & R. 305). Where *liberum tenementum* only is pleaded, the deft. begins (Pearson v. Coles, 1 Moo. & R. 206). Where the plea avers affirmative matter, concluding with a special traverse of a part of the declaration, on which issue is joined, the plt. begins (Crowley v. Page, 7 C. & P. 789). But where plt. avers the liability of the whole parish to church-rates; plea, an exemption of a part of it, with a traverse of the liability of the whole, on which issue is joined; the deft. begins (Craven v. Sanderson, 4 Ad. & E. 666). Where the deft. in replevin pleads property in a third person, A. B., and not in the plt., replication that the property is not in A. B. but in the plt. and concludes to the country, the deft. is entitled to begin (Colstone v. Hiscolbs, 1 Moo. & R. 301). Where the deft. pleads a plea, averring notice, and issue is joined on that averment, the deft. begins (Warner v. Haines, 6 C. & P. 666). On an issue in error to avoid an outlawry on the ground that plt. was beyond seas, plea that he went abroad fraudulently to defeat the outlawry, issue thereon, deft. begins (Bryan v. Wagstaff, R. & M. 327).

The erroneous ruling of the judge at nisi prius as to the right to [*1101] begin would be a ground of new trial (Huckman v. Fernie, 3 M. & W. 505; Doe d. Bother v. Brayne, 17 L. J. 127, C. P.). Mr. Baron Alderson observed, in reference to this question, that the Exchequer copy of the report of the case of Huckman v. Fernie, 3 M. & W. 517, contained a correction, in Mr. Baron Parke's handwriting, of a passage in the judgment of Lord Abinger. The judgment is in these terms: "We have no doubt as to the first point, that the Lord Chief Justice was right in ruling that the *onus probandi* was upon the plaintiff, and that he was entitled to begin. We cannot agree, however, that this is a matter entirely for the disposal of the judge at nisi prius. I cannot say that we should interfere in a very doubtful case; but if the decision of the judge *were clearly and manifestly wrong*, the Court would interfere to set it right." Mr. Baron Parke has substituted for the words "clearly and manifestly wrong" the words "did clear and manifest wrong," and has added this note in the margin, "*Quære*, if this is not the true meaning?" (Booth v. Millns, 4 D. & L. 52, Ex.; 15 L. J. 354, Ex.).

The court will not set aside a verdict on the ground that the wrong party was allowed to begin at the trial, unless it is manifest that some injustice or injury has resulted from the error; and therefore, if on the trial of a feigned issue, directed for the purpose of informing the conscience of the court, the judge calls on the wrong party to begin, the court will not grant a new trial if they consider the verdict supported by the evidence (Edwards v. Matthews, 11 Jur. 392, Ex.).

See *ante*, p. 9, as to who is to begin on a plea in abatement; and *ante*, p. 997, as to who is to begin in ejectment.

The Right to reply.] The party who begins has the right of reply, in case the other party offers any evidence. If the deft.'s counsel, after opening facts to the jury, gave no evidence to prove them, the plt. has not strictly the right to reply, but it is in the discretion of the court to admit it (Clerar v. Sodo, Moo. & M. 85). If, to prove part-payment, the deft. rely upon the particulars of demand given by plt. under a judge's order, containing a credit for certain sums, this is such evidence on the part of the deft., as entitles the plt. to address the jury in reply (Rymer v. Cook, Moo. & M. 86, n.). The particulars of demand now require no proof. If evidence is offered by the deft., the plaintiff may give evidence in answer; and, in that case, the deft.

is entitled to a limited, and afterwards the plt. to a general, reply, (Stark. Ev. 382). It was, indeed, laid down as a general rule by Lord Ellenborough, that when, by the pleadings or notice, the defence is known to the plt., his counsel is bound to prove his whole case in chief, and cannot go into general evidence in reply (Rees v. Smith, 2 Stark. 31; Rowe v. Brenton, 3 M. & R. 139, 281). But the practice is now altered, and the plt.'s counsel is at liberty either at once to enter into the whole of his case, or to make out a *prima facie* case only, and reserve his answer to the deft.'s case for the reply (Browne v. Murray, 1 R. & M. 254; Sylvester v. Hall, ib. 255; 1 Stark. Ev. 383). See Rowe v. Brenton, 3 M. & R. 139, 281, where the action was on several bills of exchange, and deft. pleaded a set-off; the plt. was allowed to prove the balance in the first instance, and after the deft. had proved his set-off, to prove further sums due, so as to exceed the set-off. "Either may be correct, and it must be left to the discretion of the judge" (Williams v. Davies, 1 C. & M. 464, per Lyndhurst, C. B.). In ejectment by a person claiming under a will against one *who claims under [*1102] a codicil, if the deft. will admit the will, he is entitled to begin, and to have the general reply (Doe v. Corbett, 3 Camp. 368; Pea. Ev. 6). And where, in ejectment by the heir-at-law against the devisee, the lessor of the plt. proved his pedigree and stopped, and the deft. set up a new case, which the lessor answered by evidence, it was held that the deft. was entitled to the general reply (Goodtitle v. Braham, 4 T. R. 497). But it has been said, that where the deft. brings evidence to impeach the plt.'s case, and also sets up an entire new case, which the plt. again controverts by evidence, the deft.'s reply is to be confined to the new case set up by him; for upon the plt.'s first case the deft. has already commented in opening his own (1 Stark. Ev. 384). Where the deft., on being called on by the plt. to produce a document, interposes with evidence to show that it is not in his possession; this gives no general reply (Harvey v. Mitchell, 2 Moo. & R. 366). Where the deft.'s counsel read a paper or made statements of material facts likely to have weight with the jury, without attempting to prove them, a general reply was permitted (R. v. Bignold, Dow. & Ry. N. P. 59). Where the deft.'s counsel goes for a nonsuit on a point of law, which is answered by the plt.'s counsel, the deft.'s counsel has a right to reply upon the law only (Arden v. Tucker, 1 Moo. & R. 192).

Where several defts. in the same interest, and relying on the same defence, defend separately, it has been ruled by Gibbs, C. J., that the senior counsel can alone address the jury, and the witnesses are to be examined by the counsel successively, in the same manner as if the defence were joint, and not separate (Chippendale v. Mason, 4 Camp. 174). So, in ejectment (Doe v. Tindall, M. & M. 314). So in trover, where the plea was joint (Perring v. Tucker, M. & M. 392). So in debt on *bond* and plea *non est factum* (Mason v. Ditchbourne, 1 M. & Rob. 462). But in actions *ex delicto*, where defts. appeared and pleaded by separate attorneys and counsel, a separate cross-examination and address was permitted (King v. Williamson, 3 Stark. 162; Massey v. Goyder, 4 C. & P. 162). And even in assumpsit, the same privilege was permitted (Ridgway v. Phillips, 1 C. M. & R. 415); but there, there was a defence of misjoinder of defts. as partners (3 Dowl. 154). Where the witnesses are subpœnaed by both defts. then only one counsel will be allowed to examine such witnesses (King v. Williamson, 3 Stark. 162). On an issue from the Chancery to try whether the plt. was next of kin of J. S. and both the defts.' interests were at variance with each other, each of their counsel was allowed to address the jury and prove his case separately, and the witnesses of each may be cross-examined by their respective counsel as well as by the plt.'s, who will be entitled to the general reply (Phillips v.

Willetts, 2 M. & R. 319, per Alderson, B.). Where, on the trial of an issue out of Chancery, it is ordered that a third party shall attend the trial, he cannot call witnesses nor address the jury, but he may cross-examine and suggest points of law (7 Bing. 459, n.; 5 M. & P. 319, n.; 4 C. & P. 389). Withdrawing a juror at a trial does not put an end to a cause unless it was clearly the intention of the parties that it should have that effect (Harris v. Thomas, 2 Gale, 197). If, on the trial of a cause, the plaintiff, upon any one issue, merely proves a *prima facie* case, he is not at liberty, after the deft. has given evidence of new facts which rebut that *prima facie* case, to offer evidence in reply of some further fact tending to confirm his case. Thus, upon an issue that A.B. did not indorse to the plt., if he proves merely the handwriting of the indorser in the first instance, he cannot, after the deft. has proved facts to show that the *plt. was not the [*1103] real *bona fide* indorsee, give additional evidence in reply to show that he was (Jacobs v. Tarleton, 10 Law T. 390, Q. B.).

DEMURRER TO EVIDENCE.

A demurrer to evidence is analogous to a demurrer in pleading; the facts alleged are confessed, and the law arising upon those facts is referred to the decision of the court. The reason why a demurrer is resorted to, is that the jury *may* find a general verdict, and so the facts will not appear upon the record (Cocksedge v. Fanshaw, 1 Doug. 134). But the power of granting new trials has, to a certain extent, dispensed with the necessity of demurrers and bills of exceptions, (3 Bla. Com. 373). The ordinary office of the judge is to declare to the jury what the law is upon the fact which they find, and then they compound their verdict of the law and the fact; but, if a party wish to withdraw from the jury the consideration of the law, and its application to the fact, he demurs to the evidence (1 Ph. Ev. 297; Gibson v. Hunter, 2 H. Bl. 206; 1 C. & P. 237). "The question upon demurrer is, whether the matters shown in evidence, admitting them to be true, be sufficient to maintain the issue." The whole proceeding upon demurrer to evidence is under the control of the judge who tries the cause, who may overrule the demurrer, and thereupon the party demurring may tender a bill of exceptions (B. N. P. 314; 2 H. Bl. 208). Where a probate was left to the jury only as evidence of a will of personality, and not as conclusive, a demurrer, and not a bill of exceptions, was held to be proper (Chichester v. Phillips, Ld. Raym. 486). If the question be on the *admissibility* of evidence tendered, and a judge admits it, a bill of exceptions, and not a demurrer, is proper (B. N. P. 314; Gibson v. Hunter, *supra*). Where the evidence is certain, as where it consists of matter of record, or other matter in writing, the party offering the evidence may be compelled to join in demurrer, or waive the evidence (Gibson v. Hunter, *supra*); but, on a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit, upon the record, every fact and every conclusion which the evidence offered conduces to prove (Ib. 187). A demurrer to evidence admits not only those facts of which positive proof is made, but also those inferences and conclusions which are, by fair presumption, deducible from the fact so proved (Fanshaw v. Cocksedge, 3 Bro. P. C. 690; S. C. 1 Doug. 218). Therefore on a demurrer to evidence, the party cannot take advantage of any objection to the pleadings (Cort v. Birkbeck, 1 Doug. 218). Where a demurrer to evidence is admitted, it is usual for the judge to give orders to the associate to take a note of the testimony, which is signed by the counsel on both sides, and the demurrer is affixed to the postea (B. N. P. 313; Tidd, Pr.

916). The demurrer is then remitted for argument to the court, out of which the record issued, and not as on a bill of exceptions to the next superior court (3 Bl. Com. 372); and error lies upon the judgment upon the demurrer (Gibson v. Hunter, 2 H. Bl. 201). The damages may be assigned either by the principal jury conditionally before discharged, or by another jury on a writ of inquiry, after the demurrer is determined; and it is said to be the most usual course, upon such a demurrer, to discharge the jury without further inquiry (Ib.). A demurrer to evidence lies in an inferior court, as the Palace Court (Fitz Harris v. Boiun, 1 Lev. 87).

[*1104]

*Form of, and Joinder.

Demurrer to evidence by the deft. when the damages are assessed conditionally at the assizes.

Afterwards that is to say on the day and at the place within contained before one of the justices of our said lady the queen assigned to hold pleas in the court of our said lady the queen before the queen herself and one of the barons of our said lady the queen of her court of Exchequer at Westminster and others their fellow justices of our said lady the queen assigned to take the assizes in and for the county of according to the form of the statute in such case made and provided came as well the within named A. B. as the within named C. D. by their respective attorneys within mentioned and the jurors of the jury whereof mention is within made being summoned also come and being chosen tried and sworn to say the truth of the matters within contained the said A. B. to prove and maintain the issue within joined on his part shows in evidence to the jury aforesaid by E. F. a witness duly sworn in that behalf that &c. (*here state the evidence on the part of the plt.*): And the said C. D. says that the aforesaid matters to the jurors aforesaid in form aforesaid shewn in evidence by the said A. B. are not sufficient in law to maintain the said issue within joined on the part of the said A. B. and that he the said C. D. to the matters aforesaid in form aforesaid shewn in evidence hath no necessity nor is he obliged by the law of the land to answer and this he is ready to verify wherefore for want of sufficient matter in that behalf shewn in evidence to the jury aforesaid the said C. D. prays judgment and that the jury aforesaid may be discharged from giving any verdict upon the said issue and that the said A. B. may be barred from having his said action against the said C. D. &c.

— (Signature.)

Joinder in demurrer.

And the said A. B. for that he hath sworn in evidence to the said jurors sufficient matter in maintenance of the said issue which matter the said C. D. doth not deny nor in any manner answer thereto prays judgment and his damages by reason of the premises to be adjudged to him &c. Whereupon it is told to the jurors aforesaid that they shall inquire what damages the said A. B. hath sustained as well by reason of the matter shewn in evidence as aforesaid as for his costs and charges by him about his suit in this behalf expended in case it shall happen that judgment shall be given upon the evidence aforesaid for the said A. B. And the jurors aforesaid upon their oath aforesaid thereupon say that if it shall happen that judgment shall be given for the said A. B. upon the evidence aforesaid then they assess the damages of the said A. B. by him sustained by reason of the matter shewn in evidence as aforesaid besides his costs and charges by him about his suit in this behalf expended to £ and for these costs and charges to s. And thereupon the said jurors by the assent of the said parties are discharged from giving any further verdict upon the premises.

— (Signature.)

Demurrer to evidence by the plt. when the jury are discharged.

Afterwards that is to say on the day and at the place within contained &c. (*as in the last, mutatis mutandis, to the prayer at the end of the demurrer, which is as follows:*) prays judgment and that the jury aforesaid may be discharged from giving any verdict upon the said issue and that his damages by reason of the premises within mentioned may be adjudged to him &c.

— (Signature.)

Joinder in demurrer.

And the said C. D. for that he hath shewn in evidence to the jury aforesaid sufficient matter to maintain the said issue within joined on the part of the said C. D. and which he is ready to verify and forasmuch as the said A. B. doth not deny nor in any manner answer the said matters prays judgment and that the said A. B. may be barred from having his aforesaid action against him and that the jury aforesaid may be discharged from giving their verdict upon the said issue &c. Wherefore let the jury aforesaid be discharged by the court here by the assent of the parties from giving any verdict thereupon.

— (Signature.)

*EXECUTORS AND ADMINISTRATORS.

[*1105]

ACTIONS BY.(a)

FORM OF REMEDY, p. 1105.

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Form of Remedy and when they may sue.

There is nothing peculiarly distinguishing the form of remedy for these parties from others.

When and how they should sue on Contracts made with Deceased.] In the case of personal contracts or covenants, which run not with the land, where the party to whom they are made is dead, the executor of such party is entitled to maintain an action for the breach of them (Brandon v. Pate, 2 H. Bl. 310; Webb v. Russell, 8 T. R. 403). But this position will not hold, where the covenants run with the land, because they pass to the person to whom the land descends (Ib. 401; Lucy v. Levington, 2 Lev. 26); and an executor cannot maintain an action for a breach, without showing some special damage to the testator in his lifetime, or that the plt. claimed some interest in the premises (Kingdom v. Nottle, 1 M. & S. 355; 4 M. & S. 53; King v. Jones, 1 Marsh. 107; 5 Taunt. 418; S. C. affirmed, 4 M. & S. 188; Knight v. Quarles, 2 B. & B. 103; Wms. Exors. 635).

In Knight v. Quarles, *supra*, which was an action against an attorney for

(a) 2 U. S. Dig. Tit. "Ex'rs and Adm'rs," p. 360; 1 Supp. U. S. Dig. p. 790; 1 Ann. Dig. p. 253; 2 Ann. Dig. p. 183; 3 Id. p. 228.

negligence in investigating a title, and the premises were conveyed with a bad one, the declaration averred that the testator was unable to sell the property, and alleged special damage to the personal estate; it was objected, on demurrer to the declaration, that this was a contract regarding land, on which an administrator could not sue; but the court unanimously held the action well brought. In *Orme v. Broughton*, it appeared the testator had agreed to purchase certain land, and had paid some deposit-money, and the deft. promised to furnish an abstract of good title, which he refused; the declaration showed special damage; demurrer on the ground, amongst others, that the damage, if any, was to the heir, and not to the administrator; but the court held, the plt. was entitled to judgment, for that there appeared on the face of the record a personal contract, a breach in intestate's lifetime, and a loss to his personal property, and that it was clear the heir could not sue, for in all the cases where the heir had sued, the action had been on a covenant, but he could have no right of action on a mere agreement to sell (10 Bing. 533; 4 Moo. & S. 417). With regard to the right of an executor, &c., to sue on the breach of covenant real, see 1 Wms. Exors. 638. *In *Morley v. Polhill* (2 Vent. 56; [*1106] 3 Salk. 109, pl. 10) it was held, that the executors of a deceased bishop might bring an action against a lessee on a breach, in the lifetime of the testator, of a covenant to repair in a former bishop's lease. In *Smith v. Symonds* (Comb. 64), an administrator *de bonis non* brought covenant, and assigned for breach in the lifetime of his testator, that the land was not discharged from incumbrances; and it was held, on error, that the action well lay. In *Raymond v. Fitch* (2 C. M. & R. 588), the question was, whether an executor could sue the lessee of his testator on a breach of covenant not to fell, stub up, head, lop or top timber trees, excepted out of the demise, such breach having been committed in the lifetime of the deceased, and no part of the timber, loppings or toppings, having been removed by the defendant; and it was held in the affirmative: Lord Abinger, C. B., in delivering judgment observed, that the defendant's counsel had urged that the limitation of the old cases affected by that of *Chamberlain v. Williamson*, must be applied to all contracts, except such as directly relate to the personal estate, and the performance of which would necessarily be a benefit, and the breach a damage, to the personal estate of the testator, whether such contracts were under seal or not; and that upon such contracts the executor could not sue, without alleging a special damage to the personal estate; but that the case certainly did not go that length; and the court thought such an extension of the doctrine laid down in it was not warranted by law, and that it could not be extended to a contract broken in the lifetime of the deceased, the benefit of which, if it were yet unbroken, would pass to the executor, as part of the personal estate; at all events, not to such a contract under seal; that the present case was one of that description, and that it was more favourable to the executors than *Morley v. Polhill*, *Smith v. Symonds*, and *Lucy v. Livingston* (*supra*), in which the covenant was with the land; and that if the last case was to be considered as having been decided, as was suggested, on the ground that the loss of rent and profits by an eviction of the testator was an injury to the personal estate (though such a ground was not intimated in either report), it was difficult to say that the loss of the shade or casual profits of trees was not equally so. But it must be remembered that, in this case, the covenant did not run with the land, it being purely collateral; if, therefore, the executor had not the power to sue, all remedy was lost; for neither the heir nor devisee could sue. Upon principle and reason, however, it would seem that the right to sue ought to survive, on covenants running with the land, to the executor; for had the deceased sued himself,

and recovered damages, his personal estate would have been thereby benefited; and the neglect to exercise this right cannot be allowed to place the executor in a worse position than he would be if the testator had sued. It is his estate, and not the party's on whom the land descends, that has sustained the injury; if the testator had recovered, the descendant could not complain, nor demand the amount of damages from the executor. In *Ricketts v. Weaver*, (12 M. & W. 719), it was held, that the executor of a tenant for life may recover for the breach of a covenant to repair committed by the lessee of the testator in his lifetime, without averring a damage to his personal estate (per Parke, B.); the question is, whether an executor can sue for the breach of a covenant to repair in the lifetime of the lessor, who was tenant for life, without averring special damage. On that point, *Raymond v. Fitch*, in which all the cases were considered, is an authority directly in point, and ought not to be shaken: the result of that case is, that unless it be a covenant in which the *heir alone* can sue (according to *Kingdom v. Nottle*, and *King v. Jones*, 5 Taunt. 518; 1 Marsh. 107) for a breach of covenant in the lifetime of the lessor, the *executor can sue, unless it be a mere personal contract, in which the rule applies, *actio personalis, &c.* The breach of covenant is the damage; if the executor be not the proper person to sue, the action cannot be brought by any one. The executor of a deceased assignee, appointed under the Insolvent Act, 1 Geo. IV. c. 119, was held liable in covenant for non-payment of rent, and for non-repair (*Abercrombie v. Hickman*, 3 Nev. & P. 676).

Whenever the reversion be for years, the executor or administrator is of course the only party capable of suing on a covenant made with the lessor, whether it run with the land, or be in gross (1 Wms. Exors. 640). An executor of tenant for years is expressly within the stat. 32 Hen. VIII. c. 34, and may maintain covenant against the assignee of the reversion; and the 11 Geo. II. c. 19, s. 15, gives an executor of a tenant for life the right to sue for a proportion of the rent, to the death of the testator, where he dies before the rent was actually due; and by 4 & 5 Will. IV. c. 22, s. 1, that stat. is extended to rents reserved on leases determining on the death of the person making them, or on the death of the tenant, *pur autre vie*; and by sect. 2, all rents, annuities and other payments becoming due at fixed periods, are made apportionable. The executor of a termor, although he has demised for a longer term than his own, may support an action on the covenant for the stipulated rent due since the death of his testator, on the *privity of contract*, though not on any supposed privity of estate (*Baker v. Gosling*, 1 Bing. N. C. 19; *Mackey v. Mackreth*, 2 Chit. Rep. 461; 2 Ch. Pl. 565).

Executors, &c., may sue in their representative character, in all cases where the money, when recovered, would be assets (*King v. Thom*, 1 T. R. 487; *Ord v. Fenwick*, 3 East, 104; *Petrie v. Hanway*, 3 T. R. 659; *Heath v. Chilton*, 12 M. & W. 633; *Cowell v. Watts*, 6 East, 405; *Aspinall v. Wake*, 10 Bing. 67; *Lyng v. Sutton*, 4 Moo. & S. 417).

With respect to such personal actions as are founded upon any obligation, contract, debt, covenant, or other duty, the right of action, on which the testator or intestate might have sued in his lifetime, survives his death, and is transmitted to his executor or administrator (*Wheatley v. Lane*, 1 Saund. 216 a, n. 1). An executor, therefore, shall have an action to recover debts of every description due to the deceased, as either debts of record, as judgments, statutes, or recognizances, or debts due on specialty contracts, as for rent, or on bonds, covenants, and the like, under seal; or debts on simple contracts, as notes unsealed, and promises not in writing, express or implied (1 Wms. Exors. 622). An action of account lies for an executor (1 Edw.

I. st. 1, c. 3); for an executor of an executor (25 Edw. III. c. 5); for administrators (31 Edw. III. c. 11). If goods of a testator, taken away, continue *in specie* in the hands of the wrong-doer, replevin or detinue will lie for the executor (*Le Meson v. Dixon*, Jon. 173; 1 Saund. 217, n. 1); or, if sold, an action for money had and received (*Ib.*). The executor of an assignee of a bail-bond may bring an action upon it (*Nott v. Stevens*, Forst. 369; Com. Dig. Admon. B, 13). And the executor or administrator may sue, although he be not named in the contract (*Ib.*); and even where money was made payable to A. or his assigns, the executor shall take it, for he is assignee in law (*Peace v. Mead*, Hob. 9; 1 Wms. Exors. 625; see also, *Iremonger v. Newsam*, Latch, 261; 1 Rol. Abr. 915). But if one enter into an obligation conditioned to pay 20*l.* to such person as the testator shall by his last will appoint, the executors cannot sue for this 20*l.*; for, though they are his assignees in law, yet the assignee here must be an assignee in deed (Hob. 9, 10; 1 Wms. Exors. 625). So, if an annuity be given to B. without saying to his executors, &c., *during the life [*1108] of the testator's wife, upon condition that he be civil to the wife, and B. die before the wife, his executor shall not have it, for it was personal to B. (*Neal v. Hanbury*, Pre. Ch. 173; see also, *Barford v. Stuckey*, 1 Bing. 225).

The common-law rule, *actio personalis moritur cum personâ*, has never been applied by the old cases to causes of action on contracts (Com. Dig. Admon. B, 13, Covenant, B, 1; Bac. Abr. Exors. N; *Raymond v. Fitch*, 2 C. M. & R. 597); for these are choses in action, and are part of the personal estate, in respect of which the executor or administrator represents the person of the deceased, and is, in law, his assignee (*Raymond v. Fitch*, *supra*). But no action can be maintained by an executor or administrator upon an express or implied promise to the deceased, where the damage consisted entirely in the personal suffering of the deceased without any injury to his personal estate. Therefore, no action lies by an executor or administrator for a breach of promise of marriage to the deceased, where no special damage to the personal estate can be stated on the record (*Chamberlain v. Williamson*, 2 M. & S. 408). As to the right of the executor, &c., to sue on a contract, broken in the lifetime of the deceased, where no damage to the personal estate can be stated, see *Raymond v. Fitch*, 2 C. M. & R. 588. So, with respect to injuries affecting the life and health of the deceased, all such as arise out of the unskillfulness of medical practitioners, the imprisonment of the party, brought on by the negligence of his attorney; for these, generally speaking, no action can be maintained by the executor, &c., on the breach of the implied promise to exhibit, on the part of the person employed, a proper portion of skill and attention, such cases being in substance actions for injuries to the person (*Ib.* 416; see *Beckham v. Drake*, 8 M. & W. 854). But see *Knights v. Quarles*, *supra*, where the action was held to lie against an attorney, for negligence in investigating a title about to be conveyed to the intestate.

If a promise be made to the deceased for the exclusive benefit of a third party, the executor or administrator may sue upon it. Thus, where A. promised to B. that if B. would pay 50*l.* to C., his son, who was married to D., the daughter of A., he would pay 100*l.* to D. his daughter, at such a time, B. paid the 50*l.* to C., and A. did not pay the 100*l.*; B. died intestate; his administrator brought an action on the case, on assumpsit, upon the promise made to B., the intestate; held, that the action lay, although the administrator should have no benefit by it if he recovered (*Bafield v. Collard*, Sty. 6; Al. 1).

An executor cannot sue, as such, for dividends received since the death

of the testator, because they never formed any part of his estate (Parker v. Baylis, 2 B. & P. 73).

The executors of a deceased partner, carrying on trade for the benefit of the estate, are liable personally, as copartners (Wightman v. Townroe, 1 M. & S. 412).

The representatives of an attorney need not deliver a signed bill of costs (Williams v. Griffith, 10 M. & W. 125).

Where the executor paid legacies in full, before he had paid the duty; held, that he might recover the amount paid for duty, in an action for money paid against the legatee (Foster v. Ley, 2 Bing. N. C. 269).

It is not necessary in an action of covenant, in order to charge an executor or assignee, to prove that he has entered upon the premises (Wollaston v. Hakewill, 3 M. & G. 257; *contra*, 1 Saund. 1 a, n.); but if he have never entered, he may discharge himself from liability by a plea to that effect (S. C. ib. 321).

On Contracts made with Executors.] As to contracts entered *into with themselves, they may sue in all cases where the money, [*1109] when recovered, would be assets (Bull v. Palmer, 2 Lev. 165; Cowell v. Watts, 6 East, 410; Thompson v. Stent, 1 Taunt. 322; Powley v. Newton, 6 Taunt. 453; Webster v. Spencer, 3 B. & A. 362; Partridge v. Court, 5 Pri. 412; Marshall v. Broadhurst, 1 Cr. & J. 405; Warner v. Humphreys, 3 Sco. N. R. 454); as on a note indorsed by him in that character (King v. Thom, 1 T. R. 487; Partridge v. Court, 5 Pri. 412; 7 Pri. 591; Catherwood v. Chabaud, 1 B. & C. 154; 2 D. & R. 271). Where a bill was indorsed generally, but delivered to S. C., as administratrix of J. C., for a debt due to the intestate, and S. C. died intestate after the bill became due, and before it was paid: held, that the administrator *de bonis non* of J. C. might sue upon the bill; for where the cause of action is such that the first administrator may sue in his representative character, the right of action devolves on the administrator *de bonis non* (Catherwood v. Chabaud, *supra*). So he may sue for goods sold by him as executor (Cowell v. Watts, 6 East, 405); or for money paid by him (Ord v. Fenwick, 3 East, 104); although guilty of a devastavit (Clarke v. Hingham, 2 B. & C. 149; Gallant v. Bonteflower, 3 Doug. 34). If an executor be sued on the obligation of the testator, who had become surety for a joint obligor, and is thus compelled to pay, an action will lie by the executor, as such, to recover the money so paid (lb. 305, 306). And if an administrator in his representative character pay that which he ought not, he may in the same character recover it (Clarke v. Hingham, *sup.*). Or for money paid and received to his use as executor (Petrie v. Hanway, 3 T. R. 659; Foxwiste v. Tremaine, 2 Saund. 208; Smith v. Barrow, 2 T. R. 477; Webster v. Spencer, 3 B. & A. 364, per Ashhurst, J.): or upon an account stated with him respecting money due to him as executor (Heashall v. Roberts, 5 East, 150; Thompson v. Stent, 1 Taunt. 322; Richardson v. Griffin, 2 Chit. Rep. 325). An executor may also sue for money lent by him *as executor* (Webster v. Spencer, 3 B. & A. 365). So, where the testator had agreed to do certain work, and died before the work was begun, and the executors did the work, using the materials of the testator, and then brought an action declaring in their representative character for work and labour done, materials found, and goods sold and delivered by the plt. as executors: held, that they might recover the value of the materials; and the court seemed further to think that they might recover also for work and labours as executors (Marshall v. Broadhurst, 1 Cr. & J. 403; 1 Tyrw. 308), which was afterwards decided in the affirmative (Edwards v. Grace, 2 M. & W. 190). Where the plts. (executors) had

continued to work the leasehold quarries of the testator, and had shipped off for the deft. from to time cargoes of stone, partly dug before and partly after the testator's death, and the deft. had accepted bills for the price of some of the cargoes drawn by the plts. as executors: held, that they might sue *as executors* for the price of the remainder of the cargoes (*Aspinall v. Wake*, 10 Bing. 51; 3 Moo. & S. 423). But they may sue without stating that they are executors (*Brassington v. Ault*, 2 Bing. 177; *Grissell v. Robinson*, 3 Bing. N. C. 10). If, however, an executor or administrator take a bond from a simple-contract debtor to the estate of the deceased, though it be given to him as executor or administrator, it should seem that he cannot sue in his representative character on such bond, because the effect of the bond is to extinguish the simple-contract debt, creating a new and personal obligation of a higher nature (*Hosier v. Arundell* (Lord), 3 B. & P. 7; *Partridge v. Court*, 5 Pri. 419, 420, 421). Where an agent having property of his principal in his hands, and in ignorance of his death, in order to transmit it obtained a bill of exchange for the amount, and indorsed it specially [*1110] *to his principal: held, that as the property for which the bill was remitted belonged to the principal's estate, it was competent to his administrator to elect to take the bill as a mode of payment; that the property vested in him and that he acquired a right to sue upon the bill in that character (*Murray v. East India Company*, 5 B. & A. 204). Where a payment by an executor, &c., is a devastavit, it seems that the representatives are not obliged to sue in their own names to recover it back (see *Clark v. Houghton*, 2 B. & C. 155, per Bayley, J.; but see *Munt v. Stokes*, 4 T. R. 561). A personal representative may bring an action on a judgment recovered by him in such character, and he may sue in that character or in his own name (*Crawford v. Whittall*, Doug. 4, n. 1; see *Bonafous v. Walker*, 2 T. R. 126).

The personal representatives may also sue in many cases upon a cause of action accruing in their own time, upon a contract made with the deceased in his lifetime, on which the deceased himself could not have sued, although they are not named in the contract, or if made with assigns only (1 Wms. Exors. 701). Thus, if A. covenant with B. to make him a lease of certain land by a certain day, and B. dies before the day and before any lease made, upon A.'s refusal to grant the lease upon the arrival of the day to the executor of B., he shall have an action as such on the covenant (*Chapman v. Dalton*, Pl. Com. 286; Went. Off. Exors. 188). So, where a father possessed of a term of years held of the church, and renewable every seven years, assigned the lease to his son in trust for himself for life, remainder in trust for the son, his executors, administrators, and assigns, and the father covenanted to renew the lease every seven years as long as he should live; the son died, and the seven years passed, upon which the executors of the son filed a bill to compel the father to renew the lease at his own expense (*Husband v. Pollard*, cited in *Randall v. Randall*, 2 P. Wms. 467). So, if A. covenant to grant a lease to B. and his assigns by such a time, and B. die before that time and the grant of the lease, it must be made to his executors, as his assigns, or they may bring covenant (Went. Off. Exors. 215; Vin. Abr. Exors. X, pl. 10). So, where one was bound to stand to the award of two arbitrators, who awarded that the party should pay unto a stranger or his assigns 200*l.* before such a day, the stranger before the day died, and B. administered: held, that the money should be paid to the administrator, for he is assignee (*Anon.*, 1 Leon. 316). So, where a man is bound to deliver a true rental, &c., to J. N., or his assignee, at such a time, and he makes an executor and dies before the time, the obligee is bound to deliver the rental to the executor (*Bro. Abr. Deputy*). So, if A. contract to deliver a horse on

a given day to B. or his assigns, and B. die before the day, his executors may sue on the contract (*Chapman v. Dalton*, Pl. Com. 288). But where an obligation is conditioned that if the obligor pay 20*l.* to such a person as the obligee by his last will in writing shall appoint, then the obligation to be void if the obligee appoint no person to whom it shall be paid, but make his last will and appoint executors, yet the 20*l.* shall not be paid to them, for this is an assignee in deed and not in law (1 Wms. Exors. 703; *Pearce v. Mead*, Hob. 625, 9). The law will never seek out an assignee in law when there may be one in fact (*Goodall's case*, 5 Rep. 97 a; but see *Chapman v. Dalton*, *supra*). So likewise the personal representative may sue in respect of a right, which never existed in the deceased, by remainder. Thus, where a lease is made to B. for life, remainder to his executors for years, or where a lease for years is bequeathed by will to A. for life, and afterwards to B., who dies before A., *although B. never had the term [*1111] in him, yet it shall devolve upon his executors, and they may sue in respect of it (*Went. Off. Exors.* 180, 181; *Co. Lit.* 54 b). Where cattle, plate, or other chattels were granted by a testator, upon condition that if A. did not pay such a sum of money, or do such other act as the testator appointed, and this condition is not performed after the testator's death, now is the chattel come back to the executor, and he may maintain an action respecting it. So, where the condition is that the testator or his executors shall pay the money to avoid the grant, as where he pledges a jewel or a piece of plate, and before the day limited for payment he dies, his executor is entitled to redeem at the day and place appointed (*Ib. Toller*, 164; 1 Wms. Exors. 704).

By whom Actions to be brought.] Where there are several executors or administrators, they must all be joined, though some be under seventeen, or have not proved the will, or have even refused (*Bro. Ex.* 88; *Smith v. Smith*, Yelv. 130; *Brookes v. Stroud*, 1 Salk. 3; *Hensloe's case*, 9 Rep. 37 a). The Court of Exchequer allowed a writ of summons to be amended by inserting a co-executor as co-plt. (*Laking v. Watson*, 2 C. & M. 685; 2 Dowl. 633); but the propriety of this has been questioned in *Roberts v. Bates*, 6 Ad. & E. 778; *Webster v. Spencer*, 3 B. & A. 363, 396; *Smith v. Smith*, Yelv. 130; *Brookes v. Stroud*, 1 Salk. 3; 1 Saund. 291 *k*, n. 4; *Kilby v. Stanton*, 2 Y. & J. 75; *Creswick v. Woodward*, 12 Law J., N. S., C. P. 111). In *Davis v. Williams*, 1 Sim. 5, it was said that the rule at law as well as in equity was, if only one executor had proved, he may sue alone, though the others have not renounced. But where two of three executors authorized the debt. to receive money, part of the testator's estate, and it did not appear that they had contracted on account of themselves, and the third executor, or on account of the estate generally: held, that the three alone could not sue, and that the misjoinder of the third was bad (*Heath v. Chilton*, 12 M. & W. 632). In *Creswick v. Woodhead* (6 Jur. 973, C. P.), it was held that an executor who had not come in and proved with two others who had been appointed his co-executors, must nevertheless be joined with them in an action against a debt. for a debt due to the estate of the deceased. But, if one has formally renounced, he need not be joined (*Munt v. Stokes*, 4 T. R. 565). And, where a promise is made to executors, but not expressly in that character, they need not all join; and it will be sufficient for those who actually contracted to sue, if they do not style themselves executors (*Brasington v. Ault*, 2 Bing. 177). The nonjoinder of executors or administrators must be taken advantage of by plea in abatement (1 Saund. 291 *i*, n. (k); *ante*, p. 10). If the debt. plead the general issue, he is too late, he cannot then come at the fact of there being another executor (*Ib.*).

In the case of a *feme covert* executrix, &c., the husband must be joined with her in an action on any personal contract of the deceased (Mounson v. Bourn, Cro. Car. 519; Com. Dig. Administrators). The husband and wife may join in replevin of goods which the wife has as executrix (Bro. Abr. Baron and Feme, pl. 85). Generally speaking, one executor cannot sue or be sued by his co-executor (2 Wms. Exors. 763); neither after the death of one of several executors can his executor be sued by the surviving co-executors for a debt due to their testator (Went. Off. Exors. 75); yet, if a debtor make his creditor and another his executors, and the creditor neither proves the will nor acts as executor, he may bring an action against the other executor for his demand on the testator, although he has not renounced (Dorchester v. Webb, Jon. 345; Rawlinson v. Shaw, *3 T. R. 557). It [*1112] seems that even the refusal of one of the executors before the ordinary to accept the trust, does not render it unnecessary to join him as a plt. (9 Rep. 37 a; 1 Saund. 291 h, n. 4; Kilby v. Stanton, 2 Y. & J. 75; Creswick v. Woodhead, *supra*; but see Munt v. Stokes, *ante*, p. 1210). A. B. obtained probate of a will with notice of a subsequent one, appointing another executor, and A. B. acted by taking possession of the testator's effects: held, that the executor under the second will, who had obtained probate, might maintain trover for the effects so taken possession of (Woolley v. Clarke, 5 B. & A. 744). It seems that an executor *de son tort* has a sufficient title to maintain an action against a mere wrong-doer for the seizure of a chattel (Oughton v. Seppings, 1 B. & Ad. 241). If they sue without stating themselves to be executors, &c., they will be nonsuited, &c. (*ante* and *post*).

If an executrix or administratrix marry, she and her husband must join for the breach of a contract made with the testator, &c. (Com. Dig. Baron and Feme, V); and, if she sue alone, it is matter of abatement (Milner v. Milnes, 3 T. R. 631); but the husband may sue alone, on a contract made to husband and wife as executrix (Ankerstein v. Clarke, 4 T. R. 616; Yard v. Ellard, 1 Salk. 117). See more fully "HUSBAND AND WIFE". An infant sole executor cannot sue till of full age (38 Geo. III. c. 87; Toller, 367. See more fully "INFANT").

When an executor or administrator dies, rights belonging to him, as such, pass to the representative, not of his own, but his testator's or intestate's estate, as on breaches of contract made with the testator, or judgments recovered by the executor thereon; and in other cases, where the money to be recovered would be assets of the representatives of the original testator himself (Partridge v. Court, 5 Pri. 412; Ham. 136; 1 Ch. Pl. 25); and in such case, there must be an administrator *de bonis non* appointed (2 Saund. 72 m, n. (f)); see Yates v. Gough, 1 Vern. 473; Elliott v. Kemp, 7 M. & W. 306). And, where a contract is made with an administrator in that character, and he dies intestate, without having sued upon such contract, the administrator *de bonis non* may sue, for he succeeds to all the legal rights which belonged to the administrator in his representative capacity (Catherwood v. Chibaud, 1 B. & C. 154; 2 D. & R. 271; Tingrey v. Brown, 1 B. & P. 310); and, therefore, he may sue the acceptor of a bill of exchange, indorsed to his administratrix, in payment of a debt due to the original intestate (Catherwood v. Chibaud, *supra*); and may join such a cause of action with counts upon promises made to the intestate (Hirst v. Smith, 7 T. R. 182). Where the executor is an infant, he cannot administer until he is twenty-one, and in the interim, administration with the will annexed must be granted to another (Wms. Exors.; Gouch v. Parsons, 3 Burr. 1802).

In cases of injury to the *person*, if either the party who received or committed the injury die, no action can be supported, either by or against the

personal representative (1 Ch. Pl. 77); for the stat. 4 Ed. III. c. 7, has made no alteration in this respect (Ib.); and the stat. 3 & 4 Will. IV. c. 42, s. 3, only gives to personal representatives an action for torts to the *personal or real estate* of the party injured, and not for those to the *person*. It enacts that an action of *trespass*, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the *death of such person, and the [*1113] damages when recovered, shall be part of the personal estate of such person, and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect to his property, real, or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executor and administrator shall have taken upon themselves the administration of the estate and effects of such person, and the damages to be recovered shall be payable in like order of administration as the simple-contract debts of such person.

In trespass to personal property by an executor, it is sufficient to show property in the executor, without also showing possession; thus where goods are taken after the owner's death, and before probate granted to his executor, the latter, after probate granted, may maintain trespass (Com. Dig. Trespass, B, 4; Smith v. Mills, 1 T. R. 480; Dunwick v. Sterry, 1 B. & Ad. 831). An executor or administrator has the property of the goods of the testator, or intestate, vested in him before actual possession (Com. Dig. Administration, B, 10); and though administration be not granted for a long time, yet where it is granted, it vests the property in the administrator, by relation from the time of the death of the intestate (Ib.; 2 Rol. Abr. 554 l, 15, 25; R. v. Horsely, 8 East, 410).

Actions by, for Torts.] In the case of torts, when the action *must* be in form *ex delicto*, for the recovery of damages, and the plea thereto not guilty, executors could not at common law sue, it being a maxim, that *actio personalis moritur cum personâ* (1 Saund. 216, 217; 3 Bla. Com. 302; Hambly v. Trott, Cowp. 371 to 377; Chamberlain v. Williamson, 2 M. & S. 408). But, with respect to injuries to *personal property*, by 4 Edw. III. c. 7, executors and administrators, and their executors and administrators, may have remedy by action for every description of injury to personal property, by which it has been rendered less beneficial to the executor, whatever the form of action may be (Ib. 416; and see the cases in 1 Ch. Pl. 77; 1 Saund. 217, n. 1; Sale v. Lichfield, (Bishop of), Owen, 99; Wilson v. Knesby, 7 East, 134; Mason v. Dixon, Lat. 167). For injuries to the real estate after the death, the executor may sue.

The statute extends to every description of injury to personal property, by which it has been rendered less beneficial to the executor, whatever the form of action may be (Chamberlain v. Williamson, 2 M. & S. 416); so that he may have trespass or trover (Russel's case, 5 Rep. 27 a; Rutland v. Rutland, Cro. Eliz. 377; Mason v. Dixon, Lat. 168). Case against the sheriff for a false return in the lifetime of the testator (Williams v. Carey, 4 Mod. 403; 1 Salk. 12; 3 Salk. 149; 1 Ld. Raym. 40; Comb. 322; 3 Bac. Abr. 98, Executors, P, 2; Sale v. Litchfield (Bishop of), Owen, 99; Wilson v.

Knesby, 7 East, 134; *Mason v. Dixon*, Lat. 167; *Chamberlain v. Williamson*, 2 M. & S. 416; 5 Rep. 27 *a*; see also *Spurstow v. Prince*, Cro. Car. 297). So, for suffering a person in his custody in the lifetime of the testator to escape (*Berwick v. Andrews*, 2 Ld. Raym. 973; 1 Salk. 316; 6 Mod. 126; see late stat. which abolished debt in such case, "*Escape*," ante, p. 1075); and it seems although the prisoner was in custody on mesne process (*Startin v. Lowton*, 1 Rol. Abr. 912; 3 Bac. Abr. 98, *Executors*, P, 2; Wms. Exors. 627, n. 10; see *Sale v. Lichfield* (Bishop of), [*1114] *Owen*, 99; *Wilson v. Knesby*, **supra*). Debt on a judgment against an executor, suggesting a devastavit (*Berwick v. Andrews*, *supra*). So, for not setting out tithes (*Hall v. Bradford*, 1 Sid. 88; *Morton v. Hopkins*, ib. 407; *Weekes v. Trussell*, ib. 181). But he cannot enforce payment of tithes, such as his testator never claimed (*Cart v. Hodgkin*, 3 Swanst. 160). So, against a tenant for double value for holding over, (4 Geo. II. c. 28). Case against a sheriff for removing goods taken in execution before the testator (the landlord) was paid a year's rent (*Palgrave v. Windham*, 1 Stra. 212; *Chace v. Chace*, Fort. 359). Case against an attorney for negligence (*Knight v. Quarles*, 2 B. & B. 103); and other actions of the like kind for injuries done to the personal estate of the deceased in his lifetime (1 Saund. 117, n. 1). So, they may have replevin of goods taken in their testator's lifetime (*Arundell v. Hewitt*, 1 Sid. 82). So, the personal representative may have ejectment or *quare impedit* for a disturbance in the time of his testator or intestate (Went. Off. Exors. 4th ed. 164; *Smallwood v. Coventry* (Bishop of), Cro. Eliz. 207; and see 1 Wms. Exors. 627, n. (a); Vin. Abr. *Executors*, P, pl. 7; *Mason v. Dixon*, *supra*; *Lemason's and Dixenson's case*, Poph. 190). So, the personal representative of a tennor may maintain ejectment where the testator had a lease for years, or from year to year, whether the ouster was before or after his death (*Slade's Case*, 4 Rep. 95 *a*; *Morton's case*, 1 Vent. 30; *Doe v. Porter*, 3 T. R. 13; Bro. Abr. Exors. 45; *Russel v. Prat*, cited 1 And. 243; *Peyton's case*, 9 Rep. 78 *b*). But the stat. of Edw. III. does not extend to injuries done to the person or to the real property of the testator; an executor or administrator, therefore, shall not have an action of assault and battery, false imprisonment, slander, or deceit, for diverting a watercourse, obstructing lights (see now 3 & 4 Will. IV. c. 42, *post*), or other actions of that kind, for such causes of action still die with the testator or intestate (1 Saund. 217 *a*, n. 1). Before the stat. 3 & 4 Will. IV. c. 42, executors had no remedies for injuries to real property, committed in their testator's lifetime. They could not maintain trespass *quare clausum fregit* (Bro. Abr. Exors. pl. 120); nor an action merely for cutting down trees (*Williams v. Breedon*, 1 B. & P. 329). So, if a man cut the growing corn of the testator, and let it lie, no action could be maintained by the executors (*Emerson v. Emerson*, 1 Vent. 187); unless corn had been cut and carried away, when he might have maintained trespass *de bonis asportatis*, on the stat. of Edw. III. (Ib.). So an action might have been maintained by an executor against the man who has cut down and carried away the trees of the testator, for taking and carrying away "the goods and chattels, to wit, the wood, timber, and boughs of the deceased, in his lifetime" (*Williams v. Breedon*, *supra*). As to whether an action will lie for cutting and carrying away the grass of the testator, see *Emerson v. Emerson*, 1 Vent. 187; 2 Rob. 874; 3 Salk. 160, pl. 3, 4; Went. Off. Shff. 166. Where grass is mowed by a trespasser, and carried away as hay, an action of trover and conversion for so many loads of hay is doubtless maintainable by the executor (1 Wms. Exors. 629).

The 3 & 4 Will. IV. c. 42, s. 2, has introduced a material alteration in

the common-law rule *actio personalis moritur cum personâ*, with respect to injuries to personal and real property, for by that statute executors may sue and be sued for such injuries (see p. 1112).

An intestate died in August, when her next of kin took out administration and went and lived in her house until November, when and where the goods were seized under a *fi. fa.* against the administrator for a personal debt: held, that an action lay against the sheriff by the administrator in that capacity, for the seizure. But, **semble*, if the [*1115] administrator had remained in possession for a very long time, it would have been otherwise (*Gaskell v. Marshall*, 5 C. & P. 31).

Upon the death of the testator or intestate, if any injury is afterwards done to his goods and chattels, the executor or administrator may bring an action for damages for the tort either in his representative or individual character, whether he ever had actual possession of the property or not (1 Wms. Exors. 695; *Hollis v. Smith*, 10 East, 295). Therefore, they may maintain trespass for taking away the goods of the deceased in their own name or representative character, whether they were actually possessed of them or not (*Adams v. Cheverel*, Cro. Jac. 113). The mortgagee of the lease of a colliery, together with the machinery and barges belonging thereto, died before the day of redemption; after his death, the mortgagor, who had remained in possession, made default in the payment of the mortgage debt, but was not dispossessed by the administrator of mortgagee; the mortgagor subsequently demised the mortgaged property to a third person, who took possession under such demise, and put his name on the barges; during such possession, the barges, together with a quantity of coal, the produce of the colliery, were illegally seized by the defts. for toll due from the mortgagor's lessee; and it was held that the plt., as administrator, had sufficient property in the coal raised from the mines after he took out administration, and in the barges marked with the name of the mortgagor's lessee, to maintain trover (*Fraser v. Swansea Canal Company*, 1 Ad. & E. 354). The action will lie although injury be done before probate or administration granted (*Long v. Hebb*, Sty. 341; 2 Rol. Abr. 399, Relation, A, pl. 1; *Anon. Comb.* 451; 1 Wms. Exors. 493, and *ante*, p. 1113). An executor, as such, may bring an action against the sheriff for the escape of one in execution on a judgment recovered by him as executor, though he may also sue in his own name (*Bonafous v. Walker*, 2 T. R. 126; overruling *Watt v. Briggs*, 1 Ld. Raym. 35; but see *Crawford v. Whyttal*, Doug. 4, n. 1).

Executor de son Tort.] A declaration charging that on, &c., a lease became vested in deft., by assignment thereof then made, is supported, without proof of an assignment in fact, by evidence that the lease vested in deft. as executor *de son tort* (*Paull v. Simpson*, 9 Q. B. 365).

A party who knowingly receives a chattel from an executor *de son tort*, and deals with it as his own, does not himself become thereby executor *de son tort*. So held where the widow of an intestate possessed herself of a lease, part of his estate, without taking out administration, and handed it to another party, who kept it, and occupied the premises for the residue of the term, with the landlord's assent (*Ib.*).

Judgment of Assets quando.] The judgment of assets *quando acciderint* embraces, not only the assets received by the executor after that judgment is signed, but also such assets as came into, or ought to be, in his hands between the issuing of the writ, or the plea, and the judgment, in the due course of administration (*Smith v. Gateham*, 2 Exch. 205; 5 D. & L. 732).

To an action of assumpsit against the deft., as executor, the deft. pleaded

plene administravit præter 10l., which was not sufficient to satisfy a specialty debt. The plt. replied, that after the commencement of the suit, and after plea pleaded, certain goods of the deceased had come into the executor's hands, in value above the sum of 10*l.*, wherewith the deft. ought to have satisfied the causes of action mentioned in the declaration: held bad, on general demurrer, as unnecessary and unprecedented, and the proper course was to take judgment *quando acciderint*.

Plene Administravit.] In an action by the plt., as executor of an original lessee, against the executor of the assignee of the lease, upon the covenant by the assignee to indemnify the lessee against breaches of the covenants in the original lease, the deft. under *plene administravit*, is protected by proof that he sold the lease in question, and had exhausted all the assets in his hands, by payment of simple-contract debts, before the breaches of covenant declared on were committed (Collins v. Crouch, 13 Jur. 361; 18 Law J. 209, Q. B.).

Rent—Liability for.] An executor, in whom a term of years vested, the value of which is less than the rent reserved by the lease, is liable, notwithstanding, as assignee, for rent to the extent for which he might have let the premises (Hoywood v. Whaley, 12 Jur. 1088, C. P.; 18 Law J. 143).

In debt for rent due from the deft. as assignee of premises demised for a term at 90*l.* a year, the deft. pleaded that he ought not to be charged with the rent otherwise than as executor of W. W., the lessee of the term; and that he, the deft., had not at any time since the death of the said W. W., had, received, or derived any profit, interest, or advantage, as such executor or otherwise, by or from the said demised premises; and that the said demised premises had not, since the death of the said W. W., yielded any profit whatever. That the term only vested in the deft. as executor, and that he had no assets to be administered. Replication, that the deft. did, after his entry on the premises, have, receive, and derive great profit, interest, and advantage by and from the said demised premises, which have yielded to him great profit, to wit, to the amount of the rent sought to be recovered. Issue thereon. At the trial, it was proved that the premises could have been let for 60*l.* a year; and the jury found accordingly, that the deft. might, by reasonable diligence, have made a profit for two years and three-quarters of a year, at a rent of 60*l.* a year: held, that the plea, to be good, must be understood to mean, that the deft. could not have received or derived any profit or advantage from the premises; and that, therefore, upon the finding of the jury, the verdict was rightly entered for the plt. (1*b.*). Held, also, that though the action was debt, and the only plea was found against the deft., yet that the plea might be taken distributively; and the verdict ought, consequently, to be entered only for the rent at 60*l.* a year, and not at the whole 90*l.* a year (1*b.*).

Form of Pleadings.

Declaration.] There is, in general, nothing peculiar relating to the form of the declaration in actions by executors. In every declaration by an executor or administrator, as such, he should describe himself accordingly in the commencement, though indeed it will suffice if the fact appear in other parts of the declaration (1 Saund. 11, 112, n. 2; Com. Dig. Pleader, 2 D. 1; Gallant v. Bonteflower, 3 Doug. 36, per Buller, J.). But where the cause of action accrues after the death of the testator or intestate, the executor or administrator may sue as such or not at his option (3 Doug. 36; see Wms.

EXORS. 697, 698, 1469). P. orally agreed to grant the deft. a lease for sixty years; the deft. paid part of the consideration, but P. died before the contract was carried into effect; the plts., P.'s executors, granted the lease, and paid their own attorney his charges for drawing the lease: held, that they might sue the deft. for money paid, and that in their own right (*Grissell v. Robinson*, 3 Bing. N. C. 10).

In an action of replevin of goods, as in all other instances where the wife is joined, the declaration must show the wife's interest in the property as the reason for joining her in the action (*Serres v. Dodd*, 2 N. R. 405; 1 Ch. Pl. 82, 83, 183).

Where the executor enters into a contract in that character, the cause of action should be stated to have accrued and the promise to have been made to him as executor (1 Ch. Pl. 23). But executors*who [*1116] contract for the sale of their testator's effects, or make any other agreement in their representative character, are not bound to declare in that capacity, but may sue in their individual right, and in such case it is sufficient to join as plt. such only of the executors as interfered, and were actual parties to the contract with the deft. (*Brassington v. Ault*, 2 Bing. 177; *Grissell v. Robinson*, ante, 1115; *Gallant v. Bonteflower*, 3 Doug. 36).

But an action of assumpsit cannot be maintained by a surviving co-executor in his own right against the surviving partner of a deceased co-executor, without stating himself to be such surviving co-executor (*Fitzgerald v. Boehm*, 6 Moo. 332). If a man name himself as executor or administrator, and it appear that the cause of action is in his own right it will be no objection, for the calling himself executor is but surplusage (*Hornsey v. Dimocke*, 1 Vent. 119; Com. Dig. Pleader, 2 D, 1; *Hargraves v. Holden*, 2 C. M. & R. 280, n. (a); see *Aspinall v. Wake*, 10 Bing. 51). But if the action be in the *debet* and *detinet*, when it should be in the *detinet* only, or *e contra*, it is substance (*Reynell v. Langcastle*, Cro. Jac. 545; Com. Dig. Pleader, 2 D, 1); but it is aided after verdict by 16 & 17 Car. II. c. 8; *Coomber v. Wootten*, 1 Sid. 342; *Frewin v. Paynton*, 1 Lev. 251; Com. Dig. Pleader, 2 D, 1); and, by 5 & 6 Anne, c. 16, on a general demurrer, or after a judgment by default (*Lee v. Pilsey*, 2 Ld. Raym. 1513); but a special demurrer to a declaration in debt by executors, commencing in the *debet* and *detinet* was overruled, because the allegation might be rejected (*Collett v. Collett*, 3 Dowl. 211). Declaration by A. against an executor, &c., for rent in arrear, partly in the time of the deceased, and partly in the time of the representative, is well brought in the *detinet* only (*Aylmer v. Hide*, 1 Selw. N. P. 610).

In assumpsit by an administrator *de bonis non*, the promise may be laid to have been made to the first administrator (*Hirst v. Smith*, 7 T. R. 182).

In stating a debt or promise to him, the word, "as" executor, &c., must be inserted, or the omission will be fatal, even after verdict (*Henshall v. Roberts*, 5 East, 150; *Powley v. Miston*, 2 Marsh. 151). In actions of debt, the words "owes to" should be omitted in the commencement (Com. Dig. Pleader, 2 D, 1, 2 W, 8; 1 Saund. 1, 112, n. 1; 3 East, 2; see *Collett v. Collett*, 2 Dowl. 211).

If the deft. order a coat to be made by A., whose executor finishes and delivers it, the executor cannot sue as for goods sold and delivered by A., but it seems he must sue as for sale and delivery by himself as executor, or must declare specially (*Warner v. Humphreys*, 2 Man. & G. 853, and note). Grant of administration must be stated by averment in the body of the declaration, and not merely by profert at the end (*Hughes v. Williams*, 4 Dowl. 169).

Where the cause of action arises after the death of an intestate or testator, the executor, &c. need make no profert of the will, or letters of administration.

If an executor, as such, recovers a judgment against a creditor of his testator, and the sheriff is guilty of an escape, he may describe himself as executor, in an action against the sheriff for the escape, and he is not bound to produce his letters testamentary; for he may sue in his own name, though he adds the character of executor, which may be treated as surplusage (*Large v. Attwood*, 1 D. & R. 552).

Plt. declared as administrator, with will annexed of F., of goods left unadministered of K., the executor, who proved the will by his attorney, to whom administration with the will annexed was granted for K.'s benefit, who having afterwards died, left H. his executor; whereupon ad-
 [*1117] ministration, with the will of F. annexed, was granted *to the plt. for the benefit of H., stating in the first count that the deft. was indebted to K., as executor as aforesaid, for interest of money forborne by him as such executor in the said count; that the deft. was indebted to the plt., as such administrator, for interest, &c., and promised him as such administrator: held, that the first count was bad in arrest of judgment, as K. never was executor, and the promise of the deft. was in law to his attorney, to whom administration was granted, but that this was *ipso facto* at an end on K.'s death, and consequently the subsequent grant to plt. good, who was entitled to recover under the second count such interest only as accrued after the grant to him (*Sewercrop v. Day*, 8 Ad. & E. 624; 3 Nev. & P. 670).

If the plt. sues as executor or administrator in trespass to the goods of the deceased after his death, he may declare that the deceased was possessed of the goods, and the trespass committed after his death to the damage of the executors or administrators (*Adams v. Chiverel*, Cro. Jac. 113); or as the property in the goods draws to it the possession in law, they may declare on their own possession as executors (2 Saund. 47, n.). So, in trover, where the goods are taken and converted after the testator's death, and before the executor has obtained possession of them, he may either sue in his own name without alleging himself executor (*Hale v. King*, Com. Rep. 163; *Jenkins v. Plombe*, 6 Mod. 181); or he may sue as executor, and declare either that the testator was possessed of the goods, and the deft. after his death converted them (*Hudson v. Hudson*, Lat. 214); or he may allege that he himself was possessed as executor, and the deft. converted them (*Anon. Comb.* 451; 2 Saund. 47, n.; see *Fraser v. Swansea Canal Company*, 1 Ad. & E. 354; 3 Nev. & P. 391).

After the conclusion, to the damage, &c., a *profert* of the letters testamentary, or letters of administration, should be made (*Bac. Abr. Executor*, C; *Doug.* 5, in notes; *Bosworth v. Ringole*, Carth. 69); unless where unnecessarily described as executor (see *Crawford v. Whittall*, 1 Doug. 4, n. 1).

It is sufficient it should seem for an administrator *de bonis non* to make profert of these letters granted to the plt. without any profert of the letters of the first executor or administrator (*Catherwood v. Chabaud*, 1 B. & C. 150; see also *Gradell v. Tyson*, 2 Stra. 716). So it is usual in declaring in *sci. fa.* to make profert of the letters, but it may be inserted either in the middle, or at the end of the writ (2 Saund. 9 b, n. 12; *Tidd*, Pr. 9th, ed. 1128; see also *Bosworth v. Ringole*, Carth. 69). If profert be made, the plt. not having in fact obtained letters of administration, in order to raise the question the deft. should it seems demand oyer, and if he plead that the plt. never was nor is executor "in manner and form as alleged in the declaration," the plt. will succeed if at any time before trial he obtain letters of administration (*Thompson v. Reynolds*, 3 C. & P. 123). If oyer be craved the plt. should give a copy as well of the will as of the certificate of the ordinary (*Daly v. Mahon*, Bing. N. C. 235).

In an action on a note indorsed to the plt. by an administrator, no profert

is necessary, because the plt. is not entitled to the custody of the letters of administration, which, however, must be proved on the trial (Willes, 560). The omission of the profert is now aided, unless the deft. demur specially for the defect (4 Anne, c. 16, s. 1).

Where the plt. made profert of letters of administration, "duly granted by the Consistory Court of St. Asaph," without making the usual statement of the grant of letters of administration in the *body of the declaration: held bad on special demurrer, as not sufficiently showing [*1118] that the letters of administration were granted by the proper authority, but the court seemed to be of opinion that the omission of the *date* of the grant was immaterial though assigned for cause of special demurrer (Hughes v. Williams, 2 C. M. & R. 331). For the form of profert of letters of administration for the limited purpose of bringing the action granted by the Archbishop of Dublin, see Huthwaite v. Phaire, 1 Man. & G. 159.

If profert be omitted in a declaration in *sci. fa.* the deft. may demur specially (see 4 & 5 Anne, c. 16, s. 1; 2 Saund. 9, n. 12: Com. Dig. Pleader, 63; 3 Doug. 1). So in other cases (2 Chit. Pl. 73, n. (t)). It is no objection, even in actions of tort, that causes of action accrued before grant of letters (Forster v. Bates, 12 M. & W. 226; Thorpe v. Stallwood, 1 D. & L. 54; 5 Man. & G. 760). A declaration, where one of several plts. is administratrix, is sufficient on special demurrer without any profert of the letters of administration (Large v. Atwood, 1 D. & R. 551).

Wherever it is material for the plt. to avail himself of a promise or acknowledgment, or other cause of action, since the death of the testator, a count should be inserted to meet the same, for otherwise such promise or acknowledgment, or other cause of action, cannot be given in evidence (Sarell v. Wine, 3 East, 409; Hickman v. Walker, Willes, 29; Pittan v. Foster, 2 D. & R. 363; 1 B. & C. 248; Whitehead v. Howard, 5 Moo. 105, 508; Ward v. Hunter, 6 Taunt. 210; Hurst v. Parker, 1 B. & A. 93; Short v. Macarthy, 3 B. & A. 626; Tanner v. Smart, 6 B. & C. 608); or on a bill of exchange indorsed to him as such (King v. Thom, *supra*; Catherwood v. Chabaud, 1 B. & C. 150; see also Murray v. East India Company, 5 B. & A. 204; McLachlan v. Evans, 1 Y. & J. 380): and the deft. may plead *non assumpsit* to such count (Timmins v. Platt, 2 M. & W. 720; Gilbert v. Platt, 5 Dowl. 748); but, if there be no particular use in such count, it should be omitted, as it would subject the plt. to costs, if he did not succeed in the action (Short v. Macarthy, *supra*; Tidd, Pr. 1014, 1015; 1 Bing. 249; 8 Moo. 146; Ashton v. Pointer, 5 Tyrw. 322). In *assumpsit*, the first count alleged that F. was indebted to the plt. as executrix in 350*l.* secured on mortgage; that the plt., as executrix, had commenced proceedings at law against F., which were pending, and had been put to divers costs in such proceedings, &c.; and thereupon, in consideration of the premises, and that the plts. would stay the proceedings against F. for twenty-one days, the deft. undertook and promised the plt. that within the twenty-one days he would pay the 350*l.* and the plt.'s costs. Averment, that the plt. did stay the proceedings accordingly, and breach in non-payment by the deft. to the plt. of the mortgage-money and costs. The second count was upon an account stated with the plt. as executrix: held, a misjoinder (Webb v. Cowdell, 14 M. & W. 820).

In a declaration in *assumpsit* by executors on a count for money paid to and for the use of the deft. by their testator, B. B., it was alleged that the deft. being indebted to the said B. B., promised to pay the said B. B.: held, that the words, "the said B. B." before "promised" might be rejected as surplusage (Buxton v. Nascolas, 11 Moo. 553).

The executor may commence an action before probate granted, for he

derives his title from the will, although he cannot declare until probate granted, as he cannot make profert. But an administrator ought not to commence an action before letters of administration are granted, [*1119] as he derives all his authority from the ordinary *(Woodbrige v. Bishop, 7 B. & C. 406; and see Rogers v. James, 7 Taunt. 147; Ex parte Paddy Buck, 235; 3 Madd. 241). But where the title of the declaration, even though incorrect, appears to be subsequent to the grant of administration, the administrator may recover on an issue joined on a plea that at the time of exhibiting the bill the plt. was not administrator (Ib.). *Secus*, if the issue had been "at the time of the commencement of the suit" (Ib.); and the above rule is equally applicable to an administrator *cum testamento annexo* (Phillips v. Hartly, 3 C. & P. 121).

Care must be taken, in the declaration, not to join a demand which the plt. may recover in his own right; such misjoinder being a defect in substance and therefore bad on general demurrer, or in arrest of judgment, or on error (2 Saund. 117 c; Tidd, Pr. 9th ed. 12). The best rule of determining what demands may be joined, is to consider whether the sum, when recovered, would be assets; if it would be so, it may be joined (Thompson v. Stint, 1 Taunt. 322; Powley v. Newton, 2 Marsh. 147; 6 Taunt. 455; Bull v. Palmer, 2 Lev. 165; King v. Thom, 1 T. R. 489; 2 Saund. 117 a; Gallant v. Bonteflower, 3 Doug. 34; Dowbiggin v. Harrison, 9 B. & C. 666). An executor may declare as such, on a note made to him as such since the death (Partridge v. Court, 5 Pri. 412; Court v. Partridge, 7 Pri. 591; Catherwood v. Chabaud, 1 B. & C. 750; Cowell v. Watts, 6 East, 410); or for money lent by him as such (Webster v. Spencer, 3 B. & A. 360); or for money paid by him as such (Ord v. Fenwick, 3 East, 104); or for money had and received to his use as such (Petrie v. Hannay, 3 T. R. 659; Richardson v. Griffin, 5 M. & S. 294; 2 Saund. 207; Gallant v. Bonteflower, *supra*; Smith v. Barrow, 2 T. R. 477; Webster v. Spencer, 2 B. & A. 364; Clarke v. Hougham, 2 B. & C. 149; Dowbiggin v. Harrison, 9 B. & C. 669); or on an account stated with him as such, whether of moneys due to him as such, or to the testator (Henshall v. Roberts, 5 East, 150; Cowell v. Watts, 6 East, 403; King v. Thom, 1 T. R. 487; Thompson v. Hunt, 1 Taunt. 322; Powley v. Newton, 2 Marsh. 147); or to the plt. and his wife as executrix (Ib.; Nicholas v. Killigrew, 1 Ld. Raym. 437; 2 Saund. 117 d, *semble contra*); or on a count for materials found, and for work and labour done by the plt. as such (Marshall v. Broadhurst, 1 C. & J. 403; Edwards v. Grace, 2 M. & W. 190; Winer v. Humphreys, 3 Sco. N. R. 226).

Where the transaction takes place after the death of the testator, the executor has the option of declaring in his private character (see Brassington v. Ault, 2 Bing. 177); and, in these cases, counts to meet such claims may be joined with counts on promises to the testator. But an executor cannot declare as such on a bond given to him since the death (Hosier v. Arundell, 3 B. & P. 7; Partridge v. Court, 5 Pri. 412; Court v. Partridge, 7 Pri. 591). So, in a declaration in debt a count on a judgment recovered by the plt. as executor, may be joined with counts on debts which accrued to the testator (Crawford v. Whittall, 1 Doug. 4, n. 1). So, an executor may declare for rent due in his own time, and for that which accrued in the testator's time (Tayler v. Holmes, 1 Free. 367).

A count for money had and received by the deft. as executor, cannot be joined with a count on an account stated with him as executor, for the first will charge him *de bonis propriis*, but the latter *de bonis testatoris* (Ashby v. Ashby, 7 B. & G. 444). But, *semble*, a count for money paid to deft.'s own use as executor may (Ib.). A count stating that the deft. had accounted with the plt.'s "executors as aforesaid," &c., was joined with counts stating pro-

mises to the testator: held, not a misjoinder of action; or, if so, cured by verdict *(*Lancefield v. Allen*, 1 Bing. N. C. 592). A count on a promise made by the deft. as administrator, to pay money received by him as such, to the plt.'s use, cannot be joined with other counts on promises made by the intestate (*Jennings v. Newman*, 4 T. R. 347). Nor can a count stating deft. to be indebted as administratrix in respect of the funeral of the intestate be joined with counts on promises by the intestate (*Hayter v. Moat*, 5 Dowl. 298; 2 M. & W. 56). The common count stated that the deft. was indebted to the plt. as executrix for money lent by the plt. to the deft. The other considerations in the same count were alleged to move from the plt. as executrix, and the promise alleged to be made "to the plt. executrix as aforesaid:" held, on special demurrer, bad, by reason of this misjoinder of considerations in different rights; but if they had all appeared to be in the same right, it would have sufficed if one consideration had been properly averred, and the remainder might be rejected (*McClelland v. M'Adam*, 1 Alc. & Nap. (Ir.) 488).

But an executor cannot include counts on causes of action accruing to him in his private right and individual character with counts on causes of action which are said to be vested in him in his representative capacity (2 Saund. 117 c); and cannot join a count upon a bond given to his testator, and a count upon a bond given to him as executor (*Hosier v. Arundel*, 3 B. & P. 7; but see *King v. Thom*, *ante*, p. 1119; *Cowell v. Watts*, *ante*, 1119); for the executor, by taking the bond, would extinguish the original debt, and it would not, when recovered, be assets (*Partridge v. Court*, *ante*, p. 1119).

It must be stated in every count, by an executor, &c., in that character, that the duty accrued to the plt. "as" executor: it is not enough to say that it accrued to him, "executor," or "being executor" (*Henshall v. Roberts*, 5 East, 150; *Powley v. Newton*, 2 Marsh. 151; 2 Saund. 117 d; *Tidd*, Pr. 9th ed. 13; but see *Curtis v. Davis*, 2 Lev. 110; 2 Vin. Abr. 47, pl. 6, 48, pl. 9; *Brigden v. Parkes*, 2 B. & P. 424; and *Lancefield v. Allen*, 1 Bli. N. S. 592, where a count stating that the deft. had accounted with the plt.'s "executors as aforesaid," was joined with counts stating promises to the testator; the deft., after verdict and judgment for the plt., brought error for the misjoinder, but the judgment was affirmed with costs).

The consequences of a misjoinder are very great, for, however perfect the counts may respectively be in themselves, the declaration will be bad on general demurrer or in arrest of judgment, or upon error (*May v. House*, 2 Chit. Rep. 697; *Brigden v. Parkes*, 2 B. & P. 424; *Jennings v. Newman*, 4 T. R. 347; *Rose v. Bowler*, 1 H. Bl. 108; *Morris v. Norfolk*, in error, 1 Taunt. 212); and if, on a writ of error, one of several counts in a declaration in assumpsit be bad, and the deft. below suffer judgment by default, and the damages be assessed generally on the whole declaration, such judgment must be reversed (*Stone v. Macmuir*, 1 Moo. 126; *Corner v. Shew*, 4 M. & W. 163). But where several breaches are assigned, some of which are bad, and the jury give general damages, the court will not arrest the judgment, but will award a *venire de novo* (*Leach v. Thomas*, 5 Dowl. 612). Where the declaration is demurred to, the plt. cannot aid the mistake by entering a *nolle prosequi*, so as to prevent the operation of the demurrer for misjoinder (*Rose v. Bowler*, *supra*; *Drummond v. Dorant*, 4 T. R. 360; *Tidd*, Pr. 9th ed. 681; 1 Saund. 207 c), though the court will in general give the plt. leave to amend, by striking out some of the counts (*Jennings v. Newman*, *supra*). A demurrer for misjoinder must be to the whole declaration, and not merely to the defective count or breach (*Kingdon v. Nottle*, 1 M. & S. 355, 366). A misjoinder in some cases may be *aided by in- [*1121] tendment after verdict (*Curtis v. Davis*, 2 Lev. 110; Com. Dig.

Action, G.; 2 Vin. Abr. 47, pl. 7; Smith v. Goodwin, 4 B. & Ad. 413). So, by taking separate damages, or by entering a *remittitur damna* (Knightly v. Birch, 2 M. & S. 533; Tate v. Whiting, 11 Mod. 196; 2 Vin. Abr. 48, pl. 9; Hancock v. Haywood, 3 T. R. 433; 2 Saunn. 117 c). Where some of the counts of a declaration are good and others defective, and separate damages have been assessed on each, the court will arrest the judgment on the defective counts only; otherwise, if the verdict was general (Hayter v. Moat, 5 Dowl. 298).

Where the plt. declared in trover as executor on the possession of his testator, held sufficient, for the property vested in the executor, and no other person having the right of possession, the property drew after it the possession (Hudson v. Hudson, Lat. 214; 3 Bac. Abr. 58).

A., B., and C., executors of D., sell goods of their testator to E., to be paid for to C., who was to distribute the amount amongst the creditors of D.; the three executors may, without a special count, maintain *indebitatus assumpsit* or debt against E. (Pearson v. Pearson, 2 B. & Ad. 859).

A declaration against two executors, on a bill accepted by their testator, stated in the commencement, that the defts. had been summoned by virtue of a writ issued on the 14th May, 1847. The defts. pleaded in abatement, that the testator, on the 13th December, 1846, made his will and appointed the defts. and B. executors thereof, and on the 16th December, 1846, died; and the defts. and B. on the 23rd January, 1847, proved the will, and took upon themselves the burthen of the execution thereof; and B. then administered divers goods, &c. Special demurrer on the ground that it did not show that B. administered before the commencement of the suit; held good, for dates may be assumed to be material on demurrer, where, if truly stated, they would support the plea, and therefore the court must intend that the administering of the assets was before the commencement of the suit, the date of the writ being stated (Ryalls v. Bramalls, 1 Exch. 734; 5 D. & L. 753). Held, also, that the plea was not double, as the allegation of probate was only inducement to the averment of administration (Ib.).

In an action for money had and received, brought by the plt. as administrator of Jane V., against the deft. as executor of Ann V., it appeared that Jane and Ann were sisters, Jane being the elder. The plt.'s case was, that Jane had lent money to one E., who gave his promissory note for the amount payable to Miss V. After the death of Ann, who survived Jane, the deft., as the executor of the survivor, sued E. upon the note, alleging it to be payable to both sisters jointly, an alteration to that effect having, as it was said, been made in the note. E. settled the action and paid the amount of the note to the deft.: held, that the plt. could only support this action by affirming the act of the deft. in obtaining payment of a note payable to both sisters, but as he would have no right to receive payment of such a note, an action for money had and received would not lie (Vaughan v. Matthews, 13 Jur. 470; 18 Law J. 191, Q. B.).

Leasehold property was bequeathed to A. for life, remainder to deft. Fifteen years after the death of A., the executor paid the legacy duty, including that on the rents which had accrued since the death of A.: held, that he was entitled to recover the amount from deft. in an action for money paid (Bate v. Pane, 13 Jur. 609; 18 Law J. 273, Q. B.).

Where a party is abroad at the time of the accrual of a right of action, and dies without returning to this country, his executors may sue, although six years have elapsed from the time of its accrual (Townsend v. Deacon, 13 Jur. 366; 18 Law J. 298, Exch.). *Quære*, whether under such circum-

stances the executors would be bound to sue within six years of the testator's death (Ib.).

Where a count for work done and money paid for a testator was joined with a count for work done for and money due on an account stated with the defts., as executors, and the jury found for the plt., with general damages, the court arrested the judgment. Such objection might have been cured by a verdict for the deft., or a *nolle prosequi* entered as to the second count (Kitchingman v. Skeel, 3 Exch. 49; 18 Law J. 23, Exch.).

To assumpsit against an executor, on an account stated by him as executor, a set-off for debts due from plt. to testator in his lifetime may be pleaded (Blakesley v. Smallwood, 8 Q. B. 538).

The plea averred that the deft.'s set-off was equal in amount to the damages sustained by the breach of the promises. The plt. replied, as to 1493*l.*, parcel of the set-off, the Statute of Limitations; and further replied, that plt. was not indebted to testator, or deft. as executor, beyond the 1493*l.*, *modo et formâ*, with a single conclusion to the court as to the whole replication. *Quære*, whether the replication was bad for duplicity (Ib.).

The first set of counts was for work done and money paid by, and on an account stated with the testator D. The second set was for the same by and with plts. as executors of D. First plea, that D., being the projector of a company for a railway, agreed, in consideration of deft. consenting to act on the provisional committee, to indemnify him from any professional or other charges on account of the railway; that deft. did not consent so to act; that the works, moneys, and accounts in the second set of counts mentioned were in and about the surveying of the line of the railway, and after the agreement to indemnify; that deft. became liable to the professional charges in respect of surveying the railway, and made the promises only in his character of member of the provisional committee, and not otherwise; that the project was abandoned, and the work and money became useless and of no value; that any sums recovered on account of the work and moneys paid will be lost to deft., and deft. will be damnified to that extent, contrary to the promise to D. to indemnify. Second plea, that the testator caused deft. to enter into the promises by fraud: held, on demurrer, first, that the first plea was a bar to avoid circuity of action (Connop v. Levy, 5 Railw. C. 124; 12 Jur. 306; 17 Law J. 125, Q. B.). Held, secondly, that the second plea was applicable to the promises in the second set of counts, which were made after the death of the testator, inasmuch as plt. might treat them as founded upon the contract with the testator stated in the first plea (Ib.).

Plea.] Besides the ordinary defences, the deft. may, by his plea, deny the plt.'s representative character, by pleading *ne unques executor* or *administrator*, or deny the fact, under either of which pleas he may dispute the sufficiency of the grant of probate or administration, by reason of the defective stamp, &c. (Thynne v. Protheroe, 2 M. & S. 555; 1 Sid. 250). Where letters of administration have been obtained in an inferior diocese, the deft. may plead in bar that these were *lona notabilia*, and may give that fact in evidence under the plea of *ne unques executor* (1 Saund. 274, n. 3). But, if he contends the intestate did not live in the diocese at the time of his death, he should plead it specially, and the mere denying the grant of administration to plt. will not suffice (Stokes v. Bate, 5 B. & C. 496). By 2 Geo. II. c. 22, s. 13, where either party sues or is sued as executor or administrator, where there are mutual debts between the testator or the intestate and either party, one debt may be set off against the other. But, in an action by an executor in his own name, to recover money due to the testator in his lifetime, and received by the deft. after his death, the deft. cannot set off a debt

due to him from the testator (*Shipman v. Thompson*, Willes, 103; *Schofield v. Corbett*, 6 Nev. & M. 527). So, though the plt. declare *as executor*, if the cause of action arose after the death of the testator (*Rilvington v. Stenson*, Selw. N. P. 245).

In an action by the executors of an underwriter against a broker for premiums due on policies subscribed by the testator, the deft. cannot set off returns of premiums which became due after the testator's death (*Houstown v. Robertson*, 6 Taunt. 448). And, if a stranger receive rent, due to the testator in his lifetime, and afterwards, by desire of the tenant in possession, pay the demand of ground-rent, due at the same time for the same premises, he may deduct such payment in an action by the executor for the rents received, but he cannot deduct a payment of ground-rent arising after the testator's death (*Wilkinson v. Cawood*, 3 Anst. 905). But a mere equitable demand cannot be set off at law (*Tucker v. Tucker*, 4 B. & Ad. 745). A judgment for the plt. in the Common Pleas may be set off against a judgment for the deft. in Queen's Bench, although the plt. was dead, and the judgment was assets in the hands of her administrator (8 Bing. 29). In answer to a set-off, the executor, &c., may give in evidence the advance of money by *him as executor, &c., to the deft. (*Gallant v. Bonte* [*1122] *flower*, 3 Doug. 34).

Where one alone of several executors or administrators brings the action, either in form *ex contractu* or *ex delicto*, the deft. can only take advantage of it by pleading in abatement, after oyer of the probate, that the other executor mentioned therein is alive, not named (*Hensloe's case*, 9 Rep. 37; *Wankford v. Wankford*, 1 Salk. 307; 1 Saund. 291 *i*, n.; see "ABATEMENT"); as to the mode to be adopted where one of several executors refuses to prosecute the suit, see Went. Off. Exors. 212; 2 Wms. Exors. 1467, n. (*w*). It is not necessary in the plea in abatement to aver that the executors, not joined as plts., have administered (1 Saund. 291, n.).

If in an action by an executor, in which all the promises are laid as made to the executor in his lifetime, the deft. pleads that he did not promise within six years next before the obtaining of the original writ of the plt., and the plt. replies that the original was sued out on such a day, and that within six years before the day of obtaining thereof,—that is to say, on such a day letters testamentary were granted to him, by which the plt.'s action accrued to him within six years, this replication is bad, because the time of limitation must be computed from the time when the action first accrued to the testator, and not from the time of proving the will (*Hickman v. Walker*, Willes, 27; 2 Saund. 63). But where an administrator brought an action for money had and received to his use by the deft., who had received the intestate's money *after his death*, upwards of six years before the commencement of the action, but within six years after letters of administration granted to the plt., the deft. pleaded the statute, and the deft. replied the above special matter: held on demurrer, that the statute was no bar, because this was not a cause of action in the intestate, the money having been received after his death, and the plt.'s title commenced by taking out letters of administration (*Cary v. Stephenson*, 2 Salk. 421). These special replications should conclude with a verification, in order to give the deft. an opportunity of answering the special matter (4 Mod. 372; 2 Saund. 73 *f*, n.). Where an action was brought by an administrator against the acceptors of certain bills of exchange, payable to the intestate, and accepted after his death, but before the grant of letters of administration: held, that the statute run only from the grant of the letters (*Murray v. East India Company*, 5 B. & Ad. 204; see also *Pratt v. Swaine*, 8 B. & C. 285; *Perry v. Jenkins*, 1 Myl. & Cr. 118). Where the executor declares on a contract made with the testator,

laying all the promises as made to the testator, and the deft. pleads the statute, the plt. cannot reply a promise made to *himself* within six years, for it would be a departure (*Hickman v. Walker*, Willes, 29; *Dean v. Crane*, 1 Salk. 28; *Marlborough (Duke of, Executors) v. Widmore*, 2 Stra. 890; 2 Saund. 63 *f*; but see *Heylin v. Hastings*, Carth. 471). However, evidence of an acknowledgment by the deft. within six years of an old existing debt of above six years' standing due to the plt.'s intestate, but which acknowledgment was made after the intestate's death, will not support a count by the administrator laying the promise to be made to his intestate (*Sarell v. Wine*, 3 East, 409; *Ward v. Hunter*, 6 Taunt. 210; *Short v. McCarthy*, 3 B. & A. 631, per Bayley, J.).

Where the executor sues on a bill or note given to his testator, averring a promise to himself as executor, after the death of the testator, to pay him the amount mentioned in the note, such promise may be denied by a plea of *non assumpsit*, notwithstanding the rule of H. T. 4 Will. IV. Assumpsit, 2, which declares that *this plea shall be inadmissible in actions upon bills of exchange, &c. For the mere production and proof of the [*1123] note would not prove the promise laid as made to the executor as it would if the promise were laid as made to the testator (*Timmis v. Platt*, 2 M. & W. 720; *Gilbert v. Platt*, 5 Dowl. 748). Payment of interest on a promissory note to an administrator who had omitted to take out administration in the diocese in which the note was *bonum notabile*, was held a sufficient acknowledgment of the debt to bar the statute (*Clark v. Hooper*, 10 Bing. 480; 4 Moo. & S. 353). See further on this subject, 2 Wms. Exors. 1476; and for the form of replication by an executor to a plea of the statute, where he recently brings a new action after the death of testator, *Ib.* 1480; 2 Saund. 63, *h*, n.

If it were part of the plt.'s case to prove his representative character, as where he sued in trover upon his constructive possession for a conversion in his own time, any defect in the letters of administration or probate which prevented him from proving such character, would, before the rule H. T. 4 Will. IV. be fatal, although there were no special plea (*Hunt v. Stevens*, 3 Taunt. 113; 1 Saund. 275, n. (a); 2 Saund. 47, n. (x)).

In an action by an administrator, the deft. may show after issue has been joined that the plt.'s letters of administration have been revoked *puis darrein continuance* (B. N. P. 309; Com. Dig. Abatement, T, 24).

If the deft., in an action by an executor, contend that the probate is void, as that the stamp is insufficient or the seal forged, he should plead *ne unques executor* (1 Saund. 275 a, n.). Where the plt. necessarily sues in his representative character, the deft. cannot, under the general issue, take advantage of any defect, such as the insufficiency of the stamp (*Thyme v. Protheroe*, 2 M. & S. 555). It is no plea that an executor plt. had renounced (*Creswick v. Woodhead*, 4 M. & G. 811).

Precedents.

Beginning of a declaration by an executor.

In the Q. B. (C. P. or Ex. of P.) On the day of A. D. 1850.
Middlesex (*venue*) (to wit). A. B. executor of the last will and testament of E. F. deceased by L. M. his attorney (or in his own proper person) complains of C. D. who has been summoned to answer the plt. as executor as aforesaid in an action on promises for that whereas &c. (as usual except in debt when the words "owes to and" should be omitted. See "DECLARATION").

*B. died in India, and his will was proved there by two of the executors, one of whom came to England, and a portion of the testator's assets was remitted to him there by his co-executor, who shortly afterwards died. On bill filed by his executor in England for an account of the moneys so remitted to him: held, that the probate or administration ought to have been taken out in this country (*Bond v. Graham*, 1 Hare, 482; 6 Jur. 620).

Where the probate or administration is produced, and the case shows that the plt. sues for a greater value than is covered by the probate or administration stamp, he cannot recover (*Hunt v. Stevens*, 3 Taunt. 113; and see *Carr v. Roberts*, 2 B. & Ad. 905, overruling 2 Moo. & M. 45). An exemplification of letters of administration *de bonis non*, requires to be stamped only as an exemplification of a single proceeding under stat. 55 Geo. III. c. 184, sch. pt. 2, tit. "Proceedings in the Ecclesiastical Court;" for, the one title appears merely as identifying the party on whom the other was conferred (*Doe v. Gunning*, 7 Ad. & E. 240).

L. was possessed of furniture, &c., and on his death intestate, in 1827, his widow removed it to another house, where she resided until her death, in 1832, with her daughter E., using the furniture during that period. In 1829 the widow had the furniture valued for the purpose of administering to L., which she did. In 1838 the furniture was sold by the deft. who had married another daughter of L., with E.'s concurrence. In 1840, E. administered to her mother: held, she could not maintain trover without having taken out administration *de bonis non* to L. (*Elliott v. Kemp*, 7 M. & W. 306).

The title of the *administrator* may be proved by the letters of administration, or a certificate or exemplification thereof granted by the ecclesiastical court; and an examined copy of the act book stating the grant of letters of administration to the deft. is proof of his being administrator without notice to produce the letters (*Davis v. Williams*, 13 East, 232), or by the original book of acts, which directs the grant of the letters with the surrogate's fiat (*Thompson v. Cross*, Hard. 108; *Elden v. Kiddell*, 8 East, 187; *Garrett v. Lister*, 1 Lev. 25; B. N. P. 246; *Rambottom v. Backhurst*, 2 M. & S. 567; *Davis v. Williams*, 13 East, 232). Where the grant of letters is void, the plt. cannot recover; thus, if on production of the letters they appear to be granted by a bishop, or other inferior judge, not having jurisdiction so to do, they will be void (Com. Dig. Admin. B, 5; but see *Comber's case*, 9 P. Wms. 767; 1 Saund. 275 a); or, if, there be no *bona notabilia* within the province of the archbishop who granted them (*Shaw v. Staughton*, 2 Lev. 86; *Allison v. Dickinson*, Hardw. 218); Com. Dig. Admin. B, 3); but, if the letters of administration be merely voidable, the plt. will not be precluded from recovering, as, where the metropolitan of a province grants the letters of administration, when the *bona notabilia* are within a diocese of that province, the power to grant letters in such case being properly vested in the bishop of such diocese (3 Bac. Abr. 37; Com. Dig. Admin. B, 3; *Lysons v. Barrow*, 2 Bing. N. C. 495). A metropolitan administration of goods within a peculiar, if not valid, is at least voidable only, and not void (1b.). Where an intestate has *bona notabilia* in two dioceses within the same province; neither diocesan has power to grant administration, but it must be done by the metropolitan of the province; though, if they be within one diocese of one province, and another diocese in another province, the case is different (*per curiam*, *Stokes v. Bate*, 5 B. & C. 493; Com. Dig. Admin. B, 3). If a man have *bona notabilia* (that is, to the value of 5*l.*) in several [*1129] dioceses of the same province, there must be a *prerogative administration; if in two of Canterbury, and two of York, there must be two prerogative administrations; and if in one diocese of each pro-

vince, each bishop must grant one (B. N. P. 141; Salk. 39; Com. Dig. *supra*). If a man die *in itinere*, the goods he has about him shall not make his testament liable to the prerogative court there (92 Canon, Jac. 1; Doe v. Owens, 2 B. & Ad. 423). Debts on recognizances, statutes, or judgments, are *bona notabilia*, where they are acknowledged, given, or recorded (Com. Dig. Admin. B. 4); but simple contract debts are such in the province in which the residence of the debtor was when the death of the testator happened (Ib.; Yeomans v. Bradshaw, Carth. 373); and specialty debts are such in the province where they were found at the death of the testator (Com. Dig. Admin. B. 4; Cro. Eliz. 472); even where the covenant is to pay out of the funds of a company whose stock lies out of the diocese (Gurney v. Rawlins, 2 M. & W. 87; 2 Gale, 235). A lease for years is *bonum notabile* in the diocese where the land is situate (Com. Dig. *supra*). To prove that a probate of a will has been revoked, an entry of the revocation in a book of the prerogative court in which all causes were entered by the registrar, and which was kept as the only record of such proceedings, and the decree of the court, has been admitted to be good evidence (Ramsbottom's case, 1 Lea. D. C. 30, n. (c); 1 Ph. Ev. 6th ed. 378). The title of several plts. claiming as executors, is proved by probate granted to one only (Walters v. Pfiel, 1 Moo. & M. 362; Scott v. Bryant, 6 Nev. & M. 381); whether they sue in their representative character or not (Walters v. Pfiel, *supra*); for the probate granted to one enures to the benefit of all (Webster v. Spencer, 3 B. & A. 363; per Bayley, J., Brookes v. Stroud, 1 Salk. 3; Walters v. Pfiel, *supra*; Watkyns v. Bent, 7 Sim. 512; Scott v. Bryant, 6 Nev. & M. 381). It seems that where a testator's will is proved in a prerogative court, and his executor's will in a diocesan court, the executor of the executor is not the personal representative of the original testator (Jenneyan v. Baxter, 5 Sim. 568). Where administration with the will annexed is granted to a person as the attorney of, and for the benefit of the executor, such person represents the testator during the life of the executor, or until he take out probate (Sewercrop v. Dew, 3 Nev. & P. 670; 8 Ad. & E. 624; 1 W. W. & H. 463). Though letters of administration, granted by an inferior judge, have been deemed void, yet, if he grant a probate, it has been considered voidable only (Comber's case, 1 P. Wms. 767; 1 Saund. 275, a).

*Evidence for Defendant.

By R. G. 4 Will. IV. r. 20, in actions by or against executors or administrators, the character in which the plt. or deft. is stated on the record to sue or be sued, shall not, in any case, be considered as in issue, unless specially pleaded. The evidence for the deft. with regard to the cause of action differs in no respect from those between other parties. The nonjoinder of another executor as co-plt., is only matter for a plea in abatement (1 Saund. 291 i, n.; see "ABATEMENT"). Payment of a debt to an executor, who has obtained probate to a forged will, is a discharge in an action brought against a debtor by the rightful administrator, on revocation of the probate (Allen v. Dundas, 3 T. R. 125. But a payment of money under a probate of the will of a living person would be void (Ib. 130; and see Woolley v. Clarke, 5 B. & A. 744). Where an executor sues on a promissory note, and lays a promise to himself, the plea of *non assumpsit* is a denial of the promise so laid, but not of the making of the note (Timmis v. Platt, 2 M. & W. 720; Gilbert v. Platt, 5 Dowl. 748). The deft. cannot prove that a person other than the plt. was appointed executor, &c., *or that the testator was insane, or that the will, of which the probate was granted, was forged, [*1130] for that would be directly contrary to the seal of the ordinary, in

a matter within his exclusive jurisdiction (*Noel v. Willes*, 1 Sid. 359; 1 Wms. Exors. 422). But the deft. may show on a plea *ne unques executor* that the deceased had *bona notabilia* in divers dioceses, and that the inferior jurisdiction had no power to grant probate, &c. (*ante*, p. 1127). A defence, however, that although the probate is valid, the particular debt did not pass under it, must be specially pleaded (*Stokes v. Bates*, *supra*); and under a plea *ne unques executor*, it may be shown that the supposed testator or intestate is alive, for there the ecclesiastical court can have no jurisdiction (*Allen v. Dundas*, 3 T. R. 130). So, that the seal attached to the supposed probate has been forged (*Marriot v. Marriot*, 1 Stra. 761); or that the letters have been revoked (*B. N. P.* 247). The deft. may plead that he has paid the debt which is the subject of the action, to an executor, who had obtained probate of a forged will unrepealed at the time of payment (1 Wms. Exors. 424; *Allen v. Dundas*, 3 T. R. 125). On a plea of the Statute of Limitations to a declaration containing only counts on promises to the testator, the plt. will not be allowed to give evidence of promises or acknowledgments to himself after the death of the testator (*Sarell v. Wine*, 3 East, 409; *Tanner v. Smart*, 6 B. & C. 608).

Competency of Witnesses.

A paid legatee is a competent witness to increase the estate (*Clarke v. Gannon*, Ry. & M. 31). A legatee, who has not received his legacy, is a competent witness for the executor in an action brought against him for a demand for mourning (*Johnson v. Baker*, 2 C. & P. 207). A person having an unsatisfied demand upon the insolvent estate of the testator or intestate, is not a competent witness for the plt. (executor), as he has no means of obtaining any sort of satisfaction for his debt, unless the plt. succeed in the action, when a fund will be created, out of which he may be satisfied (*Craig v. Cundell*, 1 Camp. 381). In an action by an executor or administrator, for a debt due to the intestate, a creditor of the intestate is a good witness to prove it (*Paull v. Brown*, 6 Esp. 34, recognised in *Nowell v. Davies*, 5 B. & Ad. 371). A creditor is a competent witness for an administrator, to prove due administration by payment of a debt to himself (*Star. Ev.* 776; see *Carter v. Pearce*, 1 T. R. 164; *Davies v. Davies*, Moo. & M. 345; but see Wms. Exors. 1490, n. (t); *Burghart v. Hall*, 4 M. & W. 727, n.; and *Bloer v. Davies*, 7 M. & W. 235, 240, 241). See now 6 & 7 Vict. c. 85; *post*, "WITNESS."

In trespass against an administrator for taking goods, one of the next of kin is competent, for the deft., to prove property in the intestate (*Thomas v. Bird*, 9 M. & W. 68). In an action for funeral expenses against one not executor, a residuary legatee is competent for the plt., for the reasonable expenses are ultimately chargeable on the estate (*Green v. Salmon*, 8 Ad. & E. 348). So, an annuitant creditor is competent to defeat a claim on the assets (*Nowell v. Davies*, 5 B. & Ad. 368; as to the admissibility of a legatee, see *Burghart v. Hall*, 4 M. & W. 727, n.).

In an action against the deft. for the value of a horse bequeathed to him by A., A.'s executor and residuary legatee was held, under 3 & 4 Will. IV. c. 42, s. 26, a competent witness to prove the property in the horse was in the plt. at the time of A.'s decease (*Bowman v. Willis*, 3 Bing. N. C. 671; 1 Jur. 262). In an action against an executor *de son tort*, it was held that the widow of the deceased was not a competent witness to support [*1131] the plea of *plene administravit*, *by showing that the deceased had, a short time before his death, executed an assignment by deed of all his property to the deft. (*Yardley v. Arnold*, 6 Jur. 718; 10 M.

& W. 141); nor can she be rendered competent by indorsing her name on the record, under the 3 & 4 Will. IV. c. 42, ss. 26, 27.

Costs.] By the 3 & 4 Will. IV. c. 42, s. 31, it is enacted, "that in any action brought by any executor or administrator, in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the said superior courts, shall otherwise order, be liable to pay costs to the deft., in case of being nonsuited, or a verdict passing against the plt., and in all other cases in which he would be liable if such plt. were suing in his own right upon a cause of action accruing to himself, and the deft. shall have judgment for such costs, and they shall be recovered in like manner." Executors and administrators are now on the same footing as to costs as other plts., except where the court sees that they have been misled by some misconduct on the part of the deft., or unless some other very peculiar ground be laid for the interference of the court, and the court would not interfere where the action was brought *bona fide*, with apparently reasonable grounds for suing, and that the plt. was taken by surprise by the defence (*Southgate v. Crowley*, 1 Bing. N. C. 518; *Godson v. Freeman*, 2 C. M. & R. 585; *Engler v. Twisden*, 2 Bing. N. C. 263; see also *Willkinson v. Edwards*, 1 Bing. N. C. 301; *Prole v. Wiggins*, 3 Bing. N. C. 235). Where the judge makes the order exempting plt. from costs, it is final (*Meddock v. Phillips*, 3 Ad. & E. 198; but see *Lakin v. Massie*, 4 Dowl. 239). The application should be made before the taxation takes place (*Ashton v. Pointer*, 5 Tyrw. 326; 1 C. M. & R. 738).

Executors will not be exempted from the payment of costs under the 3 & 4 Will. IV., c. 42, s. 31, unless there has been a positive and wilful misrepresentation made by the deft., mere silence as to his intended defence not being sufficient (*Birkenhead v. North*, 11 Jur. 436, Q. B.; N. P. C. 188; 9 Law T. 106).

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**Form of Remedy against, and their Liabilities.*

THE form of remedy against an executor or administrator is, in general, the same as against other parties.

Formerly debt on simple contract did not lie against an executor, &c., where the deceased could have waged his law (*Barry v. Robinson*, 1 N. R. 293; *Pinchin's case*, 9 Rep. 89 *b*; *Bowyer v. Garland*, Cro. Eliz. 600; *Hambly v. Trott*, Cowp. 375; *Hampton v. Boyer*, Cro. Eliz. 567; *Bowyer v. Garland*, 2 Rol. Abr. 107 *c*, pl. 3). But where the deceased himself could not have waged his law, debt lay against his executor, &c. (*Pinchin's case*, *supra*). But debt lay at common law against an executor, &c., upon a simple contract made with himself after the death of the testator or intestate (*Riddle v. Sutton*, 5 Bing. 206). But wager of law is now abolished by 3 & 4 Will. IV. c. 42, s. 13; and by sect. 14, an action of debt on simple contract shall be maintainable in any court of common law against an executor or administrator. Before the statute 4 & 5 Anne, c. 16, s. 27, no action of account lay against an executor or administrator (Co. Lit. 89; 3 Inst. 404), but that statute gave that action.

In actions against executors, all the defts. who are named as executors in the will, whether they have proved the will or not, may be made defts.; but, if they have proved the will, they must be joined (*Swallow v. Emberson*, Lev. 161; *Toller*, 367; *Douglas v. Forrest*, 1 Moo. & P. 663; *Munt v. Stokes*, 4 T. R. 565; *Alexander v. Newman*, Willes, 42; 1 Saund. 291 *h*, *n*.). Therefore where the deft. pleads in abatement that he has one or more co-executors who ought to be joined, he must aver not only that the executor is alive, but that he has *administered* (Ib.; Bro. Abr. Exors. 20, 88; Went. Off. Exors. 205; Com. Dig. Abatement, F. 10). And so, in the case of administrators, all who have administered must be joined (*Rast. Ent.* 324), or the non-joinder is a cause of abatement (Ib.). But, if an act be done by one executor only, he is liable singly, as in detinue of charters, where they came to the hands of one executor only, or in dower against one executor only as guardian, who alone possessed the ward (8 Ed. 3, 420).

If a man marry an administratrix to her former husband who had wasted the assets during her widowhood, they may be jointly sued for such devastation (*Bings v. Hilton*, Cro. Car. 603). But the husband may be sued alone for rent due during the coverture, on a lease which the wife has as executrix (Com. Dig. Baron and Feme, Y). Several executors, though of different things, and though not jointly appointed, &c., may be joined in an action (1 Vin. Abr. 139; *Rose v. Bartlett*, Cro. Car. 293). In an action against a married woman executrix, the husband must be joined as a deft. (Com. Dig. Admin. D; *Griffith v. Franklyn*, Moo. & M. 146; 1 Saund. 207 *a*). And they must both plead, otherwise it will be a discontinuance (*Aylworth v. Fenn*, 1 Free. 151). If a *feme covert* and a stranger are executors the action must be against the stranger executor and the husband and wife executrix (Com. Dig. Abatement, F, 20). If one of two executors die, an action cannot be brought against the surviving executor and the executor of the deceased executor, but must be against the survivor alone (1 Rol. Abr. 928, Exors. Z.). But if the executor of the executor administer with the other, an action lies against both as executors (Ib.). If trover be brought against a deft. executor and others not executors, and the jury either find them all guilty, or the executor not guilty, and the others guilty, the judgment [*1133] will be erroneous, for an action of **trover* does not survive against an executor for a conversion by the testator, and the defts. are improperly joined in as much as the judgment against them is different. But the plt. may cure this defect by entering a *nolle prosequi* against the

executors, and take his judgment against the others (*Dale v. Eyre*, 1 Wils. 306; 1 Saund. 207 *a*, n.), but the misjoinder could not be cured in an action on a contract (*Ib.*).

In the case of a joint contract, where several contract on the same part, if one of the parties die, his executor, &c., is at law discharged from all liability, and the survivor or survivors alone can be sued (*Godson v. Good*, 2 Marsh. 300; 6 Taunt. 594); and if all the parties are dead, the executor of the survivor is alone liable (*Hammond v. Jethro*, 2 Brownl. 99; see *Calder v. Rutherford*, 3 B. & B. 304). So, in debt on bond (*Osborne v. Crooborn*, 1 Sid. 238; see also *Towers v. Moor*, 2 Vern. 99), and the survivor only shall be charged when one of the joint obligors dies before judgment (*Lampton v. Collingwood*, 4 Mod. 315; see stat. 8 & 9 Will. III. c. 11, s. 7). But if the contract be several, or joint and several, the executor of the deceased contractor may be sued at law in a separate action (*May v. Woodward*, 1 Free. 248); but he cannot be sued jointly with the survivor, because one is to be charged *de bonis testatoris*, the other *de bonis propriis* (*Hall v. Huffiam*, 2 Lev. 228).

If one intermeddle as executor with the estate of the deceased, he may in general be sued as executor *de son tort*, although there be a lawful executor (5 Rep. 34 *a*), and is declared against as if he were lawful executor, though the party died intestate, and may be joined in the same action with the lawful executor, though not with the lawful administrator (1 Saund. 265, n. 2; Com. Dig. Admin. C, 3; Toller, 369; 1 Ch. Pl. 59), and if the husband of the executrix detain part of the goods of the testator he may be sued as executor *de son tort* (*Anon. Cro. Eliz.* 472). So, if a stranger take away the goods of the deceased, and there be no lawful executor, he is also liable to be sued as executor *de son tort*, though he claim them as his own (5 Rep. 33 *b*). But in this case if there be a lawful executor, &c., the stranger cannot be sued *de son tort* (*Ib.* 34, n.). No person can ever be sued as executor or administrator *de son tort*, of an executor or administrator *de son tort*, at law (*Anon.* 2 Mod. 293; *Hammond v. Gatcliffe*, And. 252).

Though an executor cannot in any case be sued jointly with the heir (18 Ed. 3, 4; Com. Dig. Abatement, F, 10; Vin. Abr. Actions, C. *d*, pl. 8); yet he may be sued at the same time as the heir, and if the heir be also executor, separate actions may be sustained against him in both capacities (Com. Dig. Pleader, 2 E. 3).

Where, A. and B. being partners, A. signed an agreement on behalf of himself and B., and B. survived A.: held, that an action on the agreement lay against the executors of B. without joining those of A. (*Calder v. Rutherford*, 3 B. & B. 302).

Executors and administrators are liable as representatives of the deceased, whether expressly named or not as far as they have assets, for all his debts, covenants, and other contracts (3 Bac. Abr. 95; *Shep. Touch.* 482; 1 Saund. 216 *o*, n. 1; *Sollers v. Laurence*, Willes, 421). An action, therefore, lies against an executor for all debts due from the testator by judgment, statute, recognizance, obligation, or other debts by record or specialty (Com. Dig. Admon. 314; Off. Exors. 118). So, an executor may be sued by the lord of a manor for a relief due from the testator (*St. John v. Bawdrip*, Noy, 43; Com. Dig. Admon. B, 14).

*The executor shall be bound by the testator's covenant if it [*1134] be not determined by his death (Bro. Abr. Covenant, pl. 12; Com. Dig. Covenant, C, 1; *Hyde v. Windsor* (Dean of), *Cro. Eliz.* 553; *Balley v. Wells*, 3 Wils. 29; *Thursden v. Warden*, 2 Bulst. 158; *Macartney v. Blundell*, 2 Ridgw. P. C. 113); and the executor is not only liable upon all

covenants by the testator which have been broken in his lifetime (*Went. Off. Exors.* 251; 2 *Wms. Exors.* 1372), but for all the breaches in his own time as far as he has assets; for the privity of contract of the testator is not determined by his death (*Coghill v. Freelove*, 3 *Mod.* 326); and although the covenant do not run with the land, so as to make the assignee of the term liable for a breach of it after the assignment, yet this shall not discharge the original lessee from a concurrent liability on the covenant, as far as he has assets, even although the lessor shall have accepted the assignee as his tenant (2 *Wms. Exors.* 1372). Therefore where the tenant had assigned the term in his lifetime, the lessor may still maintain covenant against the executor of the lessee upon an express covenant to pay rent, although the lessor had accepted the assignee as his tenant, and so may the assignee of the reversion by virtue of stat. 32 Hen. VIII. c. 34; (*Brett v. Cumberland*, Cro. Jac. 521; 1 *Saund.* 241 *a*, n. 5). But, although the executor of the original lessee will be liable for breaches of covenant incurred after an assignment by the testator, or by himself, it is otherwise where the testator was the assignee of the lessee, for no action will lie against him except in respect of breaches in his own time, and therefore all future liability may be discharged by assignment over, even to a pauper (*Taylor v. Shum*, 1 *B. & P.* 21). If a tenant in tail lease for years, and die, and the issue in tail oust the termor, he shall have covenant against the executors upon an express covenant for quiet enjoyment (*B. N. P.* 145, *F. n.* (a)).

So if the executor himself assign the term the lessor may afterwards bring covenant against the executor, notwithstanding any acceptance of the assignee as tenant; and so also may the assignee of the reversion (*Hillier v. Casbard*, 1 *Sid.* 266; *Coghill v. Freelove*, 3 *Mod.* 325). No action, however, lies against an executor upon a covenant *in law*, which is not broken until the death of the testator (*Swann v. Strausham*, Dy. 257 *a*; *Bragg v. Wiseman*, 1 *Brownl.* 22; *Procter v. Johnson*, *ib.* 214; *Newton v. Osborn*, Sty. 387; *Porter v. Sweetman*, *ib.* 407; *Netherton v. Jessop*, Holt, 412; *Andrew v. Pearce*, 1 *N. R.* 158; *Shep. Touch.* 160; *Com. Dig. Covenant*, C, 1; *Adams v. Gibney*, 6 *Bing.* 656).

The executor of the lessee is also liable in debt for rent accrued after the death of the testator, as long as the lease continues, and as far as he has assets, although the lessee assigned the term before his death or the executor had done so since (2 *Wm. Exors.* 1374; *Coghill v. Freelove*, 3 *Mod.* 325; *Pitcher v. Tovey*, 4 *Mod.* 76; 1 *Saund.* 241 *b*, n. 5). But see Walker's case, 3 *Rep.* 24 *a*, per *Ld. Coke*; but debt will not lie against the executor if the lessor have accepted the assignee as his tenant, though covenant will lie on the express covenant (*supra*).

The entry of one does not make both executors liable in use and occupation (see *Nation v. Tozer*, 1 *C. M. & R.* 172; *Woolaston v. Hakewill*, 3 *Man. & G.* 320; *Hernidge v. Wilson*, 11 *Ad. & E.* 655). An executor may be charged for the use and occupation of land held by him under a demise made by the testator (*Atkins v. Humfrey*, 15 *Law J.* 120, *C. P.*). When an executor is liable under a party wall act, see *Thacker v. Wilson*, 3 *Ad. & E.* 142. See *post*, "USE AND OCCUPATION."

*An executor of a yearly tenant, holding on, and paying rent, [*1135] will hold on the terms of the former demise, and be personally liable (*Buckworth v. Simpson*, 1 *C. M. & R.* 834).

So, an action lies on inferior debts of record (*Off. Exors.* 118). It also lies on the testator's obligation, or on his covenant as to pay rent (*Billinghurst v. Speerman*, *Salk.* 297), or to repair premises, or on simple contract of the testator, either in writing, or by parol, express or implied; as, on bills, notes, debt for rent on a parol lease (*Com. Dig. B.* 14); or assumpsit for

money had and received by the testator to the plt.'s use (Ib.); so for contribution in case of a joint contract when the executor is to reap the benefit (Prior v. Hembrow, 8 M. & W. 873); or for provisions furnished by a gaolor for the testator in prison (9 Rep. 876); or, as it seems, against an executor on a collateral promise by the testator (Com. Dig. Admin. B, 14; and in all other cases where the cause of action is founded on a *contract*).

An action at law cannot be maintained for the distributive share of an intestate's property against the administrator, nor against his executor, although he may have expressly promised to pay (Jones v. Tanner, 7 B. & C. 542; see Jones v. Johnson, 3 B. & P. 169); but where in an account with the legatee he debits himself with the amount "as retained for the legatee," he may recover on an account stated (Hart v. Minors, 2 C. & M. 700; see also Gordon v. Dyson, 1 B. & B. 219; Moert v. Moessart, 1 Moo. & P. 8; Gregory v. Harman, 1 Moo. & P. 209; Rose v. Savory, 2 Bligh. N. S. 145; Wasery v. Earnshaw, 4 Tyrw. 806; Roper v. Hofland, 3 Ad. & E. 99). Trover will lie after assent by the deft. for a specific legacy (Williams v. Lee, 3 Atk. 223). And, assent to a life interest in a chattel enures as an assent to a further bequest in remainder; but when the executor has such life interest bequeathed to him, his taking possession shall be presumed to be as executor, and not as legatee, if assenting to the legacy would be a *devastavit* (Richards v. Browne, 3 Bing. N. C. 493; see as to an action for a legacy charged on land, (Braithwaite v. Skinner, 5 M. & W. 313). After the assent by an executor to a specific legacy, he is clearly liable at law to an action by the legatee (Paramour v. Yardley, Plow. 539; Westwick v. Wyer, 4 Rep. 28 b.; Bastard v. Stukely, 2 Lev. 209; Barton's case, 1 Free. 289; Young v. Holmes, 1 Stra. 70; Doe v. Grey, 3 East, 120). Assent is matter of fact (Mason v. Farnell, 12 M. & W. 673).

An executor cannot be sued as such for money lent (Row v. Bowler, 1 H. Bl. 109; Jennings v. Newman, 4 T. R. 347), or had and received by him (Ashby v. Ashby, 7 B. & C. 444); or upon a penal statute (Com. Dig. Admon. B, 15).

An infant widow is liable on her contract for the funeral of her insolvent husband (Chapple v. Cooper, 13 M. & W. 252).

Where the executor submits to pay whatever shall be awarded by an arbitrator, who awards that the executor shall pay a certain sum, he is personally bound to perform the award whether he have assets or not (5 T. R. 7, per Lord Kenyon; Robson v. —, 2 Rose, 50, per Lord Eldon; Wansborough v. Dyer, 2 Ch. Rep. 40; Barry v. Rush, 1 T. R. 691; see also Worthington v. Barlow, 7 T. R. 453; Riddell v. Sutton, 5 Bing. 200). But the term of the submission or the award may limit this personal liability, and therefore, where an administrator submitted to an award, and the arbitrator awarded that a certain sum was due from the intestate's estate, *without awarding that the administrator was to pay it*: held, that the administrator was not thereby precluded from denying that he had assets (Worthington v. Barlow, *supra*). So, where the arbitrator ascertained that there was a certain balance against the testator, and awarded that the plt. was to pay that sum *out of the *assets*, on or before a certain day (Low v. Honeyborne; see the judgments of Lord Tenterden, and Holroyd, [*1136] J., in this case). It has been held that a power of attorney from an executor to ask, demand, sue for, and receive all sums due to him as executor, and to do all further acts for receiving debts, &c., with power to do and act touching the premises as effectually as the principal could do, does not authorize the attorney to bind his principal by accepting bills for debts due from his testator (Gardner v. Baillie, 6 T. R. 591; but see Howard v. Baillie, 2 H. Bl. 618).

Where rent was issuing out of lands, and the terretenant died leaving arrears due, it was decreed, that though the person of the terretenant was not chargeable with the rent at law, but only the land by distress, yet the executor should pay the arrears as far as he had assets. Where a man binds himself and his *heirs*, and leaves real assets, the heir taking the profit becomes so far a debtor that the executor shall be discharged (Went. Off. Exors. 249, 256; Henningham's case, Dy. 344). And there is no difference between a promise to pay a debt certain, and a promise to do a collateral act, which is uncertain, and rests only in damages; as a promise by the testator to give such a fortune with his daughter; to deliver up such a bond, &c.; for wherever the testator in such cases is liable to an action himself, his executors shall be liable also (Bac. Abr. Exors. P. 2; Berresford v. Woodroffe, Cro. Jac. 404; Clark v. Thomason, ib. 571; Fawcett v. Carter, Jon. W. 16; Palm. 329; Sanders v. Esterbie, 1 Roll. 266; Cro. Jac. 417).

Where the plts. and the deft.'s testator had agreed, that if certain lands which were to be sold, should not produce a certain sum, then they should repay each other proportionably to the abatement, and the deft.'s testator covenanted for himself, his executors, to pay his proportion to the plts., so as they gave him ten days notice in writing of the sale, without mentioning his executors, &c.; held, that as the covenant ran in interest and charge, the executor was bound to pay the testator's proportion, although the notice was given to the executor, and not to the testator (Harwood v. Hilliard, 2 Mod. 265).

An executor is not liable, at law, to the payment of a pecuniary legacy (Deeks v. Strutt, 5 T. R. 690); although a contrary doctrine was held in Atkins v. Hill, Cowp. 284; and Hawkes v. Sanders, ib. 289. Where a surgeon abstained from sending in a bill in the lifetime of his patient, in expectation of a legacy, he may afterwards sue the executors (Baxter v. Gray, 2 Sco. N. R. 374). But, if the executor, in respect of a new and sufficient consideration, as forbearance, &c., expressly promise to pay the legacy, and such promise be reduced into writing, so as to bring it within the 4th section of the Statute of Frauds, may be enforced by action (Deeks v. Strutt, 5 T. R. 690; Pea. 73; 1 Saund. 210 a, n. 1; 9 Rep. 94). In some cases, executors and administrators render themselves personally liable. Thus a promise by an executor or administrator to pay a debt of the testator, or to answer damages, will make him personally liable; but not unless there be a sufficient consideration to support the promise (Rush v. Kennegal, 1 Ves. 126), and the promise be in writing (Statute of Frauds); and such promise must either be by deed, or there must appear upon the face of the writing a good consideration (Rann v. Hughes, 4 Bro. P. C. 27; Hawkes v. Saunders, Cowp. 289; Philpot v. Bryant, 4 Bing. 717; but see Herbert v. Powis, 1 Bro. P. C. 355); although the declaration need not show a promise in writing, it is merely matter of evidence (Anon. 2 Salk. 519; Williams v. Leper, 3 Burr. 1890). If a creditor at the request of an executor forbear to sue him, that is a *sufficient consideration to [*1137] charge him *de bonis propriis*, whether he has assets or not at the time of the promise, and it is not necessary to aver in the declaration that he had assets (Johnson v. Whitecott, 1 Rol. Abr. 24, Action on Case, V, pl. 33). So, if a man declare against an administrator that the intestate was indebted to him in 10*l.* by bond, and died, and that the deft. being his administrator, in consideration of the premises, and that the plt. would *spare him* till such a day after, promised to pay him the debt, and avers that he spared him until the time, and that he did not pay him, though he did not say that he would spare

him the debt, or to sue him, it is a good consideration (*Gardner v. Fenner*, 1 Rol. Abr. 15, Action on Case, S, pl. 3; *Chambers v. Leversage*, Cro. Eliz. 644). So, though a bare accounting by an executor with a creditor of the testator, will not bind the executor *de bonis propriis*, yet a promise in consideration of forbearance will (*Hawes v. Smith*, 2 Lev. 122; and see *Fish v. Richardson*, Yelv. 55). So, where in *assumpsit* the plt. declared that J. S. devised to him a legacy, and made the deft. executor, and the plt. intending to sue him for the legacy, the deft. in consideration of forbearance promised to pay him, the deft. pleaded divers bonds, &c., and no assets, *ultra*; demurrer, plt. had judgment without argument for forbearance of a suit, was a sufficient consideration to charge him personally (*Davis v. Rayner*, 2 Lev. 3). It is true that no action at law lies for a legacy (*Deeks v. Strutt*, 5 T. R. 690); but the forbearance might have been to sue in Chancery, or in the Ecclesiastical Court (see 2 Saund. 137 c). So, if A. and B. are bound to C., for the proper debts of B. and A. pay the money, and B. die, and make D. his executor, and D. in consideration that A. will forbear to sue him until such a time promises to pay him, this is a sufficient consideration (*Scott v. Stevens*, 1 Sid. 89). So, if an executor be indebted to J. S. in 100*l.*, who demands the money, the executor is only chargeable in respect of assets, and not otherwise; but if he promise to pay the debt at a future day, it becomes his own debt, and to be satisfied out of his own estate (*Goring v. Goring*, Yelv. 11; *Rush v. Kennegal*, 1 Ves. 126). So, where B. having died indebted to G., for work and labour done, his executors signed the following memorandum on the back of G.'s account; "Mr. G. having consented to wait for the within account, we, as the executors of B., agreed to pay Mr. G. interest on the same at 5*l.* per cent. until the same is settled:" held, that the executors were personally liable to pay the debt and interest (*Bradley v. Heath*, 3 Sim. 543). So, if they make or indorse a bill or note, whether they represent themselves "as executors" or not (*King v. Thom*, 1 T. R. 489; *Childs v. Monins*, 5 Moo. 282; 2 B. & B. 460). Where a widow had given a promissory note for "value received by my late husband:" held, that the note was valid on the face of it (*Ridout v. Bristow*, 1 Cr. & J. 231). If an administratrix take upon herself to give a security, which may have the effect of inducing forbearance, and which purports to bind her individually, is it competent for her to say you must prove assets? To my mind the act of giving such a security supersedes the necessity of an investigation whether there be assets. It seems to me that the words "value received by my late husband" do not make the proof of assets necessary, and I go still further, and say that it is not competent to her to show that there were no assets (*Ib.*, per Bayley, J.). But where an executrix gave an acceptance for a debt due from her testator, taking an engagement from the drawer, to renew the bill from time to time until sufficient effects were received from the estate of the testator, it was held that this meant sufficient effects in the ordinary course of administration, and that she had *not precluded herself from first applying assets to pay 3000*l.* to trustees for her own use in discharge of a bond given by [*1138] her husband before marriage to that effect before she paid the acceptance (*Bowerbank v. Mentiero*, 4 Taunt. 844).

But where the plt. declared in *assumpsit* that the deft.'s testator was indebted to A., who after the testator's death assigned the debt to the plt., and appointed him to receive it to his own use, and that the deft., in consideration that the plt. would accept the deft. as his debtor, promised to pay it to the plt.: it was held that this was not a sufficient consideration to support the promise, so as to charge the deft. *de bonis propriis* (*Pitt v. Bridgewater*,

1 Rol. Abr. 20, pl. 11; Russel v. Haddock, 1 Lev. 188; 1 Saund. 210, n. 1); although forbearance by such assignee to sue the executor would have been a sufficient consideration (Reynolds v. Prosser, Hardr. 71; Odle v. Dittlesfield, 1 Vent. 153; 1 Saund. 210, n. 1; Wheeler v. Collier, Cro. Eliz. 406); and when the declaration stated that the husband of the deft. was indebted to the plt. in 50*l.* for beer, and died intestate, and administration was committed to the deft., and that afterwards, she, in consideration that the plt. would deliver to her six barrels of beer, promised to pay to the plt., as well the 50*l.* due by the intestate as for the six barrels delivered to herself, and that he thereupon delivered the six barrels: held, that she was liable personally for both (Wheeler v. Collier, *supra*); and where an attorney delivered up deeds to an executor upon which he had a lien, and which deeds were of great use to the executors in several suits, which they were carrying on: held, a good consideration to make the executor liable to the attorney's whole demand, whether there were assets or not (Hamilton v. Incledon, 4 Bro. P. C. 4). The having assets is a good consideration for a promise by an executor to pay the debt of the deceased, or to answer damages out of the testator's own estate (see Rush v. Rennegal, 1 Ves. 126; Atkins v. Hill, Cowp. 284; Hawkes v. Saunders, *ib.* 289; Fuirman v. Howell, Cro. Eliz. 91; but see Raine v. Hughes, 7 T. R. 350, n. (a)); with reference to Atkins v. Hill, and Hawkes v. Saunders, Mr. Justice Williams, in his work on Executors, says, that although the doctrine of these cases, as far as the liability of an executor to be sued at law for a legacy, has been exploded; yet it should seem that their authority with respect to the sufficiency of the consideration in question, to support a promise to pay debts, remains unimpeached (2 Wms. Exors. 1400): and in these cases where the debt is such as necessarily to make the deft. liable personally, although he be charged as executor, yet the judgment will be *de bonis propriis* (Powell v. Graham, 7 Taunt. 585; Wigly v. Ashton, 3 B. & A. 101; Corner v. Shew, 3 M. & W. 350).

With regard to the consideration for the promise, the Statute of Frauds, 29 Car. 2, c. 3, s. 4, enacts "that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages not of his own estate, or whereby to charge the deft. upon any special promise to answer for the death, default, or miscarriage of another person, &c., &c., unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in *writing* and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised." "Agreement," in this section, signifying the consideration for the promise (1 Saund. 11, n. 2); it has been held that the consideration or the promise, as well as the promise itself, must be in writing, otherwise it is void (Wain v. Warlters, 5 East, 10; Saunders v. Wakefield, 4 B. & A. 595; Jenkins v. Reynolds, 3 B. & B. 14; *Morley v. [1139] Boothby, 3 Bing. 107). The consideration however need not be stated in express terms; it is sufficient if it can be gathered from the whole tenor of the instrument (Steed v. Lill, 9 East, 348; Bateman v. Phillips, 15 East, 227; Morris v. Stacey, Holt's N. P. C. 153; Russell v. Morely, 3 B. & B. 211; Stead v. Liddard, 1 Bing. 196).

But a promise by an administrator by word of mouth, made before administration granted, may under certain circumstances be binding upon him afterwards; thus, when one promised the widow of an intestate that, if she would permit him to be joined in the letters of administration, he would make good any deficiency of assets to discharge the intestate's debts (Tomlinson v. Gill, Ambl. 330). A promise, however, by one who is neither executor nor administrator, to pay a debt of a deceased person is merely *nudum pae-*

tum; and even if such person should give his promissory note to the creditor for the debt, without any other consideration for making it, the payment of the note cannot be enforced by the payee, if at the time of the making thereof there was no personal representative of the debtor (*Nelson v. Serle*, 4 M. & W. 795; overruling *Serle v. Waterworth*, ib. 9). If, indeed, the note be payable at a future day, and the maker be entitled to take out administration, as being the widow or next of kin of the debtor, perhaps the creditor might enforce the note; because the effect of giving it is to preclude the payee during its currency from suing the maker in case the latter should take out administration (Ib. 9). Where a widow gave a promissory note "for value received by my late husband," it was held that the note was valid on the face of it (*Ridout v. Bristow*, 1 C. & J. 231).

If executors neglect to give orders for the funeral of the testator, and have sufficient assets for that purpose, they are liable upon an implied promise to the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances (*Fugura v. Harmen*, 3 Camp. 298).

So, when it appeared that the testator died at the house of his brother, who sent for the plt., an undertaker, who afterwards furnished the funeral, at which the brother of the deceased attended as chief mourner; there was no evidence of any contract made by the deft., or that he knew of the funeral until it had taken place; the court held, that, assuming he had assets, he was liable upon an implied promise to pay the expenses of the burial (*Rogers v. Price*, 3 Y. & J. 28). In one case, the widow ordered an extravagant funeral without the knowledge of the executor, who however attended the funeral, and made no objection to the expense; the undertaker charged the widow in his bill, but subsequently applied to the executor, who promised to pay; and he was sued in his own right, and allowed judgment to be signed by default. Held, that he was liable to the whole amount of the reasonable charges for the funeral, as ordered by the widow, for he adopted the acts of the widow by treating her as his agent (*Brice v. Wilson*, 3 Nev. & M. 512; S. C. 8 Ad. & E. 349; *Lucy v. Walrond*, *post*, 1140); and, per Patteson, J., "it has been decided by several cases that an executor is liable upon an implied promise at common law to pay reasonable expenses for the funeral of his testator *where no other person is liable, on an express contract*, although he does not give orders for it. But there is no case which goes the length of deciding that if the funeral be ordered by another person, to whom credit is given, the executor is liable (but see *Walker v. Taylor*, 6 C. & P. 752). Mr. Justice Williams, in his work on Executors, p. 1406, in commenting upon *Brice v. Wilson*, says that the learned judge "probably intended to lay
*down no more than that the executor, when credit is given to [*1140] another person, is not liable to the undertaker, for it would seem that if the person who gives the order for the funeral pays for it, he may have an action against the executor for the reasonable expenses; accordingly, it was held, in *Green v. Salmon*, 8 Ad. & E. 348, that, in an action by an undertaker for funeral expenses against a person not the executor, a residuary legatee is a competent witness for the plt., for although a person other than the executor may have rendered himself liable to the undertaker, the estate is ultimately answerable for so much of the costs as an executor might reasonably pay and no more, and the witness therefore has no disqualifying interest." It has been held, that the above cases of *Tugwell v. Hayman*, and *Rogers v. Price*, have only decided that the law implies a contract on the part of the executor who has assets personally, and not in his representative character, for the implied promise cannot place the deft. in a different condition than if he had made an express contract to the same effect,

which certainly would have bound personally only (*Corner v. Shew*, 3 M. & W. 350; see *Lucy v. Walrond*, 3 B. N. C. 848).

The estate of a deceased person can in no event be liable for the expenses of his funeral beyond those which are reasonable (*Green v. Salmon*, 3 Moo. & P. 388; 8 Ad. & E. 348; 2 Jur. 567), regard being had to the condition and degree of the deceased (*Hancock v. Podmore*, 1 B. & Ad. 260). 79*l.* is too much for the funeral of a captain on half-pay (*Ib.*); it seems 20*l.* would be reasonable (*Ib.*). Where the deceased was a small tradesman, the sum of 10*l.* was held to be reasonable (*Reeves v. Wood*, 2 Sco. 390; 2 B. N. C. 235). If the estate be insolvent the circumstances of each particular case must justify the expenses (*Edwards v. Edwards*, 4 Tyrw. 438; 2 C. & M. 612). But where the widow of a publican ordered an undertaker to conduct the funeral, and, as a security for his bill, deposited with him the licenses of the house, A., one of the firm who supplied the house with spirits, by arrangement with the widow, took out administration, the other partner, B., promised the undertaker to pay his bill if he would give up the licenses to him, which he did. Held, that he might recover his bill against B., although employed by the widow, and although he had made out his account charging the administrator as his debtor (*Walker v. Taylor*, 5 C. & P. 752). The assent of a party, before taking out administration, to the correctness of the funeral expenses ordered by another, is binding on such first mentioned party, when he subsequently takes out administration (*Lucy v. Walrond*, 5 Sc. 46; 3 Bing. N. C. 841). It should seem that the naming the deft. executor in the declaration is surplusage, and that if at all liable he is so *de bonis propriis*; but that since the maintenance of the action is dependent upon the fact of his being an executor *with assets*, it is a good defence under the general issue that his testator left none (see *Hayter v. Moat*, 2 M. & W. 56).

Where a party contracts, for himself and his executors, to build a house, and dies, the executors must go on, or they will be liable in damages for not completing the work (*Marshall v. Broadhurst*, 1 C. & J. 405). So, if a party engage to build a house, and die, after having procured all the necessary materials, it should seem his executors ought to complete the work, and not dispose of the materials at a loss to the estate (*Ib.*; see also *Edwards v. Grace*, 2 M. & W. 190). Again, if a bookseller undertake to publish a work in parts, and before the completion he dies, a subscriber has a claim upon the estate to complete the work, for otherwise those parts which [*1141] he has *purchased upon the faith of the work being completed would be useless (*Marshall v. Broadhurst*, *ante*, p. 1140). So, if a man make half a wheelbarrow, or half a pair of shoes, and die, the executors may complete them, and they are not bound to sacrifice the property of their testator by selling articles in an imperfect state (*Ib.*; see *Dakin v. Cope*, 2 Russ. Ch. C. 170). These cases show that the executor is bound to perform a contract, though he is not named in it; he is also liable upon a bond which becomes due, or a note payable subsequently to the death of the testator (*Toller*, 43; 2 Wms. Exors. 1353).

So, where a man covenanted that A. should serve B. as an apprentice for seven years, and died: it was holden, that if A. departed within the term, a writ of covenant lies against the executor of the covenantor without naming him (*Bro. Covenant*, 12; *Bac. Abr. Exors*, P. 1; 2 Wms. Exors. 1352). So, if A. be bound to build a house for B. before such a time, and A. dies before the time, his executors are bound to perform this contract (*Quick v. Laudborrow*, 3 Bulst. 30). But the un-named executors, &c., are not liable when the contract is personal to the testator or intestate, for in such cases no liability attaches upon them, unless a breach were incurred in the lifetime of the testator (*Hide v. Windsor* (Dean of), *Cro. Eliz.* 553; see *Siboni v.*

Kirkman, 1 M. & W. 423). The composition of a work is personal (Marshall v. Broadhurst, 1 Tyrwh. 349). In *Wentworth v. Cock*, 10 Ad. & E. 45, Patteson, J., said, that it was held, at Liverpool, that a contract to build a lighthouse was personal, it being a matter of personal skill and science. So, a covenant by a master for the instruction of his apprentice is personal (*Baxter v. Barfield*, 2 Stra. 1266; *Bott*, P. L. 696). Where one W. C., the plt.'s intestate, covenanted that he "should not thereafter exercise the business of a newsman, but should use his utmost endeavours to procure for the deft. his customers in the said business," and also to pay eight shillings a week to the said W. C., his executors, administrators, and assigns, during the life of the said W. C. & A. his wife, and the survivor of them; C. died, his wife administered, and commenced business as a newspaper vendor on her own account. Held, she was not bound by the covenant, for that was that C. himself, without naming his executors, &c., should abstain from the business of a newsman, but that the payment was to be made to him, his executors, &c., and that this was now payable to the plt. as administratrix, and was assets for the payment of deceased's debts (*Cooke v. Colcraft*, 2 Bla. R. 856; 3 Wils. 380). Where the lessee for years covenants for himself to repair the houses demised, omitting other words, or saying that they were to be repaired "during the term," he is bound only during his life, and his executors are not (*Shep. Touch. 178*; 2 Wms. Exors. 1354). So, where the lessor covenants for himself only, without other words, or saying "during his life," to discharge the lessee of all quit rents out of the land, this binds the covenantor only during his life (*Shep. Touchst. 178, 482*; *Ingers v. Hyde*, Dy. 114 a). Where the plt. had contracted with one C. to supply him with certain quantities of slate by monthly instalment, until the 1st of July, 1838, before which day C. died, and the plts., pursuant to their contract, continued to supply the slate to the administrator, who refused to receive it, whereupon an action was brought, to which it was objected that the contract was personal, and was not obligatory upon the administrator. Held that he was liable, for it was like any ordinary case of goods ordered by a testator, which the executor must receive and pay for (*Wentworth v. Cock*, 10 Ad. & E. 42; 2 P. & D. 251). It has been held, that, if one covenant that his executor shall pay 10% no action lies for this against the executor (**Perrott v. Austin*, Cro. El. 232). But this has been doubted (*Plumer v. Marchant*, 3 Burr. 1383), and would seem to be over- [*1142] ruled by *Powell v. Graham*, 7 Taunt. 580 (see 2 Wms. Exors. 1355, n. (a)). If a creditor appoint a debtor to be his executor, such voluntary act is deemed a *release in law*; but when a debtor becomes administrator, such appointment being only an act of court, and not of the creditor himself it merely suspends the right (*Went. Off. Exors. Ex. Ch. 2*, pl. 76; *Needham's case*, 8 Rep. 136; *Wankford v. Wankford*, 1 Salk. 306; *Crossman's case*, 1 Leon. 326; see *Feakley v. Fox*, 9 B. & C. 130).

An administrator arrested a debtor of the intestate for money had and received to the deft.'s use, and obtained a verdict, and charged him in execution; he obtained a rule for a new trial, and petitioned the insolvent court for his discharge; he then requested to be discharged on payment of a less sum than that recovered, and less than the costs, to which the administrator consented, and he was liberated. In an action by a creditor against the administrator, it was held, that the administrator was not personally liable, as for assets, for any part of the sum given by the verdict against the debtor, and was not guilty of a *devastavit* in permitting his liberation (*Pennington v. Healy*, 3 Tyrw. 319; 1 C. & M. 402).

At common law, the executor, &c., was not liable for the tortious acts of the deceased. If an injury therefore was done either to the person or property

of another, for which *damages* only could be recovered in satisfaction, the action died with the person by whom the wrong was committed (1 Saund. 216 *a*, n. 1); and where the cause of action is founded upon any *malfeasance* or *misfeasance*, is a tort, or arises *ex delicto*, such as trespass for taking goods, &c., trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights (see 3 & 4 Will. IV. c. 42), and in many other cases of the like kind, when the declaration implies a tort done, either to the person or the property of another, and the plea must be not guilty, the rule *actio personalis moritur cum personâ* applies; and if the person by whom the injury was committed die, no action of tort can be brought against the executor or administrator (1 Saund. 216 *a*, n. 1); therefore no action lies against them on a penal statute (2 Wms. Exors. 1356; Com Dig. Admon. B, 15). So, if a man neglect to appear as a witness upon a subpœna, his expenses being tendered to him, and he dies, no action lies against his executor or administrator (Went. Off. Exors. 255). If the sheriff, &c., suffer one in execution for debt or damages to escape, and the sheriff die, no action lies against the executor for the escape (Anon. Dy. 271 *a*; Whiteacres v. Ously, ib. 322 *a*; Parkinson v. Gilford, Cro. Car. 540; Bro. Escape, 28; ib. Exors. 100; Berwick v. Andrews, Ld. Raym. 973; Hambly v. Trott, 1 Cowp. 375; 1 Saund. 216 *a*, n. 1). An action for negligence may be supported against the executor of an attorney (Wilson v. Ducker, D. & R. 30). At common law, if an executor committed a *devastavit* and died, his executor was not liable, for it was considered a personal tort (Sir B. Tucke's case, 3 Leon. 241; Brown v. Collins, 1 Vent. 292). But he is made liable by 30 Car. 2, c. 7, explained and made perpetual by 4 & 5 Will. & Mary, c. 34, s. 12 (1 Saund. 219 *d*, n.); *quære*, whether the statute applies to an executor *de son tort* of an executor *de son tort* (Hammond v. Gutliffe, Andr. 254; Anon. 2 Mod. 293).

But, although the action of tort is not maintainable, yet the executors may be liable in another form. Thus, debt will lie against the executors of the sheriff, &c., upon a judgment obtained against the *testator for [*1143] an escape (2 Wm. Exors. 1366); so, for money which he had levied under a *fi. fa.*, and had not paid over (Perkinson v. Gilford, Cro. Car. 539; Adair v. Shaw, 1 Sch. & Lef. 265; Parkinson v. Culleford, 1 Rob. Abr. 921; Cockram v. Welbye, 2 Show. 79; Speake v. Richards, 2 Show. 281). So, although trover will not lie against the executor for the conversion of the testator, yet if the goods taken away continue still *in specie* in the hands of the executor or administrator of the wrong doer, replevin or detainee will lie against him (Le Mason v. Dixon, W. Jon. 173; Arundell v. Trewitt, 1 Sid. 82; 1 Saund. 217, n. 1); or trover, laying the conversion to have been by the executor (Hambly v. Trott, 1 Cowp. 375); or, in case they are sold, an action for money had and received to recover their value (Ib.; 1 Saund. 217, n. 1). So, an action on the custom of the realm against a common carrier is for a tort and supposed crime, and therefore does not lie against his executors; but assumpsit will lie against them (Hambly v. Trott, *supra*; Powell v. Layton, 2 N. R. 370, per Mansfield, C. J.). So, where a man takes a horse of another, and brings him back again, the executor is not liable for this trespass in that form of action, but he is for the use and hire of the horse (Hambly v. Trott, *supra*, p. 375); nor at common law will an action of trespass for mesne profits lie against an executor, &c. (Pulteney v. Warren, 6 Ves. 86); yet he is liable in an action for use and occupation for the rent up to the day of the demise in the action of ejectment (Ib. 87); but he is not liable for the rent subsequent to that day, for that would enable the plt. to treat the holding as founded in trespass and contract at one and the same time (Birch v. Wright, 1 T. R. 378; see also Pulteney

v. Warren, *supra*; Bridges v. Smith, 5 Bing. 410; Cobb v. Carpenter, 2 Camp. 14; Money Penny v. Bristow, 2 Russ. & M. 117). An action of waste does not lie at the common law against an executor for waste committed by his testator, it being a tort (2 Inst. 302; 2 Rol. Abr. 828, pl. 7; 2 Saund. 252 n.); nor shall an executor be chargeable for the injury done by his testator in cutting down another man's trees (Compen v. Hick, 7 T. R. 732; 1 Saund. 216, n. 1). But for the benefit arising to the testator for the sale or value of the trees he shall (Ullertson v. Vernon, 3 T. R. 549; Cowp. 373, 376). So, the executor is liable for money had and received by the testator for coal tortiously taken by him from the plt.'s land, if the testator have sold it and received the money, although no evidence be given of the actual sum received on the sale (Powell v. Rees, 7 Ad. & E. 426; see Winchester v. Knight, 1 P. Wms. 406); again, although no action will lie against the executor of a parishioner by whom titles were substracted, to recover the treble value under the stat. Edw. VI.: yet the executor will be liable in another form of action, for the tithes when severed belong to the tithe owner (Went. Off. Exor. 254; Holl v. Bradford, 1 Sid. 88; Weekes v. Trussell, ib. 181; Moreton v. Hopkins, 2 Keb. 502; Com. Dig. Administrator, B. 15; Pulteney v. Warren, 6 Ves. 89, 90).

But now, by the stat. 3 & 4 Will. IV. c. 42, s. 2, a remedy is given for a wrong done by a person deceased, to another in respect of his *property real or personal* (see *ante*, p. 1112). Where coal had been tortiously taken from the plt.'s land by an intestate, who had sold it and received the money, and part had been raised more than six months before his death, and part within: held, that the plt. might bring trespass for what was raised within six months, and money had and received for what was raised before (Powell v. Rees, 7 Ad. & E. 426). Trover for a watch, against the deft. as executor of H. R., declaration stated that H. R. died on the 27th of March, 1839, and alleged a conversion by her within six calendar months next before *her decease; plea, not guilty, within six calendar months [*1144] before the time of her death; evidence that the watch had been given by H. R. to one S. in September, 1837, that S. re-delivered it to her in March, 1838, for the purpose of being pawned by her; that on its being demanded by the plt. in 1838, H. R. said, "I shall not talk to you any more, but shall see my solicitor;" she died in March, 1839: held, sufficient evidence of a conversion six months before her death (Richmond v. Nicholson, 8 Sco. 134). An action on the case lies at common law against the executors of deceased rector, &c., for dilapidations (Went. Off. Exors. 255), for it is not considered as a tort in the testator, but as a duty which he ought to have performed (Sollers v. Lawrence, Willes, 421). So, he is liable for the dilapidations of a prebendal house (Radcliffe v. D'Oyly, 2 T. R. 630, 637; see Wise v. Metcalf, 10 B. & C. 299). So, where the hedges and fences belonging to a glebe are left in a state of decay, or where timber has been felled otherwise than for repairs and fall (Bird v. Relph, 4 Ad. & E. 830; 2 Ad. & E. 773). But he is not liable for neglect to cultivate the land in a husbandlike manner (Ib.; see the cases collected and cited on this subject fully in Grady on Fixtures and Dilapidations.)

Where several persons jointly contract for a chattel to be made or produced for the common benefit of all, and the executors of any party dying are by agreement to stand in the place of such party dying, although the legal remedy of the party employed would be solely against the survivors, yet the law will imply a contract on the part of the deceased contractor that his executor shall pay his proportion of the price of the article to be furnished (Prior v. Henbrow, 3 M. & W. 873).

Judgment.] When judgment is obtained against an executor in an action on the bond of his testator, execution cannot be issued in the first instance against the goods of the executor, although he have been guilty of a *devastavit*, and have no goods of the testator in his hands; but an action must first be brought suggesting a *devastavit* (Ward v. Thomas, 2 Dowl. 87). If the deft. executor plead to the action and do not plead *plene administravit*, the judgment against him is evidence of a *devastavit*; and if after production thereof, upon a *sci. fa.* inquiry, the sheriff return *nulla bona testatoris*, the court will quash the return, and award a new *sci. fa.* for inquiry (Palmer v. Waller, 1 M. & W. 689; 5 Dowl. 172). In debt upon a judgment by default again the deft. as executor, suggesting a *devastavit*, the plt. gave in evidence the record in the original action, and a testatum *fi. fa.*, with the sheriff's return that he had caused to be levied the costs *de bonis propriis* of the deft., and that the deft. had no goods or chattels of the testator in his hands to be administered: held, that this was *prima facie* evidence of a *devastavit* (Leonard v. Simpson, 3 Sco. 335; 2 Bing. N. C. 176).

The executor is liable on contracts of the testator, although the cause of action accrue not till after his death; as, on a bond which becomes due, or a note payable, subsequently to that event (Com. Dig. Pleader, 2 D, 2). Where the executor of a lessee has assigned the term, the lessor, or his assignee, may still maintain either debt or covenant against the executor or assignee of the term, at his option; but, if he accept the assignee of the term as his tenant, he can no longer maintain debt against the executor for rent subsequently accruing (Cro. Eliz. 715; Moo. 600), although he may maintain covenant; and the same, if the lessee had himself assigned the term before his death (1 Sid. 366; 1 Lev. 127).

*Where the executor is liable to an action in respect of the acts [*1145] of the deceased, the plt., on the death of a sole executor, may sue his executor, for the executor of such executor is to all intents and purposes the executor and representative of the first testator (2 Wms. Exors. 1577). But on the death of an executor without appointing an executor of his own, or on the death of an administrator, the action must be brought against the administrator *de bonis non* (Ib.). With respect to the remedies for the first *devastavit* of an executor or administrator, in the event of his death, at common law no executor, &c., was answerable for a *devastavit* by his testator or intestate; but, by 30 Car. II. c. 7, and 4 & 5 Will. & M. c. 24, s. 12, this was remedied (2 Wms. Exors. 1577); so that if a judgment be now recovered against an executor who afterwards dies, an action may be brought against his executor, &c., suggesting a *devastavit* by the first executor (Ib. 1566, 1577), and in every case where the executor in his lifetime was in any way guilty of any act which amounts in law to a *devastavit* such as exhausting the assets by payment of debts of an inferior degree before those of a superior degree, and the like, an action may be brought against the executor or administrator of such executor (1 Saund. 219 *ef*, n, 8), and such actions must be brought in the *detinet* only, and the judgment must be *de bonis testatoris* (Ib.).

Where executors underlet premises for the remainder of their testator's term, to hold from year to year, subject to the determination of their own interest, and the tenant at the expiration of the term refused to give up possession; held, that the lessor was entitled to recover for the use and occupation of the premises from the expiration of the term until the day when the possession was offered to him (Ibbs v. Richardson, 1 P. & D. 618; 3 Jur. 102).

No action can be maintained against a party as executor until he has taken

upon himself to act as such, or has proved the will (Douglas v. Forrest, 4 Bligh, 686).

Form of Pleadings.

Declaration.] It is usual to describe the representative character of the deft. in the commencement of the declaration, though it is sufficient if it appear in other parts of the declaration (Rann v. Hughes, 1 Saund. 112, n. 2; Com. Dig. Pleader, 2 D, 1, 2; Gallant v. Bontebower, 3 Doug. 36; Halliday v. Fletcher, 2 Ld. Raym. 1510). In an action by the lessor against the executor of the lessee for rent incurred in the testator's lifetime, whether the action be in debt or covenant, the venue is transitory, and so it is in actions where the executor is sued *as executor* for rent incurred in his own time. But where he is sued in debt, in the *debet* and *detinet*, or in covenant, as assignee for rent incurred in his own time, the venue is local (Hillier v. Castard, 1 Sco. 266; Cowmel v. Lissett, 2 Lev. 80; 1 Saund. 241); and, in declaring against an executor *de son tort*, he is stated to be executor of the last will and testament, and, in the same manner, as a rightful executor (1 Saund. 265). If the plt. declare in the *debet* and *detinet* against an executor or administrator in cases where he ought to sue in the *detinet* only, the declaration is bad on demurrer, though aided by verdict (Fruen v. Porter, 1 Sid. 379); but no objection can be made to a declaration in the *detinet* which might strictly or ought to be in the *debet* and *detinet*, for a party may abridge his demand, though he cannot extend it (Wilson v. Hodday, 4 M. & S. 120). In actions of debt against executors or administrators in that character, the words "*owes to*," should be omitted in the commencement (see Gardner v. Bowman, 4 Tyrw. 412; *Com. Dig. Pleader, 2 D, 1, [*1146] 2), except in an action upon a judgment recovered against an executor suggesting a *devastavit*, when the *debet* and *detinet* is proper (Ib.; 2 W. 8; Rol. Abr. 603; Bac. Abr. Debt, J.; Hope v. Bayne, 3 East, 2). In proceeding against an executor, a count cannot be added which would charge him personally, as the judgment would in one case be *de bonis testatoris*, and in the other, *de bonis propriis* (2 Saund. 117 d); therefore, a count on a promise made by the deft. as administrator, to pay money received by him as such, to the plt.'s use, cannot be joined with other counts on promises made by the intestate (2 Saund. 117 a; Jennings v. Newman, 4 T. R. 347). And a count in assumpsit, against husband and wife, who administer with the will annexed, upon promises by the testator to pay rent, cannot be joined with counts upon promises by the husband and wife, as administratrix, for use and occupation by them after the death of the testator (Wigley v. Ashton, 3 B. & A. 101); and such misjoinder is bad on general demurrer, or arrest of judgment, or on error (*ante*, p. 1119; Jennings v. Newman, 4 T. R. 347; Rose v. Bowler, H. Bl. 108; Ashby v. Ashby, 7 B. & C. 444; Brigden v. Parkes, 2 B. & P. 424; 2 Saund. 117 e; ib. 210); and the court cannot award a *venire de novo* (Corner v. Shew, 4 M. & W. 163). If separate damages be assessed on each count the objection may be cured by entering a *nolle prosequi* on the count which is misjoinder (Hayter v. Moat, 5 Dowl. 298).

When rent is sought to be recovered against the executor under a demise, if the whole rent accrues due in the lifetime of the testator, the action to recover it from the executor must be brought against him in his representative character; and therefore, if the form of action be in debt, it must be in the *detinet* only, and not in the *debet* and *detinet*, and the judgment must be *de bonis testatoris* (1 Rol. Abr. 603, S, pl. 9; Fruen v. Porter, 1 Sid. 379). But where the rent accrues after the death of the lessee, if the executor enter

upon the demised premises, the lessor has his election either to sue him as executor, or charge him personally as assignee in respect of the perception of the profits (Boulton v. Cannon, 1 Freem. 337; 1 Saund. 1, n. 1); and if the action be brought in debt the lessor may either sue the deft. as executor in the *detinet* (Royston v. Cordrye, Al. 42; Hope v. Bogue, 3 East, 2); or in the *debet* and *detinet*, as assignee of the term (Hargrave's case, 5 Co. Rep. 31; Rich v. Frank, Cro. Jac. 238; Caly v. Joslin, Al. 34; 1 Saund. 1, n. 1). So, if the executor enter he may be charged in the *debet* and *detinet* for the current half-year's rent which commenced before the testator died (Ipswich (Bailiffs) v. Martin, Cro. Jac. 411; Jevens v. Harridge, 1 Saund. 1); but if one sum of money be due for arrears of rent which became due in the lifetime of the testator, and another sum for arrears due in the executor's own time, the lessor cannot in one action charge the executor in the *detinet* for one part, and in the *debet* and *detinet* for the other; for then two different judgments would be necessary (Salter v. Codbold, 3 Lev. 74); but one action may be brought for both sums in the declaration only (Aylmer v. Hyde, Selw. N. P. 6th ed. 610; 2 Wms. Exors. 1375). Where the deft. was sued in the *debet* and *detinet* as assignee, he was usually named as executor, stating the demise to the deceased, his death, the grant of letters of administration to the deft., his entry into the demised premises, and subsequent accruing of rent (see Jevens v. Harridge, *supra*; Caly v. Joslin, Al. 34). But it should seem sufficient to charge the deft. in the *debet* and *detinet* as assignee generally, without naming him executor (see Lyddale v. Dunlapp, 1 Wils. 405). So, in covenant, the lessee has his election *either [*1147] to charge the deft. as executor or as assignee, without styling him executor, stating generally in the declaration that the estate of the lessee in the premises lawfully came to the deft. (Buckley v. Pirk, 1 Salk. 317; Tilney v. Norris, 1 Ld. Raym. 553; 1 Saund. 1, n. 1). If the executor do not enter he is still chargeable as executor in the *detinet*, because he cannot so waive the term as not to be liable for rent as far as he has assets (House v. Webster, Yelv. 103; Helier v. Casebert, 1 Lev. 127). As to whether this distinction as to the entry of the executor still exists, see Williams v. Bosanquet, 1 B. & B. 238, overruling Eaton v. Jacques, Doug. 455; Nation v. Tozer, 1 C. M. & R. 176; per Parke, B., at the conclusion of his judgment; Wollaston v. Hakewill, 3 Sco. R. 593; 3 Man. & G. 297).

Where the term was assigned by the testator, it seems clear that the executor cannot be charged as assignee, because the lease did not pass to him; but still he will be liable in debt in the *detinet* for the rent, unless the lessor has accepted the assignee as his tenant (Helier v. Casebert, 1 Lev. 127); and even the executor will be liable *as executor* in covenant (*ante*, p. 1145; see Leigh v. Thornton, 1 B. & A. 625). If the executor enter, and then assign the lease, he is chargeable as assignee for that time only for which he occupied (*ante*, p. 1134; 2 Wms. Exors. 1373, n. (f), 1379); and if he be sued for rent incurred since the assignment by himself, he is liable in his representative character only: therefore, if the lessor bring an action of covenant against the executor, and charge that, after the testator's death and the proving of the will by the deft., the demised premises came by assignment to A. B., and that such assignee has broken the covenants in the lease, the deft. may plead *plene administravit* (Wilson v. Wigg, 10 East, 313).

It has been held, that although in respect of rent the personal liability of an executor does not exceed what the demised premises yield, yet this qualification does not extend to a covenant for repairs; but that when an executor is sued as assignee on a covenant to repair he is liable as any other assignee (Treemeere v. Morrison, 1 Bing. N. C. 89). Where a plea that the

demised premises had yielded no profit, nor had been of any value whatsoever since the testator's death, with an addition of an averment of *plene administravit*, and an offer to surrender before the breaches occurred, was held bad on demurrer. But see observations of Bayley, B., in *Reid v. Ten-terden* (Lord), 4 Tyrw. 118, 120; see *Ives v. Sammes*, 2 And. 51; 2 Inst. 302. So, debt for rent against the deft. as assignee of a term, who pleaded that he was administrator, that the premises were of less value and had yielded less profit than the arrears of rent; that he had paid over the plt. all the profit he had received, and had fully administered and had offered to surrender: replication, that the premises were worth more, and a denial of the surrender. The premises were demised by a party through whom the plt. claimed to N., for twenty-one years, in 1818, under a covenant by the lessee to repair. N., in 1827, underlet to E. for twelve years wanting ten days, at the rent reserved in the lease; N. died in 1829, and in 1830 deft. administered; E. died in 1828, and since then the sister occupied the premises, who paid the rent for some years, out of which the plt.'s rent was paid, but latterly her rent had fallen into arrear; the premises were out of repair, and had been for some time of less value than the rent reserved, but, if repaired, would be of that value; the deft. had given the plt. notice of his willingness to surrender: held, that the proof of non-payment of rent by the under-lessee was no defence to this action on issue as to the value of the premises, and that under the same issue the deft. could not rely on the premises being out of repair as a *ground of defence, being himself bound by the covenant to repair (*Hernidge v. Wilson*, 11 Ad. & [*1148] E. 645; 3 P. & D. 641). Where A. demised lands, &c., to B.

for one year certain, and then from year to year at the pleasure of the parties with power to determine on giving notice to quit; the lessee died, and his executors entered into the occupation of the premises, and continued to hold and pay rent: held, that they were chargeable in their personal character upon the terms contained in the original demise (*Buckworth v. Simpson*, 1 C. M. & R. 834). Where lands are leased for years by demise, not under seal, and one of the two executors of the lessee enter into the demised premises, such entry does not enure as the entry of the two executors, so as to make them both liable in an action for use and occupation (*Nation v. Soyer*, 1 C. M. & R. 172).

In ejectment by an administrator, the demise may be laid on a day after the intestate's death, but before the grant of the letters of administration (*Patten v. Patten*; *Alcock v. Napier*, 493, Irish).

In an action of covenant against an executor, the plt. may join a breach by the testator, and a breach since his decease (*Wilson v. Wigg*, 10 East, 313). And a count on an account stated with an executor, for money due from the testator, may be joined to a count on a promise made by the testator, this being the common mode of declaring against executors, to waive the Statute of Limitations (2 Saund. 117 c; *Lecar v. Atkinson*, 1 H. Bl. 102; *Ellis v. Bowan*, *Fearne*, R. Ex. 98). Whenever an executor or administrator is sued upon promises by him in that character, the words "as executor" must be inserted in each count in stating the promise, and also in stating the debt or cause of action, if it be laid to have accrued after the death of the testator or intestate (*Brigden v. Parkes*, 2 B. & P. 424; 1 Ch. Pl. 126; but see *Lacefield v. Allan*, 1 B. N. C. 592). But these words may be rejected where the nature of the claim is such as to charge the deft. personally (*Wigley v. Ashton*, *post*, p. 1149); but not if he be liable in his representative character (*Corner v. Shew*, *post*, p. 1149).

The declaration stated that a cause depending in Chancery, in which T. B. was a party, was referred to arbitration, upon (amongst others) the terms

that the death of either of the parties was not to abate the reference; that T. B. died before the making of the award; that the arbitrator awarded that the executor should pay the plt. 225*l.* out of the assets of T. B.; and that being so liable the deft., executor as aforesaid, promised to pay: held, that the executor was not charged thereby personally, but as executor only, and that the judgment must be *de bonis testatoris* (3 Bing. 20). The judgment was reversed on a different ground (6 B. & C. 255). One of the counts stated a promise by the testator in his lifetime, that in consideration the plt. would enter into his service as a nurse and housekeeper, and would continue to serve him until his death, his executors should, after his decease, pay the plt. 20*l.*; averment, the deft.'s liability as executor, and that in consideration thereof the deft. promised to pay the plt. that sum, whenever the deft. as executor should be requested: held, that upon this count the deft. was not liable individually, but as executor only (Powell v. Graham, 7 Taunt. 581; 1 Moo. 305). So, a count averring that the deft. as executor was indebted to the plt. for so much money paid by the plt. to the use of the deft. as executor, and that in consideration thereof the deft. as executor promised to pay, charges the deft. in his representative character only, and that he may plead *plene administravit* to it, and the judgment will be *de bonis testatoris* (Ashby v. Ashby, 7 B. & C. 444: but see Rose v. Bowler, 1 H. Bl. 108; 2 Saund. 117 *e, n.*). But a count alleging that the deft. as executor was indebted to the *plt. for so much money *lent* by the plt. to the deft. [*1149] as executor, and that the deft. in consideration thereof as executor promised to pay, charges him personally, and he cannot plead *plene administravit*, and the judgment must be *de bonis propriis* (Rose v. Bowler, *ante*, p. 1148; Powell v. Graham, *ante*, p. 1148). So, where the count charges that the deft. as executor was indebted to the plt. for money had and received by the deft. as executor for the use of the plt., and in consideration thereof the deft. as executor promised to pay, and *plene administravit* cannot be pleaded, and the judgment must be *de bonis propriis* (Rose v. Bowler, *supra*; Jennings v. Newman, 4 T. R. 347; Brigden v. Parkes, 2 B. & P. 424; Powell v. Graham, *supra*; Ashby v. Ashby, *supra*: but see the observations in the last case of the learned judges, Lord Tenterden, Bayley and Littledale, JJ., as to the correctness of the law in these cases). A count upon a promise by the deft. as executor for use and occupation after the death of the testator has been held to charge the deft. personally (Wigley v. Ashton, *supra*). So, a count against the deft. as executor, for goods sold and delivered by the plt. to the deft. as executor at his request, and for work and materials provided by the plt. for the deft. as executor at his request, and that the deft. as executor promised, &c., charges the deft. in his personal capacity; for no goods could be sold to or work performed for another in his representative character (Corner v. Shew, 3 M. & W. 350). In the above cases a promise by the executors is a mere *nudum pactum*, if there were no assets (1 Saund. 310 *b*, 211, n. 1; Pearson v. Henry, 5 T. R. 8; Rann v. Hughes, 7 T. R. 350, n. (a)). But it is not necessary to aver in the declaration that the deft. had assets (Powell v. Graham, *supra*; Dowse v. Cox, 3 Bing. 20; see also Pinchon's case, 9 Rep. 90, 96).

If goods, or work and labour, are contracted for in the lifetime of the testator, and the contract is completed in the lifetime of the executor, the plt. cannot recover on the common counts for goods, and work and labour, but must declare specially (Corner v. Shew, 3 M. & W. 305).

Counts for goods sold and delivered to the deft. as executor, and for work and labour done for the deft. as executor, cannot be joined with a count for money paid for the use of the deft. as executor, and for money due on an account stated with the deft. as executor; but a count for money paid

to the use of the deft. as executor may be joined with a count for money due on an account stated with the deft. as executor (*Corner v. Shew*, 3 M. & W. 350).

Plea.] If the deft. be an infant, he must plead by guardian, and not by attorney, though he be sued in the representative character (1 Moo. 250; 1 Chit. Pl. 399). *Non assumpsit* in an action by or against an executor has precisely the operation which belongs to it in other cases (see *ante*, pp. 226—232); it admits the character of executor (p. 1165). It is not always advisable to plead *non assumpsit* without due cause, as the costs of the issue joined thereon and evidence applicable thereto fall on the deft. if he fail, although he obtain a verdict on a special plea (see p. 1131).

The deft. may plead any matter which the testator or intestate might have pleaded (Com. Dig. Pleader, 2 D, 8); he may also deny the character in which he is sued by pleading *ne unques executor* or *administrator*; or, if he admit it, he may plead that he has no assets in his hands, and that either generally or specially with the exception of assets to a certain amount, which are not sufficient to satisfy the plt. (2 Wms. Exors. 1523); although upon an issue of *plene *administravit vel non*, the stamps of the probate of testator's will is admissible in evidence, yet it is not even [*1150] *prima facie* of assets come to the testator's hands (*Phunn v. Lane*, 5 Moo. & M.); or he may plead a retainer to pay his own debt of equal or superior degree, or debts of a superior degree due to third persons on bonds or judgments, &c. (Tidd, Pr. 644). Formerly, in actions of debt on simple contract against an executor or administrator, *non detinet* was a good plea in those cases where there was nothing due at the time of commencing the action (Tidd, Pr. 648; Com. Dig. Pleader, 2 W, 17). But by R. G. H. T. 4 Will. IV., 11, in actions of debt on simple contract, all matters in confession and avoidance shall be pleaded specially; and in every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in law on the ground of fraud, or otherwise shall be specially pleaded. In an action of assumpsit, *non assumpsit* generally is a good plea, at least after verdict, for it shall be referred to the testator (*Browning v. Litten*, 1 Lev. 184; 1 Sid. 292). So in debt on bond, if the executor plead *non est factum suum*, it is good after verdict, for *sum* refers to the testator (*Baker's case*, Lat. 125; Com. Dig. Pleader, 2 D, 8). A plea by the deft. of his own bankruptcy is not pleadable unless a *devastavit* be suggested, for the commission would not find any effects upon which the sheriff would have a right to levy the amount of the plt.'s judgment, and execution under a *fi. fa.* (1 Wms. Exors. 497; 2 Wms. Exors. 1523); and where a deft. in an action against him as administrator was under terms to plead issuably, and pleaded *plene administravit* and his own bankruptcy, the court held that the plt. might sign judgment as for want of a plea, on the ground that the plea of bankruptcy could not possibly be good if the plea of *plene administravit* were true (*Serle v. Bradshaw*, 2 C. & M. 148; 2 Dowl. 289). If several executors plead different pleas, *that* shall be taken which is most advantageous to the testator. Thus, if one executor acknowledge the action, and the others plead *non assumpsit*, the latter shall be received (*Chaffe v. Relland*, 1 Rol. Abr. 929, Exor. A, pl. 1; *Elwell v. Quash*, 1 Stra. 20). Hence, if a warrant of attorney be given by one of several executors to confess judgment against them all, the court will order it to be given up (*Ib.*; Tidd, Pr. 498). Where one executor pleaded a good plea, and the other a bad one, on demurrer judgment was given for both the defts. which was reversed on error, and a new judgment was given for the plt. against one executor only (*Baldwin v. Church*, cited 1 Stra. 20). Where several executors plead a

release to the testator or to themselves some of them afterwards make default, this shall not be a total default in the debts, so as to induce a judgment against them (Went. Off. Exors. 213; 14th ed.).

It has been already observed that where the debt. intends to deny his representative character he must plead such denial specially, otherwise it will be admitted under not guilty, the executor cannot be called upon to show the death of the testator (Lloyd v. Finlayson, 2 Esp. 564); and the plea of *ne unques executor* or *administrator* is a plea in bar (Com. Dig. Pleader, 2 D, 7). But a plea to an action brought against the debt. as executor, that he is administrator and not executor is a plea in abatement only (Pyne v. Wolland, 2 Vent. 178; Harding v. Salkill, 1 Salk. 296; Greenwell v. Sibly, 2 Lev. 190; Com. Dig. *supra*). But he need not traverse *absque hoc* that he administered as executor, for this is more properly for the other side, nor that he [*1151] was made executor, nor need he make *profert of the letters of administration (Ib. 2 D, 4). In an action against debt. as administrator, a plea that he is not administrator but executor, can only be in abatement (Ib. Abatement F. 20; Ib. Pleader, 2 D, 12); and in this plea the debt. must traverse *absque hoc* that the deceased died intestate (Ib. 2 D, 4); and if he be sued as administrator generally, he must plead in abatement that he is administrator only *durante minoritate* (Little v. Plant, 1 Lat. 20; Com. Dig. Pleader, 2 D, 12). It is said, that it seems to be now settled that the plt. would fail on an issue joined, on the plea of *ne unques executor*, unless he could prove the appointment of the debt. as executor, but also that he has taken upon himself to act as such or has proved the will (2 Wms. Exors. 1525, citing 2 Ph. Ev. 7th. ed. 363; Douglas v. Forrest, 4 Bing. 704; Cottle v. Aldridge, 2 Stark. N. P. 38; Atkins v. Ingold, 2 B. & C. 30). But he says it is laid down in a book of great authority, that an executor who proves the will, though he does not otherwise administer, cannot plead *ne unques executor*, and that if there be two executors and one proves it in the name of both, even against the will of the other, yet he cannot plead *ne unques executor* nor administered as executor (Com. Dig. Pleader, 2 D, 7; see also Went. Off. Exors. c. 15, p. 339; 2 Wms. Exors. 1525). Where an opinion is expressed that even in the case of a sole executor who has refused before the Ordinary he cannot plead *ne unques executor*, since he so was executor before he refused, and that he might have released all debts due to his testator, and given away all his goods, and therefore he must plead specially, showing his refusal, and not generally deny his being executor. But where the plt. declares on promises by the debts. as executors, the mere naming of one of them in the will is not enough to prove him executor (see the judgment in Atkins v. Tredgold, 2 B. & C. 30; 2 Wms. Exors. 1526, n. (w)). And this plea may conclude to the country (see Wood v. Kerry, 2 C. B. 515; 15 Law J. 122, C. P.). But *semble* a conclusion with a verification would not be incorrect, (Ib.; and see Blakesley v. Smallwood, 15 Law J., N. S., Q. B. 185; see also Scott v. Widlock, 14 Law J., N. S., Q. B. 359. A plea of *ne unques executor*, properly concludes to the country (Wood v. Kerry, 2 C. B. 515; see Scott v. Wedlake, 7 Q. B. 766; 3 D. & L. 642). Under the plea *ne unques executor* pleaded by several the plt. may take a verdict against the real executor, on counts laying promises by the testator, and discharge the others (Griffiths v. Franklin, Moo. & M. 146). Where an administrator is compelled to pay an annuity for which his intestate was liable, he may on this plea recover against the party who has covenanted to indemnify the intestate against such payment, though such claim has not been taken into account in the amount of the stamp on the letter of administration (Carr v. Roberts, 1 Moo. & R. 45). An executor made profert in the usual form, which stated "whereby it appears to the court here that the

plt. is executor," the deft. did not crave oyer, but pleaded that the plt. never was nor is executor, *modo*, &c.; replication that he was and continued to be executor, *modo*, &c.: held, that the plt. might recover on this issue, although he had not taken out probate till some months after the declaration (Thompson v. Reynolds, 3 C. & P.). If the deft. plead that before the date of the writ his administration was revoked and granted to another, he ought to allege that he has fully administered all the goods in his hands, or else that he has delivered them over to the new administrator (Garter v. Dee, 1 Free. 13; 1 Wms. Exors. 462). If an administrator waste the goods, and afterwards administration is committed to another, yet any creditor may charge him in debt, and if he plead the last administration committed to another, the other may reply that *before the second administra- [*1152] tion committed he had wasted the goods (Packman's case, 6 Rep. 18 b).

But a set-off for money due from the plt. to a testator in his life-time may be pleaded in an answer to a declaration on a cause of action which accrued to the plt. from the defts. as executors, after the death of the testator (Blakesley v. Smallwood, 15 Law J., N. S., Q. B. 185; 8 Q. B. 538).

Wherever the executor or administrator pleads a *tender*, with *tout temps prist*, he must allege that his testator or intestate was at all times from the time of making the promise to the time of his death, ready to pay, and that he the deft. has at all times since the death of his testator or intestate, been ready to pay (Clements v. Reynolds, Say. 18).

Where the deft. is sued as executor or administrator, he cannot set off a debt due to himself personally; nor if sued for his own debt, can he set off a debt due to him as executor or administrator, because they must be mutual, and due in the same right (Bishop v. Church, 3 Atk. 691; Gale v. Luttrell, 1 Y. & J. 180; 2 Wms. Exors. 1473, 1474). It seems, where three executors join in an action to recover a debt due to the deceased, and the deft. pleads that one of the plt. never was executor, for that he had never taken upon himself the administration of the estate, and that he had renounced his executorship, and never revoked his renunciation, the plea is not sufficiently pleaded as a renunciation by deed, disqualifying the renouncing executor from joining in the action (Creswick v. Woodhead, 6 Jur. 973). Where A. and B. are sued as executors, A. cannot plead that B. never was executor, &c., this being a personal discharge, of which B. only could avail himself (Atkins v. Humphrey, 2 C. B. 654).

An administrator cannot distrain before he obtains letters of administration for rent due to the intestate, nor justify the detention of goods distrained by the intestate for rent, and remaining under distress at the time of his death (Dejoncourt v. Rogers, 8 Ir. Law R. 450).

Statute of Limitations.] If an action be brought on a debt contracted by the testator or intestate more than six years before the commencement of the suit, and the plt. means to rely upon a promise by the executor, &c., to take the case out of the Statute of Limitations, the declaration should contain a count or counts upon promises by the executor or administrator as such (see Brown v. Paris, 5 M. & W. 120, per Parke, B.). The mere existence of a debt owing by the testator or intestate is not evidence of a promise to pay by the executor or administrator as executor or administrator (Atkins v. Tredgold, 2 B. & C. 28, per Abbott, C. J.). Hence, as against an executor or administrator an acknowledgment by him merely of the debt's existence, is not sufficient to take the case out of the statute; there must be an express promise (Tullock v. Dunn, Ry. & M. 417; Scholey v. Walton, 12 M. & W. 510). That was an action against several executors who pleaded the general issue

and the Statute of Limitations: held, that neither an acknowledgment of the debt by all the executors, nor an express promise by one of them, took the case out of the statute, there ought to have been an express promise by all, and now by 9 Geo. IV. c. 14, s. 1; reciting 21 Jac. 1, c. 16, and the Irish Act, 10 Car. 1, it is enacted, "in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby

to take any case out of the operation of the said *enactments, [*1153] or either of them, or to deprive any party of the benefit there-

of, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby, and that when there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect, or by reason only of any written acknowledgment, or promise made and signed by any other, or others of them, provided that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever;" provided "that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial, or otherwise, that the plt., though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, or executors, or administrators, shall be entitled to recover against any other of the debts. by virtue of a new acknowledgment or promise, or otherwise, judgment may be given, and costs allowed for the plt., as to such debt, or debts, against whom he shall recover, and for the other debt, or debts, against the plt." The debt. pleaded the Statute of Limitations to an action by an administrator, and it appeared that the cause of action arose more than six years before, but that within six years the plt. and debt. went over the items of the account, and struck a balance, which the debt. promised verbally to pay; it was objected, that this was not within the 9 Geo. IV. c. 14. But Vaughan, B., said, "I think the plt. has shown a good cause of action upon the count, on an account stated, she does not go upon the original debt at all. I take the statute to apply to cases where you go for the original debt, and then give some evidence of an acknowledgment to rebut the presumption raised by the Statute of Limitations that the debt has been satisfied (*Smith v. Forty*, 4 C. & P. 126; but see *Jones v. Ryder*, 4 M. & W. 32; and *Hopkins v. Logan*, 5 M. & W. 248, per Parke, B.). As to admissions by an executor, see *Fox v. Waters*, 12 Ad. & E. 43. The payment of interest by one of the makers of a joint and several promissory note takes the case out of the statute in the same manner as before the statute 9 Geo. IV.; *Chippendale v. Thurston*, Moo. & M. 411; *Wyatt v. Hodson*, 8 Bing. 309; see *Pearse v. Hirst*, 10 B. & C. 122; *Burleigh v. Scott*, 8 B. & C. 36). In *Channell v. Dinchburn*, 5 M. & W. 494, it was held that payment of interest by one of the makers of a joint and several promissory note, though made more than six years after it became due, is sufficient to take the case out of the Statute of Limitations as against the other maker. But if the action be brought against the executor of the deceased contractor, a payment by a surviving joint contractor made *after the death* of the testator, will not take the case out of the statute (*Atkins v. Tredgold*, 2 B. & C. 23). And where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representative of the deceased to take the case out of the statute as against the survivor; therefore, after the death of one maker of a joint and several promissory note, signed by two, a payment upon it by the executor of the

deceased party will not take the debt out of the Statute of Limitations as against the survivor (*Slater v. Lawson*, 1 B. & Ad. 398). In *Douglas v. Forest*, 4 Bing. 686, an action was brought against an executor on a Scotch judgment recovered against his testator, the deft. pleaded the Statute of Limitations, and the plt. replied that the deceased at the time the action accrued was beyond seas, and remained there until he died, and that the plt. sued out his writ against the deft. within six years *after he first [*1154] took upon himself the burden and execution of the will: held, that the replication was a good answer to the plea; for, although the injury of which the plt. complained had existed more than six years, yet he had no cause of action until there was some person within the realm against whom the action could be brought. It is no answer to a plea of the Statute of Limitations that after the cause of action accrued, and after the statute had begun to run, the debtor within the six years died, and that (by reason of litigation) as to the right to probate, an executor of his will was not appointed until after the expiration of six years, and that the plt. sued such executor within a reasonable time after probate granted. For as soon as there is a cause of action, a plt. that can sue, and a deft. that can be sued in England, from that time the date of six years begins to run, and when the statute begins to run it must continue to run (*Rhodes v. Smithurst*, 4 M. & W. 42; 6 M. & W. 351; *Freaker v. Cranefeldt*, 3 Myl. & Cr. 499). An acknowledgment made to an executor or administrator will not support a count laying the promise to the testator or intestate (*Ward v. Hunter*, 6 Taunt. 310; *Sarell v. Wine*, 3 East, 409; 2 Saund. 63, g. n.).

By the 3 & 4 Will. IV. c. 42, s. 2, actions of trespass or case may be maintained by executors, &c., of any person deceased for any injury to the real estate of such person committed in his lifetime, if such injury shall have been committed within six calendar months before the death of such person, and if such action be brought within one year after the death; and the like actions may be maintained against executors or administrators for any wrong committed by the deceased in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executor, &c., shall have taken upon himself the administration of the estate, &c.

In trover against an executor it appeared that the watch, which was the subject-matter of the action, had been given by the testatrix to one S., in September, 1837, who re-delivered it in March, 1838; that on its being demanded by the plt. in December, 1838, the testatrix said she would consult her solicitor. The testatrix died in March, 1839; held, on a plea under the above statute, that this was sufficient evidence to warrant the jury in finding a conversion within six months before the death (*Richmond v. Nicholson*, 8 B. & C. 134). The administrator is liable for the price of coal tortiously raised and sold by the intestate from the plt.'s land (*Powell v. Rees*, 7 Ad. & E. 426); and when part has been sold more than six months before the intestate's death, and part within, trespass will lie under the above statute for so much as was raised within six months, and money had and received for so much as was raised before (*Id.*).

If the executor or administrator have not assets to satisfy the debt, upon which the action is brought, he must plead *plene administravit* or *plene administravit prater*, &c. For a judgment against an executor or administrator, either by default, or on demurrer, or upon verdict upon any plea except *plene administravit*, or admitting assets to such a sum, and *riens ultra* is conclusive upon him that he has assets to satisfy such judgment (*Rock v. Leighton*, 1 Salk. 310; *Erving v. Peters*, 3 T. R. 686; *Leonard v. Simpson*,

2 Bing. N. C. 176; 2 Sco. 335; Ramsden v. Jackson, 1 Atk. 292; 1 Saund. 219 b). But if the executor plead either a general or special *plene administravit*, it is now held, that he is only liable to the amount of assets proved to be in his hands, so that now a judgment against an executor *on a [*1155] verdict upon *plene administravit*, is only an admission of assets to the extent of assets proved to be in his hands (1 Saund. 219 b, n.; Cousins v. Paddon, 2 C. M. & R. 558, per Parke, B.; Yardley v. Arnold, 1 C. & M. 434): and if several executors join in the plea of *plene administravit*, each will only be liable to pay the assets found by the jury to be in his own hands, though it is more usual for each executor to plead separately (1 Saund. 336, n. 10). The plea of *plene administravit* must aver that "the said deft. has no goods which were of the said A. B. (the testator), at the time of his death, in the hands of the said deft., as executor, to be administered *or had at the time of the commencement of the suit, or ever since*, and the omission of any one of these will be fatal on demurrer, as well in a general as a special *plene administravit*. Thus, in *assumpsit*, the deft. pleaded several outstanding bonds of the testator, "and that he had fully administered all the goods of the testator at the time of his death, or ever since, except goods and chattels to the value of 10*l.*, which are not sufficient to satisfy the debts due on the said bonds, and which are charged therewith:" held bad, for not averring "that he has not any goods or chattels of the testator, or had on the day of suing out of the writ, or ever since." For the *plene administravit*, as there pleaded, refers to the time of the plea pleaded, and the deft. may have paid debts on contract without suit after the writ was purchased, and before the plea, which he may give in evidence on the trial if issue were joined on this plea, and therefore he must demur (Hewlet v. Framlingham, 3 Lev. 28); and the omission of the words "or ever since," is fatal (2 Saund. 216, n. 1); and the defect is not aided unless it be found by the verdict that he had no assets on the day of the plea pleaded, for that aids the fault in the bar, and makes it not material; but it is not so upon demurrer (Greven v. Role, Cro. Jac. 132); and the words "on the day of exhibiting the bill," instead of "on the day of suing out the said writ," when the action was in the Common Pleas or in the King's Bench by original, were held to be a fatal defect (Covel v. Deval, 2 Lutw. 1637; 2 Saund. 216, n. 1; and see, since the Uniformity of Process Act, 2 Will. IV. c. 39, Rees v. Morgan, 5 B. & Ad. 1034). The usual allegation, that the deft. "has fully administered all the goods and chattels, &c., which were of the deceased at the time of his death, and which have ever come to the hands of the deceased, as executor, &c., would seem to be superfluous, and that the more formal and correct way of pleading is to omit them, and state merely that that the deft. has no goods or chattels (2 Saund. 220; see Reeves v. Ward, 2 Bing. N. C. 235; 2 Wms. Exors. 1534). But, where the action is against the executor of an executor, he must plead either that the first executor fully administered, or that he, the said deft., has no assets of the first executor out of which he can satisfy any *devastavit* committed by the first executor (Wells v. Fydell, 10 East, 315). To *indebitatus assumpsit* against an administratrix, containing counts for use and occupation, and the money counts, the deft. pleaded to the whole declaration that before she had any notice of the said demands, and before she had any notice of the making of the said promises, she had fully administered: held bad, as tendering an immaterial issue: held, also, that surplusage, tending to embarrass the pleading, is ground of special demurrer. *Quære*, would such a plea to the count for use and occupation be a good plea? (Commissioners of Education v. Loughman, 9 Ir. Law R. 167).

This plea may be pleaded to a judgment debt, without alleging that the judgment was not docketed (see *Hall v. Tapper*, 3 B. & Ad. 665; **Grant v. Taylor*, 3 M. & G. 886; see also 2 & 3 Vict. c. 11). [*1156] Where the administrator is under terms to plead issuably, the first pleads, *plene anministravit*, and then his own bankruptcy, the plt. may sign judgment as for want of a plea (*Serle v. Bradshaw*, 2 C. & M. 148; 2 Dowl. 289). The plea of *plene administravit* need not be signed by counsel (*Reed v. Spurr*, 2 M. & W. 76), except it seems in Common Pleas (*Tidd*, Pr. 9th ed. 672).

Plene administravit præter. [The executor must also plead a debt of a higher nature, of which he has notice, in bar of an action against him for a debt of an inferior nature, and *reins ultra* if he have not assets for both, otherwise it will be an admission of assets to satisfy both debts (*Rock v. Leighton*, 1 Salk. 310; *Earle v. Hinton*, 2 Stra. 732; *Britton v. Bathurst*, 3 Lev. 114; *Leman v. Tooke*, ib. 57). The plea ought to state some certain sum, or say, to "the value of the goods aforesaid;" for a plea stating generally "except goods and chattels, which do not amount to, or were not sufficient to satisfy the debts aforesaid, or not *ultra* what will satisfy," or to the same effect would be uncertain (*Tresham's case*, 9 Co. 109; *Edgecombe v. Dee*, Vaugh. 104; *Davage v. Davage*, 1 Sid. 210; 1 Saund. 333, n. 7); but the omission to state a certain sum is neither material nor traversable (*Parker v. Atfield*, 1 Salk. 312; *Moon v. Andrews*, Hob. 133; 1 Saund. 333 a, n. 7). An administrator, after obtaining time to plead on the usual terms, pleaded a judgment recovered since the commencement of the action, but did not aver that there were no assets *ultra*, the court gave leave to sign judgment as for want of a plea, the deft. having since the commencement of the action admitted by letter the possession of assets sufficient to cover the judgment, and also the plt.'s demand (*Roberts v. Wood*, 3 Dowl. 797). Where an unsatisfied judgment against the testator is pleaded, the deft. must show on what day, in what year and court, the judgment was recovered (*Jordon v. Fawcett*, 1 Mod. 50; 1 Saund. 328 a, n. 1). Where an executor pleads a judgment, not merely erroneous but void as a recovery in an impossible term, the plea is bad (*Drake v. Randall*, 1 Freem. 255); but a judgment merely erroneous, if not fraudulent, is, it should seem, pleadable by an executor (*Williams v. Fowler*, 1 Stra. 407, 410). And, where the judgment was recovered against the testator and another, the plea must aver the survivorship of the testator (*Trethaway v. Acland*, 2 Saund. 50). In pleading a judgment against the executor himself, it is not necessary to set out the debt which is the consideration of the judgment (1 Saund. 329, n. 3); nor is it necessary to state that the debt for which the judgment was obtained was a true and just debt, for if not it would be the subject of a replication (1 Saund. 329, n. 4; 2 Saund. 50, n. 3). The form of pleading a judgment obtained against an executor, is to allege that A. B., on such a day and year of the reign, in the court, &c., impleaded the deft. as executor in a certain plea, &c., setting out the whole declaration) and such proceedings were thereupon had in the said court, that the said A. B. recovered judgment, &c. (1 Saund. 313 a, n. 5); and there need be no statement of the number of the roll in the margin. The rule of H. T. does not apply to a plea by an executor of judgment recovered against the estate (*Power v. Ivey*, 3 Dowl. 140; *Power v. Izod*, 1 Bing. N. C. 304; 5 M. & S. 119; 3 Dowl. 140); and it seems unnecessary to aver that the judgment remains in force, for if not, it would be a subject of replication (1 Saund. 329, n. 4); nor is it necessary to aver the identity of the deft. with the person [*1157] named on the record *(1 Saund. 333 a, n. 8). But where the

action is on a specialty, it must be shown either that the judgment pleaded was recovered against the executor on a specialty, or that it was obtained before the executor had notice of the specialty debt on which the action was brought (1 Wms. Exors. 826; 2 Wms. Exors. 1537). A recovery by one of several executors or administrators, and no assets *ultra*, may be pleaded in an action against all the executors or administrators for another debt of the testator or intestate (Further v. Further, Cro. El. 471).

A plea of judgment recovered against the executor himself, and no assets *ultra*, is a plea in bar of the action generally, and not with an *ulterius manutenere non debet*, even where the judgment has been confessed after action brought (1 Wms. Exors. 830; 2 Wms. Exors. 1537), and pleaded *puis darrein continuance*, contrary to the general rule that a matter of defence, arising after action brought, cannot properly be pleaded in bar of the action generally, but must be pleaded in bar of the further maintenance of the suit (Le But v. Papillon, 4 East, 502). In consequence of the peculiar nature of the action which is brought against the executor, not only on the foundation of a debt due from the testator to the plt., but in respect also of assets supposed to be in the executor's hands, liable to its satisfaction, the executor has by law a power of confessing a judgment to another creditor in preference to the plt., in the suit first brought (Cases collected, 2 Wms. Exors. 830); to the extent of the assets then in hand, to create a perpetual bar to the plt.'s suit, the same being pleaded in the usual way, *viz.*, that he has not assets, except so much, which are not sufficient to satisfy that judgment. But the plt. may, and constantly does, avoid the effect of the plea as an absolute bar, and protect himself from costs at the same time, on the ground of his original right of suit, by praying judgment of such assets as should come to the executor's hands after satisfying the judgment so confessed: so that the plea of judgment recovered against the deft. as executor, pending the suit, enures in point of effect, if the judgment itself be not questioned by the replication, as only a plea in bar of the further maintenance of the suit against the executor in respect of his present assets (Le But v. Papillon, 4 East, 508).

With respect to pleading bonds due from the testator, the executor may either plead the penalty as the debt or the sum really due (England (Bank of) v. Morrice, 2 Stra. 1028; Cox v. Joseph, 5 T. R. 307). But if the days of payment had not yet come, the sums in the *conditions* are the debts, and the assets can only be recovered for them (*Ib.*), for the executor may save the penalty by payment of the less sums at the time specified in the conditions, and if he do not it will be a *devastavit* in him if he have assets (1 Saund. 333 a, n. 7).

An action against executors who pleaded *plene administravit* was referred; pending the reference a judgment was recovered by a third party in another action against them, which judgment the court allowed to be pleaded *puis darrein continuance*, and before the arbitrator (Alder v. Peake, 2 H. & W. 78).

It would seem to be optional in the executor to plead a retainer of a debt due to himself from the deceased, or to give it in evidence under a plea of *plene administravit* (1 Saund. 333, n. 6). In Jones v. Harry, the retainer of a specialty debt was pleaded (4 Price, 89). The retainer for unsatisfied debts of the testator or intestate of a higher degree than that on which the action is brought must be pleaded (B. N. P. 141; 2 Wms. Exors. [*1158] 825, 1539). It is also optional *with the executor to plead that he retains assets to a certain amount for funeral expenses, or to give it in evidence under the plea of *plene administravit* (R. v. Wade, 5 Price, 621). So, for the expenses of administration (Gillies v. Smithier, 2 Stark. 528). So to reimburse himself for payments, made out of his own

pocket, in discharge of debts not inferior in their kind to the debt of the plt. before the commencement of the suit (Co. Lit. 283 *a*; B. N. P. 141; 2 Wms. Exors. 1539). Where, however, the administrator pleads a retainer, the letters of administration need not be set out, for the declaration admits him to be lawful administrator (Picard v. Brown, 6 T. R. 550). But if the action be brought against an executor, whether he be a rightful executor or one *de son tort* who has no right to retain, he ought to entitle himself executor in his plea, by stating the making of the will and his appointment as executor, in order to show that he is such a person as may retain (1 Wms. Exors. 193, 195; Prince v. Rowson, 1 Mod. 208; 2 Mod. 51). But where the action was brought against the deft. as executor, and he claimed to retain as administrator, it was held that it was necessary for him to show the letters of administration in his plea (Caverly v. Ellison, Jon. (T.) 23).

Where the executor of a lessee, having entered upon the demised premises, is sued in the *debet* and *detinet* as assignee, for rent incurred after his entry, he cannot plead *plene administravit* (Caly v. Joslyn, Al. 34; Helier v. Casebert, 1 Lev. 127; Sackvill v. Evans, Freem. 171; Buckley v. Pirk, 1 Salk. 317), even though he be styled executor in the declaration (2 Wms. Exors. 1377); for if the rent be of less value than the land, as the law *prima facie* supposes, so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to anything else, and therefore the plea of *plene administravit* confesses a misapplication, since no other payment out of the profits can be justified until the rent be satisfied (Buckley v. Pirk, 1 Salk. 317), and the judgment against the executor must be *de bonis propriis* (1 Saund. 1, n. 1), as it would in an action for use and occupation in his own time, though it be laid that he occupied as executor (Wigly v. Ashton, 3 B. & A. 101). If the land be of less value than the rent, the deft. may plead the special matter, viz., that he has no assets, and that the land is of less value than the rent, and pray judgment whether he shall be charged otherwise than in the *detinet* only (Billingham v. Spearman, 1 Salk. 297; Buckley v. Pirk, *supra*; 1 Saund. 1, n. 1); Went. Off. Exors. 289; Toller, 280; Wms. Exors. 1377, n. (z)).

If the plea be pleaded to the whole declaration it will not be a good plea in bar, unless it shows that there were no profits at all; for the executor is chargeable personally for so much as the premises are worth. If, therefore, the profits have been less than the rent, and therefore cover a part only, that part should be confessed, and the plea pleaded to the remainder (Ruberg v. Stevens, 4 B. & Ad. 241). That was an action of covenant for rent at 26*l.* a year; plea that the defts. were only chargeable as executors, and that the term came to them as such, that the premises were of less yearly value than 26*l.*, viz., of no value, and that they had fully administered; replication, that the premises were of the yearly value of 26*l.*; issue thereon, the jury found the value to be 20*l.*: held, that the replication was in substance that the premises were of some value, and that the issue was merely informal, and cured by verdict, and that the plt. might recover at the rate fixed by the jury. In action for use and occupation, it appeared that the deft. was administrator of the original tenant, under an agreement for a lease, had taken possession *after the intestate's death, yet it having [*1159] been proved by the deft. under the general issue that the premises had been productive of no profit to him, and that eight months after the death of the intestate he had offered to surrender them to the plt.: held, a good defence to the action (Remnant v. Bremridge, 8 Taunt. 191). On the same principle, though he cannot waive the term, yet if the value of the lands be less than the rent and there is a deficiency of assets, he may waive such a lease (Went. Off. Exors. c. xi. 244, c. xii. 290; Wilkinson v. Cawood, 3

Anst. 909). He must promptly offer to surrender the lease, which will help him as to subsequent breaches of covenant (see *Reid v. Tenterden* (Lord), 4 Tyrw. 118, 120).

But if the executor be sued as executor in debt in the *detinet* for rent incurred after the death of the testator, he may plead *plene administravit*, for that is a good plea whenever no other judgment can be given, but only against the deft. as executor (*Lyddall v. Dunlapp*, 1 Wils. 5). So, where he is charged as executor in an action of covenant for non-payment of rent incurred in the deft.'s own time, although he might have been charged as the assignee of the term (*Ib.*; *Wilson v. Wigg*, 10 East, 315). But if the deft. had received any profit from the land there would it should seem be a verdict against him, for he could not legally apply the profits to any other purpose than the payment of the rent; therefore if the land yield some profit, but less than the rent, the executors ought to plead *plene administravit præter the profit* (2 Wms. Exors. 1379, n. (g)).

Where an administrator has occupied premises demised to the intestate, it is no plea to an action of covenant to pay rent and taxes, and for non-repair to say that the premises yield no rent (*Tremeere v. Morrison*, 1 Bing. N. C. 89).

Where the payee of a promissory note made the maker his executor, it was held that the deft. was discharged, and that no action could be maintained upon the note, even by the person to whom the executor had indorsed it (*Freakley v. Fox*, 9 B. & C. 130).

Where a deft. executor applies for an order for time to plead, the plt.'s attorney requires the deft. to be placed under terms not to confess and plead a judgment to another creditor of equal degree (*Anon.* 8 Mod. 308).

The executor of the obligee of a common money bond sued in debt the executor of the obligor, who pleaded that the money mentioned in the condition was part of the personal estate of C. T., deceased, by whom it has been bequeathed to the testator of the plt., and the testator of the deft. and the survivors of them, and the executors, &c., upon trust to place and put the same out at interest, upon such real or other security as they might approve of, and to pay the interest, &c.; that the testator of the plt. died, leaving the testator of the deft. surviving, whereupon the personal estate of C. T. vested in the deft.'s testator, to be by him and his executors, &c., applied according to the trust of the will of C. T. Held bad, on general demurrer; for the loan by one executor to the other was a misapplication of the fund, for which the executor of the obligee was liable, until the money was laid out on real or sufficient security, and consequently that he had a right to sue on the bond to protect himself (*Gleadow v. Atkin*, 2 Cr. & J. 548).

Where the executor or administrator has no ground on which to dispute the plt.'s debt, it is, in general, advisable not to deny it (*Dearne v. Grimp*, 2 Bl. R. 1275); or, if he cannot dispute his being executor, he should not plead *ne unques executor*; for if he do, *and the plt. on the plea [*1160] of *plene administravit*, take judgment of assets *quando*, and proceed to trial on the other issues; and they are found for the plt., and no issue, which goes to the whole cause of action, is found for the deft., the deft. will be liable for costs (*Hindsley v. Russel*, 12 East; 232); but, not so, if the plt. do not take judgment of assets *quando*, and, on the trial, the plea of *plene administravit* is found for the deft. (*Hogg v. Graham*, 4 Taunt. 135; *Edwards v. Bethel*, 1 B. & A. 254); otherwise, the plt. should move to withdraw the pleas of the general issue and *ne unques executor* (1 Ch. Pl.).

Replication. To the plea of *ne unques executor* or *administrator*, the plt. may assert the fact of deft.'s being executor or administrator (Keble v. Keble, Hob. 49; Com. Dig. Pleader, 2 D, 7), or that goods of the testator to a certain value came to the deft.'s hands before administration granted (Kellow v. Westcombe, Freem. 122; 3 Rob. 202). To the plea of *plene administravit*, if untrue, the plt. should reply, that at the time of exhibiting the bill, or the commencement of the suit, the deft. had assets; or, if assets have come to his hands since the commencement of the suit, and before the plea; or if, at the time the deft. first had notice of the action, he had assets, but unduly administered them afterwards, the facts may be replied specially (Mara v. Quin, 1 T. R. 10; 1 Ch. Pl. 615). In debt on a bond against the executors of an executrix, the deft. pleaded *plene administravit*, except goods to the value of 10*l.* The plt. replied, and prayed judgment as to the 10*l.*, and further said, that on the day of suing forth the original writ, the deft. had goods of the testator to the value of the residue of the debt over and above the said 10*l.*, and concluded with an averment. Held, a good replication, although objected that the plt. ought to have accepted of the 10*l.*, and prayed judgment for the same, and of assets *in futuro*, &c., or ought to have replied singly that the defts. had assets in their hands *ultra* the 10*l.*, and to have gone to issue thereupon (Lockyer v. Coward, 3 Wils. 52).

If the plea be *plene administravit*, except a sum not sufficient to satisfy bonds or judgments outstanding, the plt. may reply that the deft. has assets *ultra*, or that the judgment mentioned in the plea was obtained or kept on foot by fraud (1 Saund. 334, n. 9; 2 Wms. Exors. 1446, 1540), which the deft. is bound to traverse in his rejoinder (Veale v. Gatesdon, Jon. (W.) 92; Parker v. Atfield, 1 Ld. Raym. 678; 1 Saund. 324, n. 9; 2 Saund. 50, n. 3); and, on this issue, the plt. may either give in evidence that the debt was not a just one, or that less is due than the sum for which judgment is given (Williams v. Fowler, 1 Stra. 410; 2 Saund. 50, n. 3). And, in answer to the latter evidence, which is *prima facie* proof of fraud, the deft. may show that the judgment was entered for more than was due by mistake (Pease v. Naylor, 5 T. R. 80). But he cannot traverse this averment (Robinson v. Corlett, 1 Lut. 662; 2 Saund. 50, n. 2). But it is not necessary to make it (but see Green v. Wilcock, Cro. Eliz. 462; Trethaway v. Acland, 2 Saund. 48 a; Com. Dig. Pleader, 2 D, 9). The executor may, when he pleads several judgments, either traverse that each particular judgment was kept up by fraud, or include all the judgments pleaded in one general traverse (1 Saund. 334, n. 9). The other averments, such as the allegation of the payment of the money in satisfaction of the judgment, are not traversable (Veale v. Gatesdon, *supra*; Beaumont's case, Lat. 111; 1 Saund. 334, n. 9; Jones v. Roberts, 2 C. & M. 219). If a judgment is pleaded, and *per fraudem* replied, upon which issue was *taken, and it appears in evidence that the creditor was willing to take less than is [*1161] recovered, it is proof of fraud; but, if it be shown that the administrator had not assets to pay that sum, it is no fraud (per cur. Parker v. Atfield, 1 Salk. 312). Where a judgment is obtained against an executor by covin, but for a just debt, the creditor cannot avoid the judgment by alleging that it was obtained by covin to defraud him (Veale v. Gatesdon, *supra*, 3rd Resolution; Williams v. Fowler, 1 Stra. 410; 1 Saund. 334, n. 9; Wms. Exors. 830).

If the deft. plead several outstanding debts, or judgments and bonds, and that he has no assets beyond what will satisfy these debts the plt. may reply to any judgment, or other debt or judgment pleaded, or some or one of them, omitting the rest, without being guilty of duplicity in his plea (Turner's case, Rep. 132; Trethaway v. Ackland, *supra*; 2 Saund. 49, 50; Jefferies v.

Doe, 1 Lev. 281 ; Ashton v. Sherman, 1 Ld. Raym. 262 ; 1 Saund. 337 n. 2). But the better way is to answer only such judgment as the plt. knows to have been obtained by fraud (Ib.) ; and the replication may either conclude with one averment to the whole, or conclude the answer to each separate judgment, &c., with one (Ashton v. Sherman, 1 Salk. 298 ; Carth. 431) ; but the former seems the better mode (1 Saund. 337 n. 5) ; and if the plt. after replying to the judgments, allege that the deft. has assets *ultra*, the replication ought to conclude with an averment, and not to the country (2 Wms. Exors. 1542, citing Ashton v. Sherman, *supra* ; see Ward v. Ward, Cunn. 74). If, in an action against a person as executor, he plead a retainer for a debt due to himself, and the plt. reply that he was only executor *de son tort*, the deft. may by way of plea *puis darrien continuance* rejoin that he has since obtained letters of administration (Vaughan v. Brown, 2 Stra. 1106).

But this reason does not apply when the judgments pleaded were obtained against the testator, for a judgment against him is no admission of assets against the executor. Where the executor, after pleading several judgments, avers that he has *assets only sufficient to satisfy them*, if the plt. can falsify any one of them, as by showing it satisfied or the like, he will be entitled to judgment ; for the plea was false, and the falsehood detrimental to the plt. and beneficial to the deft. (1 Saund. 337 n. 1). Where an administrator pleaded a retainer for a debt due to himself, and a judgment obtained by another creditor, and no assets *ultra* ; the replication denied that the sum sought to be retained was justly due, and as to the judgment alleged that it was obtained and kept on foot by fraud. Eyre, C. J., told the jury that they were to inquire whether the deft. had pleaded a false plea or not ; if they believed either of the demands set up against the intestate's estate to be unfounded they ought to find a verdict for the plt. (Campion v. Bently, 1 Esp. 344). But if the executor plead several judgments recovered against the testator, and *avers that he has assets to a small amount named in the plea*, and the plea be false or bad in part, it shall be wholly set aside (Trethaway v. Acland, 2 Saund. 48) ; and where the deft. pleaded amongst others a judgment against his testator and A. B., but did not aver that A. B. died before the testator, so that it did not appear that the deft. was liable to that judgment, *although he averred that he had assets to a small amount*, yet the plea was held insufficient and bad in the whole, and judgment given against the deft. *de bonis testatoris* generally, and all the judgments which were well pleaded set aside (Norton v. Harvey, cited 2 Saund. 50 ; Parker v. Atfield, *supra* ; R. v. Dickinson, Park. 263 ; 1 Saund. 337 n. 1). But the sound-

ness of these decisions has been questioned (1 Saund. 337 n. 1 ; [*1162] *Wms. Exors. 1544) ; and, in Edgecomb v. Dee, Lord Vaughan says, the entirety of the plea, which is the only foundation for the decisions, is a spongy reason and not sense, for if the falseness or badness of the plea be neither hurtful to the plt. nor beneficial to the deft. why should the plt. have what he ought not, or the deft. pay what he ought not (Vaug. 104 ; 1 Saund. 337 n. 1). Besides, the usual pleading is, that the plt. must avoid all payments pleaded in bar until some assets appear remaining in the executor's hands, and then the plt. is to have judgment (Vaug. 105 ; 1 Saund. 337 n. 1). Mr. Williams, in his work on executors, p. 1544, says, " Perhaps the rule may be understood thus ; that if the executor plead judgments obtained against *his testator*, and that he has not sufficient to satisfy them, or any of them, if any one or more of the judgments be avoided, still there ought not to be a general judgment against the executor, or at least not until so many are avoided as to leave assets in the executor's hands. But if he plead judgments obtained against *himself*, and any

more of them be avoided, in that case there ought to be a general judgment for the plt." (1 Saund. 337, a, n. 1; see *Cousins v. Padden*, 2 C. M. & R. 558). Where the deft. pleaded to an action for work and labour, that judgment had been obtained against the testator in his lifetime, and that the defts. had fully administered, &c., except as to chattels of small value, not sufficient to satisfy the judgment; replication, that the plt. paid a large sum, to wit, 200*l.*, in full satisfaction and discharge of the debt recovered, and of the judgment, and that debts deceitfully and with intention to defraud the plt. of his damages have deferred and still do defer procuring acknowledgment or satisfaction to be entered up of the said debt or to be released therefrom, and still permit the said judgment thereon to remain in full force: rejoinder traversing the payment of the said sum in full satisfaction and discharge of the debt recovered, and of the judgment, was held bad on demurrer; for the material fact to be traversed was the keeping on foot the judgment by fraud, whereas the payment in satisfaction was immaterial, and not traversable (*Jones v. Roberts*, 4 Tyrw. 48).

If the deft. have pleaded the general issue, or any other plea, denying the debt or cause of action with the plea of *plene administravit*, the plt. must proceed to trial to establish his debt, and on the prayer of judgment of assets, *quando*, &c., upon the plea of *plene administravit*, there is a stay of judgment until the determination of the issue (1 Ch. Pl. 615). But where the debt has not been denied, and the deft. has merely pleaded *plene administravit* generally or specially, and the plt. prays judgment of assets, *quando*, &c., thereon, there should be an entry of that judgment immediately, and an award of an inquiry to ascertain the amount of the plt.'s demand, unless the deft. has by cognovit confessed the same in order to save the expense of the inquiry (1 Ch. Pl. 615); or, unless in reference to the form of action, the judgment is final in the first instance as in debt (Ib.). On a plea of *plene administravit præter*, the plt. is entitled to judgment of assets in *futuro quando*, for costs as well as for the debt (*Cox v. Peacock*, 2 Sco. 125), and the plt. should not take issue on the plea; for, if he do, and the plea be found for the deft., the latter will be entitled to all the costs (*Iggulden v. Terron*, 2 Dowl. 277).

If the deft. plead several judgments recovered against himself, and one is ill pleaded, or upon issue joined is found against him, it will entitle the plt. to a general judgment; for, a judgment recovered against an executor being an admission of assets, if any one of the judgments be falsified, the deft. admits by his plea that he has *more assets than will satisfy the other judgments, by as much as the judgment so falsified amounts [*1163] to (*Rock v. Leighton*, 1 Salk. 314; *Parker v. Atfield*, 1 Saund. 337 a, n. 1). When the judgments or debts pleaded are upon penalties, it seems the right way of replying is to say that the creditor would have accepted the less sum, but the deft. either would not pay, or had paid them, but kept the judgments or bonds on foot by fraud and covin; and the plt., on issue joined thereon, may give in evidence such matter as will serve to avoid the penalties (1 Saund. 334, n. 9, citing *Thompson v. Hunt*, 3 Lev. 368; *Bell v. Bolton*, 1 Lut. 450). The replication should conclude with a verification (1 Saund. 334, n. 9). If the plt. cannot deny the plea of *plene administravit*, he should pray judgment of assets, *quando acciderint*, either generally or specially; as, "which, after satisfying the moneys due on the outstanding judgments, bonds, &c., mentioned in the deft.'s plea, shall come to the deft.'s hands as executor, &c., to be administered" (Com. Dig. Pleader, 2 D. 9). Or, if *plene administravit præter* a sum acknowledged to be in hand has been pleaded, the plt. should pray and take judgment *pro tanto*, and of asset *quando acciderint*, as to the residue, in case the plea be true.

Where the plea averred that the debt set off was equal in amount to the damages sustained by the breach of the promises, the plt. replied, as to 1493*l.* parcel of the set-off, the Statute of Limitations, and further replied that the plt. was not indebted to testator or deft. as executor, beyond the 1493*l. modo et formâ*, with a single conclusion to the court as to the whole replication: held, on special demurrer, a bad conclusion. *Quere*, whether the replication was bad for duplicity (*Blakesley v. Smallwood*, 8 Q. B. 538).

Precedents.

Commencement of declarations.

The mode of framing the commencement of declarations against executors and administrators may be collected from the precedents at the suit of them (*ante*, p. 1123), *mutatis mutandis*. Omit the words "owes to" in a declaration of debt.

Declaration against an executor, for work, &c., for testator, on promises by him.

In the Q. B. (C. P., or Ex. of P.). On the day of A. D. 1850. to wit. A. B. by E. F. his attorney (or in his own proper person) complains of C. D. executor of the last will and testament of G. H. deceased who has been summoned to answer the said A. B. for that whereas the said G. H. in his lifetime to wit on &c. was indebted to the plt. in £ for the price and value of work then done by the plt. for the said G. H. and at his request (*state any other cause of action*) and thereupon the said G. H. in consideration thereof then promised the plt. to pay him the said moneys on request. Yet the said G. H. in his lifetime and the said deft. as executor as aforesaid since the death of the said G. H. respectively hath disregarded the said promise of the said G. H. and have not nor have either of them paid the several sums of money respectively or any or either of them or any part thereof to the damage of the plt. of £ and thereupon he brings his suit &c.

For other forms of declarations, see Ch. jun., by Pearson, 115, and 2 Ch. Pl. 76, 77,

Replication that deft. is executor.

In the Q. B. (C. P. or Ex. of P.). The day of A. D. (day of delivery) 1850.

And the plt. as to the plea of the deft. by him firstly above pleaded saith that the deft. at the time of the commencement of this suit was and from *thence hitherto [*1164] hath been and still is executor of the last will and testament of the said G. H. deceased and hath administered divers goods and chattels which were of the said G. H. deceased at the time of his death as executor of the last will and testament of the said G. H. and this the plt. prays may be inquired of by the country &c.

Replication to *plene administravit*, that deft. had assets.

[Commence as above.] Saith that the deft. at the time of the commencement of this suit in this behalf had divers goods and chattels which were of the said G. H. deceased at the time of his death in the hands of the deft. as executor (or administrator) as aforesaid to be administered of great value to wit of the value of the damages sustained by him the plt. by reason of the premises in the said declaration mentioned and wherewith the deft. as executor (or administrator) as aforesaid could and might and ought to have satisfied those damages and this the plt. prays may be inquired of by the country &c.

See other forms of declaration against a surviving executor, 2 Ch. Pl. 76; against a surviving administrator, ib. 79; against husband and wife executrix before marriage, ib. 76; against husband and wife executrix after marriage, ib.; against husband and wife administratrix before marriage, ib.; against husband and wife administratrix after marriage, ib. 80; against executor on promise to pay legacy in consideration of forbearance, ib. 179; against executor or administrator of maker of note, ib. 142; against executor or administrator of acceptor, ib. 167; against executor of obligor of bond, ib. 332; against administrator of obligor, ib.

Plea of deft. *ne unques executor*.

In the Q. B. (C. P. or Ex. of P.). On the day of A. D. 1850. C. D. } The deft. by his attorney says that he never was executor of the last will and testament of the said G. H. deceased nor ever administered any of the goods and chattels which were of the said G. H. deceased at the time of his death as executor of the last will and testament of the said G. H. deceased in manner and form as the plt. hath above in his said declaration in that behalf alleged. And this &c. (Conclude with a verification, as post, "Plea.") (Signature).

Deft. ne unques administrator.

[Same as above] says that he is not nor ever hath been administrator of the goods or chattels rights or credits which were of the said G. H. deceased in manner and form as the plt. hath above in that behalf alleged. And this &c. (Conclude with a verification, as post, "Plea.") (Signature.)

Plene administravit.

First plea general issue (but see *ante*), and for a further plea in this behalf the deft. saith that he hath fully administered all and singular the goods and chattels which were of the said G. H. deceased at the time of his death and which have ever come to the hands of the deft. as executor (or as administrator) as aforesaid to be administered and that he the deft. hath not at the time of the commencement of this suit or at any time since had any goods or chattels which were of the said G. H. deceased at the time of his death in the hands of the deft. as executor (or as administrator) as aforesaid to be administered. And this &c. (Conclude with a verification, as post, "Pleas.") (Signature.)

Plene administravit præter.

And for a further plea in this behalf. Except as to the sum of £ parcel of the moneys in the declaration mentioned the deft. saith that he hath fully administered all and singular the goods and chattels which were of the said G. H. deceased at the time of his death and which have ever come to the hands of the deft. as executor &c. as aforesaid to be administered except goods and chattels of the value of £ (or except the said sum of £) and that he the deft. hath not nor at the time of the commencement of this suit or at any time since had any goods or chattels which were of the said G. H. deceased at the time of his death in his hands to be administered except the said goods and chattels of the value aforesaid (or the said sum of £), and this the deft. is ready to verify. (Signature.)

*Other forms of pleas.

[*1165]

See other forms of pleas, *plene administravit* by an executor of an executor, 3 Ch. Pl. 131; of a retainer, ib.; judgment recovered and bonds outstanding, ib. 133; *plene administravit* to debt on bond, ib. 164; and the like before notice of bond, ib.; see also Ch. jun. by Pearson.

See other forms of replications to *plene administravit* by an executor of an executor, 3 Ch. Pl. 445; to *plene administravit præter* bonds outstanding assets ultra, ib.; that deft. had assets when he had notice of writ, ib.; that judgments against deft. were obtained by fraud, ib. 447; that judgment was fraudulently suffered for more than was due, ib.; that bond has been paid, and is kept on foot by fraud, ib. 448; award of venue where only *plene administravit* is pleaded, ib.; prayer of judgments of assets in future, and general issue, ib.; the like with award of venue, ib. 449; *rejoinder* that no assets have come to hand since issuing the writ, ib. 513.

Evidence for Plaintiff.

The proof of the *cause of action* will be the same as in other cases. If the deft. does not plead a plea denying the debt, the same is admitted; and, in such case, plt. should be prepared merely to prove the amount of such debt. But, in an action of debt, in which a specific sum is demanded, that amount need not be proved (1 Salk. 296; B. N. P. 140). Where there is no other plea denying the cause of action, *plene administravit* admits it, so does *ne unques executor* (1 Saund. 207 a, n.).

Evidence of Deft.'s being Executor or Administrator.] Where the deft. pleads *ne unques executor* or *administrator*, the plt. should be prepared to prove the deft.'s being such executor or administrator; and in this case, a notice should be served on deft. requiring him to produce the probate, or letters of administration, which, if produced, will establish the issue (see ante, p. 1127). On proof of the service of this notice, secondary evidence of the deft.'s being executor or administrator is admissible; and, in that case, it must be proved by the statute-book from Doctors' Commons, in which the probates and administrations are entered, or the original will may be produced by an officer of the court (Davis v. Williams, 13 East, 234; Gorton v. Dyson, 1 B. & B. 219); but in this case, the usual indorsement, "that probate had been granted to the deft.," must be proved. It is not also

necessary, in order to let in secondary evidence, to prove that the probate or letters are in the deft.'s possession; for if he have been duly appointed that will be presumed (2 Ph. Ev. 6th ed. 347. It is doubtful whether there is any legal presumption that the probate is in the possession of the executor (Waite v. Gale, 2 D. & L. 925). The deft.'s identity should be established (Ib.). To prove the deft.'s character of executor, it will be, however, sufficient to prove the deft.'s taking possession of the effects of the deceased, and dealing with them in such manner as to make himself liable as executor *de son tort*; and what will make a man executor *de son tort* is a question of law for the court, but whether the acts are proved is a question of fact for the jury (Padget v. Priest, 2 T. R. 97; 1 Wms. Exors. 136; 1 Saund. 265, n. 2); and, as the plea of *ne unques executor* must allege that the deft. never administered as executor, this latter part of the plea is found to be untrue (Went. Off. Exors. c. 15, p. 339). The most usual acts are, deft.'s taking possession of and converting the assets to his own use (5 Rep. 336); living

in the house, and carrying on the trade of the deceased (Hooper v. [*1166] Summerset, 1 Wight. 16); *paying the deceased's debts or legacies out of them; suing for, receiving, or releasing the debts due to the estate; seizing a specific legacy, without the assent of the lawful executor (3 Bac. Abr. 21); entering on a lease or term for years (Ib. 22); or an estate, *pur autre vie* (Carth. 166), which is made assets by 29 Car. II. c. 3; answering in the character of an executor to an action brought against him, or pleading any other plea than *ne unques executor* (Toller, 38; Bac. Abr. Exors. B, C). And evidence of slight acts of intermeddling will be sufficient; as, merely taking part of his property, as a Bible or bedstead, have been held sufficient (3 Bac. Abr. 24). And, if a person be sent by the ordinary to collect the effects, and he exceed his authority, and sell any of them, even such as are perishable (Off. Exors. 174); or if he had the express direction of the ordinary for such sale, the same being illegal, he becomes an executor *de son tort* (Padget v. Priest, 2 T. R. 97). And where A., the servant of B., sold goods of C., an intestate, both before and after C.'s death, in consequence of orders given by him in his lifetime, and paid the money arising from such sale into the hands of B. and D., had also, in the capacity of a servant, sold other goods of the intestate, on an action against B. & D., as executors, for a debt due from the deceased, they not having discharged themselves by payment of the money which they had respectively received, to the rightful administrator, at the time when the action was commenced, or even when they pleaded, were held liable as executors *de son tort* (Ib.). And, where a creditor took an absolute bill of sale of the goods of the debtor, but agreed to leave them in his possession for a limited time, before the expiration of which the debtor died, and the creditor took and sold the goods, he was held liable as *executor de son tort* (Edwards v. Harben, 2 T. R. 587). But the performing offices of kindness and charity will not render a person liable; such as locking up the goods of the deceased, directing the funeral in a manner suitable to the estate, and out of the effects of the deceased, making an inventory of his property, advancing money to pay his debts or legacies, feeding his cattle, repairing his houses, or providing necessaries for his children (Toller, 40; Wms. Exors. P. 1, B; 3 Ch. Pl. 5). Where the widow continued in the house and shop after the husband's death without selling anything, and made a promissory note to a creditor of her husband, and afterwards took out administration; held, that she could not be charged as *executor de son tort* (Serle v. Waterworth, 4 M. & W. 9).

The plea of *ne unques executor* or *administrator* does not deny the cause of action (1 Saund. 207 a). Therefore where, in assumpsit against two

defts. as executors, there was a plea by both of *ne unques executor*, and it appeared in evidence that one of the defts. was executor, and the other was not: held, that the plt. might upon counts, laying promises by the testator, take a verdict against the former deft. alone, and the latter must be discharged, although as to the counts which laid the promises by the defts. as executors, the plt. must fail altogether (*Griffiths v. Franklyn*, Moo. & M. 146; see also *Atkins v. Tredgold*, *supra*); and, if one of the defts. plead severally *ne unques executor*, the plt. may enter a *nolle prosequi* as to him, and proceed against the others (1 Saund. 207 *a*, n.). This plea admits a debt, but not the amount (see 1 Saund. 207, n.). If the plt.'s character of executor be not denied specially, the letters of administration need not be produced at the trial (*D'Arenda v. Houston*, 6 C. & P. 511); nor can advantage be taken of their being wrongly stamped (*Thynne v. Protheroe*, 2 M. & S. 555).

**Evidence of Assets, on Plea of Plene Administravit.]* On issue taken on this plea, plt. must prove that assets existed, or [*1167] ought to have existed when the writ was sued out (*Mara v. Quin*, 6 T. R. 5; *Cooper v. Taylor*, 6 Man. & G. 789). On an issue taken, that assets have come into the hands of the executor after the suing-out of the writ, the plt. must prove that fact; proof of assets coming to hand before that time will not suffice (lb. 11; 2 Ph. Ev. 347). Proof that articles of furniture were bought by deceased and seen at his residence shortly before his death is *prima facie* evidence of assets (*Britton v. Jones*, 3 Bing. N. C. 676). Assets may be shown by proof of the inventory exhibited in the ecclesiastical courts. But a copy of it signed by the appraisers, and not by the executors, is not evidence (B. N. P. 140). But it should seem that any clear recognition of the instrument as an inventory would be tantamount in effect to signature (2 Wms. Exors. 1677, n. (y)). If, upon the issue of *plene administravit*, it shall appear that the executor or administrator has been guilty of a *devastavit*, which has caused a failure of assets, the jury must find that the deft. has assets to that amount, and not find a *devastavit* (2 Wms. Exors. 1677). Proof of assets will be sufficiently established by the production of the inventory of the personal estate of the deceased, delivered by the executor into the ecclesiastical court; or a copy of the inventory, signed by the executor may be admitted (B. N. P. 140; *Sanderson v. Nichol*, 1 Show. 81); but not if signed by the appraisers; after the inventory is put in, it is for the deft. to discharge himself from the items (*Gyles v. Dyson*, 1 Stark. N. P. 32). In *Shelley's* case, *Ld. Hale* said, "that all separate debts mentioned in the inventory shall be counted assets in the executor's hands, for that is as much as to say that they may be had for demanding, unless the demand or refusal be proved" (1 Salk. 296).

A. had ordered a pair of boots of B., and had paid B. for them; they were never delivered to A., but being in the hands of a journeyman who made them, A. was obliged to pay him the price of making them in order to get possession of them; A. was sued as executor *de son tort* of B.: held, that he was liable for the value of the boots, after allowing the sum he paid the journeyman (*Hobby v. Rewell*, 1 C. & K. 716). Where A., after B.'s death, obtained the cattle of B. from C., with whom they were agisted, A. paying for their agisting; he was charged as executor *de son tort* (lb.). Where a party receives a debt due to the estate of a person deceased, for the purpose of providing the funeral, he will not thereby become chargeable as executor *de son tort* unless he receive a greater sum than is reasonable for the purpose, regard being had to the estate and condition of the deceased, which is a question for the jury (*Camden v. Fletcher*, 4 M. & W. 378).

By exhibiting an inventory an administrator admits assests (Hickey v. Hayter, 6 T. R. 384); but in Stearn v. Mills, 4 B. & Ad. 657, the inventory was held not to be, generally, even *prima facie* evidence of his having received assets, and there, Parke, J., seemed to consider that when the inventory only described effects on a farm with which the executor was acquainted, it might be *prima facie* evidence, but that this is rebutted if it appear that no effects actually came to the executor's hands, though his co-executor has, to his knowledge, intermeddled with the property (see 2 Wms. Exors. 1212; 2 Stark. Ev. 3d ed. 447). If, on the inventory, it does not sufficiently appear what debts are sperate and what desperate, the debt. may be charged with the whole, as *prima facie* assets, *though he [*1168] may prove any of them desperate (Smith v. Davis, B. N. P. 140; see, however, Giles v. Dyson, 1 Stark. 32).

The debt. proved by a witness who went to demand several of them, that he could not recover them, and accordingly they were allowed as desperate Selw. N. P. 779; see Young v. Cawdrey, 8 Taunt. 734; Young v. Corde-roy, Moo. 66). With reference to the effect of an inventory as an admis- sion of assets, there seems to be a material difference between the inventory, which, according to the old practice of the Prerogative Court of Canterbury, and the present practice of some country jurisdictions, is exhibited before probate, and the deliberate inventory which is exhibited by an executor or administrator on the citation of a party interested in the estate, or spontane- ously before a final settlement (Wms. Exors. 1547). In Stearn v. Mills, 4 B. & Ad. 657; 1 Nev. & N. 434; which was an action of debt against executors on testator's bond. Wright let judgment go by default, and Mills pleaded *plene administravit*. The cause was tried in 1832, when it appeared that the testator died in 1816, and that both debts. proved the will. When an inventory was exhibited, Wright produced, and Mills being present ac- quiesced in it, though without saying anything, but neither signed it. It only comprised the stock upon the farm occupied by the testator at his death, valued at 1105*l.*; there were other effects as well as debts and moneys of the testator not included; there was no other inventory: Wright continued in the occupation, &c., of the farm (at the testator's desire) till 1830, of which Mills knew, who was occasionally at the farm, but it did not appear that any of the effects actually came to his hands. Lord Denman, C. J., said, "I am of opinion that the inventory *delivered by an executor on proving the will* is not in itself evidence of assets having come to his hands, and the fact of Mills having occasionally gone to the farm is not sufficient to affect him with liability as an executor having had possession of the property." And Little- dale, J., said, "It is not necessary here to consider whether an inventory in some cases may or may not be evidence of assets received; it was not so under the circumstance of this case. It was indeed stated that nothing came to the hands of Mills, but I do not agree in the general proposition that an executor who has exhibited an inventory is bound to show that he received no assets; because, even if that did not appear, I think an inventory exhibited as this was, would be no evidence against him; an executor is not obliged before proving the will to go into any distant county where effects are to ascertain their real value: it is sufficient if he receives such information as he is able to obtain, and then exhibits an inventory to show as far as possible the amount of the property to be administered, one object of which is to ascertain the fees to be taken on the probate pursuant to the stat. 21 Hen. 8, c. 5. There may be goods in the hands of the factor who may prove insol- vent, it cannot be said that an executor, by including them in the inventory, charges himself with them as assets." And Parke, J., said, "Assuming that the inventory here was exhibited by both debts., of which I have some doubt, it

could be only *prima facie* evidence; I will not say whether such an inventory as this would not be *prima facie* evidence since it related wholly to effects which were upon the farm, and did not include any debts; but if so, the evidence was clearly rebutted by proof, that Mills never did in fact take possession. To say generally that the mere circumstance that having joined in an inventory for the purpose of obtaining probate renders an executor liable, would be going further than is warranted by any authority." It is not sufficient to charge an executor *with assets to show that he has acquiesced in the receipt of assets by his co-executor (*Stearne v. Mills*, 1 Nev. & M. 434). On plea [*1169] of *plene administravit*, proof of an admission by the executor, "that the debt was just, and should be paid as soon as he could," is not evidence to charge him with assets (*Hindsley v. Russell*, 12 East, 232). The payment of interest on a bond due from the deft.'s testator will not be an admission of assets (*Cheverly v. Brett*, 5 T. R. 8 (a)); nor will a submission to the award of an arbitrator by the executor be an admission of assets (*Pearson v. Henry*, 5 T. R. 6). And, per Lord Kenyon, C. J.: "In many cases, an executor or administrator is desirous of ascertaining whether or not there be any foundation for the demand which is made upon him, without disputing it in an action; and it is frequently advantageous to both parties, that the matter in dispute should be referred" (Ib.). But it will be an admission of assets, if the executor bind himself to pay whatever sum may be awarded, and the arbitrator award a certain sum to be paid (*Barry v. Rush*, 1 T. R. 691; *Worthington v. Barlow*, 7 T. R. 453); the one case being merely to ascertain the amount of the debt due from the intestate, the other agreeing to pay what an arbitrator should award (Ib.; *Pearson v. Henry*, *supra*). Submitting disputed accounts to arbitration is of itself an admission by an executor that he has assets, unless he protests against its being so taken at the time (*Riddle v. Sutton*, 5 Bing. 200; *Robson v. —*, 2 Rose, 50); and the arbitrators, without finding that the executrix had assets, awarded her to pay a certain sum: held, that *plene administravit* was no bar to an action on the award; the submitting to the reference, without protesting that she had no assets, being an admission that she had assets (Ib.); and in such a case an allegation that no evidence of any assets was tendered to the arbitrators, could not be the subject of a plea (Ib.) Where, however, an executor, on being applied to for payment, referred the creditor to a third party for information as to assets, and such third party admitted assets, it was held sufficient to charge the deft. (*Williams v. James*, 1 Camp. 364). If an executor compound with the creditors, and after, at the suit of them, plead *plene administravit*, proof of the composition will be conclusive evidence of assets, and the court will not suffer him to give evidence of no assets (B. N. P. 145 a). An administrator *bona fide* compounding with a debtor to the estate is not liable to the full amount of the debt compounded as he is where he releases it without consideration (*Pennington v. Healey*, 1 Cr. & M. 402). Merely proving the amount of the stamp upon the probate is *prima facie* evidence of assets, to the amount covered by the stamp (*Foster v. Blakelock*, 5 B. & C. 328; S. C. 8 D. & R. 48). But only of the smallest amount which the stamp would cover (*Curtis v. Hunt*, 1 C. & P. 180). But in *Stearne v. Mills*, *Littledale* and *Parke, JJ.*, seem to have been of opinion that a probate stamp is not *prima facie* evidence that the executor has received assets to the amount covered by the stamp, and in *Mann v. Lang*, 3 Ad. & E. 699, it was admitted, and on the motion for a new trial, *Littledale, J.*, said it does not of itself furnish *prima facie* evidence of the amount of effects which have come to the executor's hands. Lord Denman, C. J., "If there be evidence of a long acquiescence by the executor, without redemanding any of the duty it is *prima facie* evidence

of such amount, but it is not of itself evidence of such amount; and per Patteson, J., it is not such *prima facie* evidence, even if a long acquiescence be shown.

In an action of assumpsit the plt. will also have to prove the amount of the debt, otherwise he shall recover but 1*d.* damages; for the plea only admits a debt, but not the amount (Shelley's case, *1 Salk. 290; 2 [*1170] Wms. Exors. 1213). Not so in an action of debt where a specific debt is demanded; for there, if the deft. plead *plene administravit*, without pleading also *nunquam indebitatus*, then the debt is admitted by the plea, and need not be proved (2 Ph. Ev. 348; Saunderson v. Nichols, 1 Show. 81; B. N. P. 140). The deft. is only liable to the amount of assets proved to be in his hands, though less than the debt (Harrison v. Beccles, 3 T. R. 688; Jackson v. Bowley, 1 C. & M. 197; 2 Wms. Exors. 1217). Where leasehold premises are the assets, the value as between the lessor and lessee's is exclusive of the deterioration for want of repair or other breach of covenant committed in the executor's time, and the insolvency of a sub-tenant let in cannot be taken into consideration, but there there was a clause of re-entry for non-payment of rent (Hernidge v. Wilson, 11 Ad. & E. 645). If there be several defts. executors who plead *plene administravit* jointly, it seems that the plt. may succeed against one only, who is shown to have assets (1 Saund. 336, n.; 2 Wms. Exors. 1218; Parsons v. Hancock, 1 Moo. & M. 330). If one of several executors plead no assets, and is shown to have assets, he alone is liable (ib.). The plt. cannot on an issue joined on the allegation that the deft. "had no assets at the commencement of the suit," &c., give evidence of payments made by the deft. between the times of suing out the writ and filing the declaration (Rees v. Morgan, 5 B. & Ad. 1035).

Evidence in Action, suggesting a Devastavit.] Where an executor, to an action on a bond, pleads payment, omitting to plead *plene administravit*, and the verdict be against him on such plea, it will operate as an admission of assets, in an action founded on the judgment suggesting a *devastavit* (Erving v. Peters, 3 T. R. 685; Skelton v. Hawling, 1 Wils. 259); or, if an executor suffer judgment by default, or a judgment be given against him on a demurrer to the declaration, the effect will be the same (Ramsden v. Jackson, 1 Atk. 292; Rock v. Leighton, 1 Salk. 310; S. C. 1 Ld. Raym. 589; Skelton v. Hawkins, 1 Wils. 259; Treil v. Edwards, 6 Mod. 308; 2 Stra. 1075; Leonard v. Simpson, Bing. N. C. 176; Palmer v. Waller, 1 M. & W. 689; 1 Saund. 335); a plea of *non est factum testatoris*, release to the testator, payment by him, or *non-assumpsit*, will admit assets. In an action against an administrator the deft. after obtaining time to plead on the usual terms pleaded a judgment recovered since the commencement of the action, but did not aver that there were no assets *ultra*. The court gave time to the plt. to sign judgment as for want of a plea, the deft. having, since the commencement of the action, admitted by the latter the possession of assets to cover the judgment, and also the plt.'s demand (Roberts v. Wood, 3 Dowl. 797). Where the plea denied the wasting, a judgment for the plt. in a court baron on a plea of no assets and *nulla bona* returned to a *fi. fa.* in that court, is conclusive without replying an estoppel (Dawson v. Gregory, 7 Q. B. 756).

When an executor pleads *plene administravit*, and shows payments by him to the extent of the assets proved by the plt. to have come to his hands, the plt. may show in answer that the funds so applied did not come to the deft. as executor, but were handed to him in trust to pay the testator's debts, and were not part of the assets at first proved to have come to his hands (Marsten v. Downes, 1 Ad. & E. 31).

Where deft. admitted assets to 350*l*. and gave a check for the amount, but the broker refused to pay it without the assent of the other executors; held to be no answer, for the deft. was estopped by his admission. He ought to have pleaded assets specially, so as *to show that he had them only jointly with the executors, or to have denied assets [*1171] altogether if he had no power over them, (*Cooper v. Taylor*, 6 M. & G. 989).

It is laid down with respect to what shall be said to be assets in the hands of an executor or administrator to charge him, that all those goods and chattels, actions, and commodities which were of the deceased in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator doth get into his hands, as duly belonging to him in the right of his executorship or administratorship, and all such things as do come to the executor or administrator in lieu, or by reason of that; and nothing else shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee. If an executor renew a lease, he shall account for the new lease as well as the old, as assets (*Anon.* 2 Ch. Ca. 208; *Bromfield v. Chester*, 2 Dick. 480; *James v. Dean*, 11 Ves. 392; *Randall v. Russell*, 3 Mer. 190; see also *Fitzroy v. Howard*, 2 Russ. 225; *Giddings v. Giddings*, ib. 241; *Fosbrooke v. Balguy*, 1 Myl. & K. 226). If A. covenant with B. to make him a lease of certain land by such a day, and B. die before the day, and before any lease made, A. is bound to make the lease to the executor of B., and the lease so made shall be assets in his hands, or, if A. refuse he is liable to compensate the executor in damages, which are also assets (*Went. Off. Exors.* 14th ed. 188; *Chapman v. Dalton*, Pl. Com. 286; *Com. Dig. Assets, C.*). So, if A. promise, on good consideration, to deliver to B., by such a day, certain merchandises, and this is not performed in the life of B., but they are delivered to his executor, the goods will be assets in his hands, as well as the damages for not performing the contract would have been (*Went. Off. Exors.* 14th ed. 188; *Com. Dig. Assets, C.*). If a lease be made to one for life, remainder to his executors for years, such remainder will be assets in the hands of the executor, though it were never in the testator (*Went. Off. Exors.* 14th ed. 189; *Com. Dig. Assets, C.*; 2 Wms. Exors. 1299). So, where a lease for years is bequeathed to A. for life, and afterwards to B., who dies before A., although B. never had this term in him, it shall be assets in the hands of his executor (*Ib.*). So, a remainder in a term for years, though it never vested in the testator's possession, and though it still continue a remainder, shall be assets in the hands of the executor, for it bears a present value, and is vendible. (*Ib.*)

If the sheep or other cattle of the testator bear lambs, &c., after the testator's death, these, although never the property of the testator, will be assets (*Went. Off. Exors.* 14th ed. 190). So, if an executor of a lessee for years, enter into the tenements, the profits, over and above the rent shall be assets (*Buckley v. Pirk*, 1 Salk. 79; *Went. Off. Exors.* 14th ed. 190). But not the profits as far as the amounts of the rent are received by the executor as terre tenant and appropriated to the use of the lessor (*Buckley v. Pirk*, *supra*; 2 Wms. Exors. 1299).

So, if an executor has a lease for years of land, of the yearly value of 20*l*., rendering a yearly rent of 10*l*., it is assets in his hands only for 10*l*. over and above the rent (*Body v. Hargrave*, Cro. Eliz. 712; *Godolph.* pt. 2, c. 24, s. 1). A leasehold estate, though not sold, is assets to the extent of its value (*Jury v. Woodhouse*, Barnes, 333; *Vincent v. Sharp*, 2 Stark. 507). So, if an executor employ the testator's goods in trade, the profits shall be assets (*Godolph.* pt. 2, c. 24, s. 4; *Com. Dig. Assets, C.*; 2 Wms. Exors. 1410); and, whether the executor take upon himself to carry on the testa-

tor's trade, or does so in pursuance of a provision of the *articles [*1172] of partnership entered into by the deceased; or by direction of the testator, contained in his will, or by that of the Court of Chancery, the profits of such trade shall be assets. Therefore, in *Giblett v. Read* (9 Mod. 459), Lord Hardwicke held, that a share in a newspaper should be considered as personal property of the deceased, transmissible to his representatives, and that the profits of printing the same, subsequent to his death, should be distributed accordingly, and his lordship said that there were many cases where no part of the property of a testator had been employed or made use of in carrying on the business, and yet the executor had been held accountable for the profits of the business as the testator's personal estate; as in the instance of physical secrets or nostrums, where every thing was carried on with materials purchased after the testator's death, and yet the nostrum was part of the personal estate of the testator; and, if the house of the testator were one of great trade, the executor must account for the value of what is called the goodwill of it (*Ib.*; see *Worral v. Hand*, Pea. 74). But in *Spicer v. James* (Rolls, cited in *Coll. Partnership*, 82), where an attorney having died intestate, another attorney, a friend of the family, by an arrangement with the widow, took out administration, and continued the business of the deceased until her son came of age, paying the widow half the profits, Sir J. Leach held, that the good will of a trade of a personal nature, as that of an attorney, was not a subject of administration, and was not assets in the hands of the administrator. With respect to the goodwill of a business, in which several are partners, it seems that as to a partnership between professional persons, on the death of one the goodwill shall survive to the other, although the deceased paid a large premium on entering into the partnership (*Farr v. Pearce*, 3 Madd. 78). But, whether this survivorship of the goodwill exists in the case of commercial partnerships is not clear: Lord Loughborough held, that the goodwill of a trade carried on in partnership, without articles, survives, and is not partnership stock (*Hammond v. Douglas*, 5 Ves. 539): but Lord Eldon doubted the propriety of that decision (*Crawshay v. Collins*, 15 Ves. 227; see also *Featherstonhaugh v. Fenwick*, 17 Ves. 298). So in *Pitt v. Pitt*, (2 Ca. t. Lee, 508; 2 Wms. Exors. 1410), the administratrix of a deceased ropemaker in the king's yard at Woolwich, was cited in the Prerogative Court of Canterbury, to exhibit an inventory and account. The deceased had four apprentices; and the question was whether the administratrix was bound to insert in the inventory the amount of wages earned by them in the yard of the deceased since his death: and Sir G. Lee was clearly of opinion, that she, who did not belong to the yard, could have apprentices there only as administratrix to the deceased, and accordingly decreed her to charge herself with the profits arising from the apprentices (*Ib.*).

Where a lease for years, or cattle, plate, or other chattel, was granted by the testator, upon condition that if the grantee did not pay such a sum of money, or do other acts, &c., and this condition is broken or not performed after the testator's death, the chattel will be assets (*Went. Off. Exors.* 181; 2 Wms. Exors. 1411): chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets in the hands of the executor, for so much as they are worth beyond the sum paid for their redemption (*Went. Off. Exors.* 182; 2 Wms. Exors. 1411; *Hawkins v. Lawse*, 1 Leon. 155; *Harecourt v. Wrennam*, or *Harwood*, v *Wrayman*, Moo. 858; 1 Roll. 56, pl. 32; 1 Brownl. 76; 1 Rol. Abr. 920, G, pl. 6; *Alexander v. Gresham* (Lady), 1 Leon. 225; *Vincent v. Sharp*, 2 Stark. 507). A testator *deposited with his creditor, R., a policy [*1173] of insurance on his life, as security for the debt, and died, leaving R. and M. his executors; R. applied to the insurers for the

amount due on the policy which they refused to pay unless R. and M. gave a receipt as executors, which they did. In an action by a judgment creditor, the executors pleaded *plene administraverunt*, except as to 4*l.*, the surplus out of the 200*l.* after payment to R.: held, that the executors were not chargeable with the 200*l.*, as assets, but only with the surplus after payment to R. (*Glaholm v. Rowntree*, 6 Ad. & E. 710). But, if the executor redeem with his money the goods pledged by the testator, he shall be indemnified in respect to the sum he has disbursed out of the effects of the testator, or, if necessary, by the sale of the chattel itself; and in that case the surplus over and above such indemnity shall be assets (*Went. Off. Ex.* 182; 2 Wms. Ex. 1412). In case he have no fund as executor, and he advance the money out of his own purse for the redemption, and it be fully equivalent to the value of the chattel, the property is altered by such payment, and shall be vested in the executor as a purchaser in his own right (*Anon. Dy. 2 A*, pl. 3: *Went. Off. Exors.* 182; 2 Wms. Exors. 1412). But if the executor redeem the chattel after the time specified for the redemption is elapsed, then it is said that the chattel without any distinction in respect to its value, shall, at law, belong to the executor in his own right, since in such case it must be deemed to be sold to him by the mortgagee or pawnee, who, after the forfeiture is incurred, has a legal right to dispose of it at his pleasure to him, or to any other person: but in equity, the excess in the value of the thing beyond the money paid for the redemption, shall be regarded as assets in the hands of the executor (*Went. Off. Exors.* 186, 187; 2 Wms. Exors. 1412).

Assets in any part of the world shall be said to be assets in every part of the world (*Shep. Touch.* 496). Therefore it has been held that the effects of the testator are assets, wherever situate, whether at home or abroad; and such effects as are in a foreign country at the time of the testator's death, although they remain and are wholly administered there by the executor, are equally assets (*Attorney-General v. Dimond*, 1 Cr. & J. 370; 1 Tyrw. 258). So, where the jury found that assets within the kingdom of Ireland came to the hands of the executor, it was resolved that the finding the assets to be beyond sea, was surplusage; for, if executors have goods of their testators in any part of the world, they shall be charged in respect of them; since many merchants and other men, who have goods to a great value beyond sea, are indebted here in England; and it would be a great defect in the law, that those goods should not be liable to their debts (*Dowdale's case*, 6 Rep. 47 *b*; 2 Wms. Exors. 1413).

If the testator or intestate dies entitled to stock in the French or other foreign funds, and there is a deficiency of assets in this country to meet the debts of the deceased, it is the duty of the executor or administrator to sell the stock, and bring the proceeds into this country in order to satisfy the creditors, and if he neglects to do so he will be guilty of a *devastavit* (*In re Ewin*, 1 Cr. & J. 157; 1 Tyrw. 107). So, a leasehold estate for years in Ireland is personal assets in England, and may be sold here by the executor (*Bligh v. Darnley (Lord)*, 2 P. Wms. 622).

As to how far real estates of British subjects in India are assets in the hands of executors, &c., see 9 Geo. IV. c. 33, s. 1.

By sect. 2, executors may sell such real estates for the payment of debts.

*By sect. 3, in any action for debt, the executor may be charged with the full amount of such real estate. [*1174]

By sect. 4, in suits against executors, courts may order writs of sequestration.

The grant of probate or administration here will not extend to the colonies. And an administrator, under letters taken out within the Queen's dominions out of England, has a right to hold the property of which the deceased died

possessed there against the executor or administrator under a grant obtained in this country (Wms. Exors. 1307).

An executor or administrator shall not be charged with any other goods as assets than those which come to his hands (Read's case, 5 Rep. 33 *b*, 34 *a*). It is said in Went. Off. Exors. 227, that if the testator at the time of his death has a stock of sheep in Cumberland, bullocks in Wales, fat oxen in Bucks, money, household stuff, and plate in London, and his executor lives in Coventry, viz., far from all these places, the executor has such an actual possession presently upon the testator's death, that he may maintain trespass against any stranger taking them away or spoiling them; and therefore that author considers it doubtful whether this shall not be goods in his hands, as to charge him with payment of debts and legacies, and make his own goods liable instead of them (2 Wms. Exors. 1419). If, however, an executor live at London, and the goods of which the testator died possessed are at Bristol, although the executor has such an immediate possession of them that he may maintain trover in his own name against any converter of them, and the damages recovered shall be assets in his hands, yet if he do not recover so much in damages as really the goods were worth, and that happens not through any fault of his, he shall answer for no more than he recovers (Ib.; Jenkins v. Plombe, 6 Mod. 181; see also Com. Dig. Assets, D.).

There are some authorities for asserting that things taken out of the possession of the executor are assets in his hands (Read's case, 5 Rep. 34 *a*; Bethel v. Stanope, Owen, 132), unless they are taken by the Queen's enemies (Went. Off. Exors. 14th ed. 235; Com. Dig. Assets, D; 2 Wms. Exors. 1420). But it should seem at least in a court of equity that an executor or administrator stands in the condition of a gratuitous bailee, with respect to whom the law is that he is not to be charged without some default in him (Ib.; Went. Off. Exors. 235; Com. Dig. Assets, D). Therefore, if any goods of the testator's are stolen from the possession of the executor or from the possession of a third person, to whose custody they have been delivered by the executor, the latter shall not in equity be charged with these as assets (Jones v. Lewis, 2 Ves. sen. 240; Went. Off. Ex. 236; Com. Dig. Assets, D); but a contrary rule is said to prevail at law (see Cross v. Smith, 7 East, 258, 259; 2 Wms. Exors. 1420). Again, if a trespasser take goods from the possession of an executor or administrator, although he is bound to sue the trespasser, if known, yet the executor or administrator shall not be answerable in assets for more than he recovers in the suit. But if he omits to sell the goods at a good price, and afterwards they are taken from him, then the value of the goods shall be assets in his hands, and not what he recovers; for there was a default in him (Jenkins v. Plombe, 6 Mod. 181, 182; 2 Wms. Exors. 1420). Again, if the goods be perishable goods, and, before any default in the executor to preserve them or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself (Jenkins v. Plombe, 6 Mod. 181).

[*1175] *So, if the testator's sheep or other beasts die, or if his ships perish by tempest, the executor shall not be charged with them as assets (2 Wms. Exors. 1420; Went. Off. Exors. 236; Com. Dig. Assets, D; but see Cross v. Smith, 7 East, 258, 259).

Choses in action, are not assets until the executor or administrator has received the money (Com. Dig. Assets, D; Bac. Abr. Exors. H, 2; 2 Wms. Exors. 1421). So, if the executor or administrator recovers at law or in equity any damages they shall be assets in his hands, after deducting the costs and charges of recovering them (Went. Off. Exors. 14th ed. 191; Co.

Lit. 124 a; 1 Rol. Abr. 920, Exors. G; pl. 4, 5; Godolph. pt. 2, c. 24, s. 1, 2; Bac. Abr. Exors. H, 2; Com. Dig. Assets, C), when he has reduced them into possession (Godolph. pt. 2, c. 24, s. 5; Jenkins v. Plume, 1 Salk. 207; 11 Vin. Abr. 239, 240; Williams v. Innes, 1 Camp. 364). If the testator recover a judgment for debt and costs, and his executor sue out a *sci. fa.* upon that judgment, the debt and costs due to the testator are assets when received, but the sum due for costs to the executor is only by way of indemnity to himself, and is not assets (per Parke, B., in Smedley v. Philpot, 3 M. & W. 586). But such debts or damages will be regarded as assets, although never, in point of fact, received if they be released by the executor. For the release in contemplation of law shall amount to a receipt (Cocke v. Jennor, Hob. 66; Brightman v. Keighley, Cro. Car. Eliz. 43; 2 Wms. Exors. 1421). So, if the executor take an obligation in his own name for a debt due to the testator, he shall be equally chargeable as if he had received the money, for the new security has extinguished the old right, and is a *quasi* payment (Norden v. Levit, 2 Lev. 189; Hosier v. Arundel, 3 B. & P. 7; Partridge v. Court, 5 Pri. 419; 2 Wms. Exors. 1422). But where an executor sues for money had and received to his use as executor, the debt or damages is assets immediately; for if the money was had and received by the deft., by the consent and appointment of the executor; it was assets in his hands forthwith; and if without his consent, yet the bringing the action is such a consent, that upon judgment obtained it shall be assets immediately without execution (Jenkins v. Plume, 1 Salk. 207; 6 Mod. 188; 2 Wms. Exors. 1422).

Where the patron of a church grants to the testator the next avoidance, and the church becomes void, and the testator dies before he presents, and after his death his executor presents to his son; yet this shall make no assets in his hands; because he could not lawfully take money to present (2 Wms. Ex. 1422; Godolph. pt. 2, c. 24, s. 8; see also judgment on Rennel v. Lincoln (Bishop of), 7 B. & C. 195). But if a stranger presents, and gets his clerk admitted, and the executor recovers damages in a *quare impedit*, the money so recovered will be assets (2 Wms. Exors. 1422; Godolph. pt. 2, c. 24, s. 8; Sale v. Lichfield (Bishop of), Ow. 99; Smallwood v. Lichfield, (Bishop of), 1 Leon. 205). And if the testator had died before the church had become void, then, because the executor might lawfully have sold it, it should seem that he will be charged with the value as assets, if he has neglected a proper opportunity for sale (Went, Off. Exors. 173). A grant for years of an office is assets in the hands of the executor or administrator of the grantee (Reynel's case, 9 Rep. 97 a; Shelenger v. Blackerby, 1 Ves. sen. 347; 2 Wms. Exors. 1423).

As to whether estate *pur autre vie* are assets, see 29 Car. II. c. 3, s. 12; 14 Geo. II. c. 20, s. 9; 1 Vict. c. 26; 2 Wms. Exors. 1311, 1315.

If the testator take a bond for another in trust, and dies, *this is not assets in the hands of the executor. So, if the obligee assigns [*1176] over a bond, and covenants not to revoke, and dies, that bond is not assets in the hands of the executor of the obligee (Deering v. Torrington, 1 Salk. 79; but see Byrn v. Godfrey, 4 Ves. 6; Bac. Abr. Exors. H, 1; see Parker v. Baylis, 2 B. & P. 78).

As to whether terms attendant on the inheritance of the testator are assets in the hands of the executor, &c. see 2 Wms. Exors. 1426).

If property come to the hands of an executor which the testator would have been bound to apply to a particular purpose, that property cannot be considered as general assets (Hassall v. Smither's (12 Ves. 119).

In Parry v. Ashley (3 Sim. 97), the testator charged his real estate, being a house, with an annuity to his widow, subject to which he devised it to S. A. in fee, whom he appointed executrix. He had insured the house, and on the expiration of the policy a few months after his death, it was renewed by

S. A.; the house was afterwards burnt down; and Sir L. Shadwell, V. C., held, that, as she being executrix renewed the policy, it must be taken she did so in the character of an executrix. But that the proceeds of the policy could not be considered part of the testator's personal estate, but were affected with a trust for the benefit of the parties interested in the real estate (see *Rook v. Warth*, 1 Ves. sen. 461; see also *Cruickshank v. Robarts*, Madd. 104). It has been held that an executor, in trust has a sufficient interest to enable him to make an insurance in his own name on the life of a person who has granted an annuity to the testator (*Tidswell v. Ankerstein*, Pea. 151). In *Thacker v. Wilson*, 3 Ad. & E. 142; 4 Nev. & M. 659, it was held, that under 14 Geo. III. c. 78 (Building Act), s. 41, where a party wall has been rebuilt, the person who is owner of and entitled to the improved rent of the adjoining premises, is liable to contribution out of such rent, though he be only executor or administrator, although there be a judgment outstanding of a date prior to the pulling down of a wall, and no sufficient assets to meet it.

Where a debt is set aside as fraudulent against any of the creditors the property become assets (*Richardson v. Smallwood*, 1 Jac. 552; see *Wms. Exors.* 1439). An assignment within the statute 13 Eliz. c. 5, is utterly void against creditors, and the property assigned is assets in the hands of the executors (*Shears v. Rogers*, 3 B. & Ad. 363). It should seem that to render a conveyance fraudulent within the statute 13 Eliz. c. 5, the party at the time of making it must be indebted to the extent of insolvency. But where a person owing 102*l.* on a bond wrote to the obligee that he and his wife were bound down by pecuniary embarrassments, and that the obligees proceeding to extremities would render the debtor's wife after his death perfectly destitute, and a month afterwards for a nominal sum of 10*s.*, and in consideration of natural love and affection, assigned a lease of the value of 206*l.*, to A., in trust for his own benefit for life, and after his death for that of one of his daughters-in-law, and he soon afterwards died, having by his will, made the assignee of the lease his executor; by which assignment of the lease the residue of his property became insufficient to discharge a bond debt: held, that the assignment was within the meaning of the statute, and utterly void against creditors, and that the lease was assets in the hands of the executor (*Shears v. Rogers*, 3 B. & Ad. 362).

Money received by an executor for the goodwill of a house is assets in his hand (*Warral v. Hand*, Pea. 74). So. a lease belonging to an [*1177] intestate, and on which the plt. had a lien, is assets, the administrator having the power to redeem it and dispose of the legal estate (*Vincent v. Sharp*, 2 Stark. 507). C. mortgaged his estate in fee to W. and Co., in trust to sell, repay themselves, and pay over the balance to C., his executors or administrators; before the sale C. died, having devised all his real and personal estates to trustees, whom he appointed executors in trust to sell, and pay debts, &c. In the lifetime of these trustees W. and Co. sold the mortgaged estate, and paid the surplus to the executor's attorney; before the money was disposed of the executors and their attorney died, and the plts. took out administration *de bonis non*, with the will of C. annexed, and sued the attorney's executor for money had and received: held, that the money in the hands of the latter was equitable, not legal assets, and would not be recovered at law (*Clay v. Willis*, 1 B. & C. 364). So, moneys arising from the sale of lands devised to executors in trust to sell for the payment of legacies are not legal assets (*Barker v. May*, 9 B. & C. 489). A decree was made in a certain cause whereby the Master was ordered to tax the costs of all the parties to be paid out of the fund; thus plt.'s costs (consisting of those of A., the plt. in the original suit, and E., his executor in the revived suit) to D., the then solicitor, and the costs of the debts to their several solicitors. The plt.'s costs were taxed, and certain sums in

respect of them were paid to D. C., a former solicitor in the suit, sued E. as executor of A., for the amount of his bill, and obtained judgment of assets, *quando*, &c., on which he brought another action, and had given notice of trial, when they agreed that if C. would withdraw the record E. would then pay him 100%. on account of his bill, and the remainder out of assets which should first come to his hands as executor of A. A further sum was afterwards paid out of the Court of Chancery to D., in respect of the same costs: held, by Parke and Alderson, BB., and Lord Abinger, C. B., *dissentiente*), that this sum was assets in the hands of E. within the meaning of the agreement (*Swedly v. Philpott*, 3 M. & W. 573).

It is a question for the jury whether the executor has committed a *devastavit* by swearing the property above its value, and so incurring a greater stamp duty than he would otherwise have to pay, seeing that the executor is bound to act promptly, and therefore is not to be held to too close a search of the testator's property (*Jackson v. Bowley*, 1 Car. & M. 97).

On the plea of *plene administravit* the plt. is bound to show affirmatively that the deft. has property of the testator in his hands unadministered, which will entitle him to his verdict and costs. But the measure of the damages is not the amount of the plt.'s debt, but only so much as he can show to be in the hands of the executor (*Jackson v. Bowly*, 1 Car. & M. 97).

The plea admits that the deft. is executor, but that may be that he is only executor *de son tort*, and as such he is not liable to all the property of the testator that would pass by the will, but only for the amount of assets that would come to his hands (*Yardley v. Arnold*, 1 Car. & M. 434; 10 M. & W. 141); and, therefore, where the deft.'s father died intestate, being the owner of a leasehold house, and leaving some debts due to him, some of which the deft. received and applied to the payment of the funeral expenses; held, that the deft. was not liable for the value of the leasehold house, but only to the extent of the sums he had actually received, against which he had a right to deduct reasonable expenses (*Ib.*).

Evidence in Action against Executor de son Tort.] If an executor *de son tort* be sued by the rightful executor or administrator, he *may, under the general issue, and in mitigation of damages, prove payment made by himself in the due course of administration; but, should those payments amount to the full value of the goods claimed, the plt. is nevertheless entitled to nominal damages (*Mountford v. Gibson*, 4 East, 447; *Woolley v. Clarke*, 5 B. & A. 744); and if the lawful executor would, by these means, be divested of his right of preferring one creditor to another of equal rank, or giving himself the same preference, or, if there be a failure of assets, such payment shall not be allowed in damages (*Toller*, 365; 3 Bla. Com. 508; 1 Wms. Exors. b. 3, c. 5; *Layfield v. Layfield*, 7 Sim. 72). Where an executor under a will sued the person appointed executor under a prior one, who had administered with knowledge of the later one, and whose probate was revoked, it was held that plt. might recover the full value of the goods (*Wolley v. Clarke*, *supra*).

What acts make a person liable as executor *de son tort* is a matter of law for a judge to decide, but it is for the jury to say whether the acts be sufficiently proved (*Padget v. Priest*, 2 T. R. 97). Almost any intermeddling with the deceased's property makes a party executor *de son tort* (*Edwards v. Harben*, 2 T. R. 587). Thus, if A., the servant of B., sell the goods of C., an intestate, as well after his death as before, though by C.'s orders, and pay the money into B.'s hands, B. is liable as executor *de son tort*. So, if one have money belonging to an intestate at the time when an action is brought against him as executor for a debt due from the intestate (*Ib.*). So,

where a creditor took an absolute bill of sale of the goods of his debtor, but agreed to leave them in his possession for a limited time, and in the mean time the debtor died, whereupon the creditor takes and sells the goods, he will be liable as executor *de son tort*, for the debtor's continuing in possession is inconsistent with the deed and fraudulent against creditors (Edwards v. Harben, *supra*). So, living in the house and carrying on the trade of a licensed victualler (Hooper v. Summersett, Wight. 16), and it is not requisite, in order to create this liability, that the dealing with the chattels of the deceased should be in the character of executor; therefore, where one had received possession of goods from the widow of a deceased person, being aware at the time that they were the property of the deceased, he was held liable in this character (Seally v. Powis, 1 Har. & W. 2). A possession of goods, which the deft. had received from the deceased in his lifetime, under a colourable sale, may be sufficient to charge him (Ib.). A. pledged goods to B. for a debt; B. died, and the parish officers took the goods and gave them to J., who made B.'s coffin, on condition of his paying B.'s rent and the funeral expenses: held, that by taking these goods, the parish officers became executors *de son tort*, and that if they sold the goods to J. they would be liable to A. in trover, for such a sale was so inconsistent with the bailment as to revest the right of property in A. But if the parish officers merely relinquished their possession, and let J. take possession, this would not make them liable in trover, for in this case a mere seizure of the goods by a stranger, who afterwards relinquished them, would not be a conversion (Samuel v. Morris, 6 C. & P. 620). But giving directions for a funeral will not make a man liable as executor *de son tort* (Harrison v. Rowley, 4 Ves. jun. 216). He is entitled to collect from the debtors of the deceased such a sum of money as may reasonably be considered sufficient for that purpose, and in an action charging him as executor *de son tort*, the proper question to be left to the jury is whether the sum so received by him was, under the circumstances, a reasonable one for the purpose or not (Cumden v. Flather or Fletcher, 4 M. & W. 378; 3 Jur. 57). A man who [*1179] *possesses himself of the effects of the deceased under the authority of and as agent for the rightful executor, cannot be charged as executor *de son tort* (Hale v. Elliott, Pea. 86). Although a man cannot be charged in this character where he acts under the power of attorney of one of several executors, who has proved the will, yet if he continue to act after the death of such executor, he may, though he act under the advice of another of the executors who has not proved (Cottle v. Aldrich, 4 Moo. & S. 175). If one set up in himself a colourable title to the possession of the goods of the deceased, though he may not be able to establish a strictly legal title, it is sufficient to exempt him from being charged as executor *de son tort* (Femings v. Jarrat, 1 Esp. 335). A trust deed conveyed the lease of a farm and all the grantor's effects, and all the debts due to him, to trustees in trust to dispose of, and out of the produce to reimburse the trustee a sum he advanced to the grantor, and to pay the grantor's debts, and to hold the surplus for the benefit of the grantor's wife as a separate maintenance for her: held, that the wife was not liable as executrix *de son tort* after the death of her husband intestate, on account of her possession of this property under the deed of trust (Nunn v. Willsmore, 8 T. R. 52). The widow of a hairdresser, who died in October, 1836, continued to reside in his house, and keep open the shop (through which the entrance was to the house), but it did not appear that any articles were sold. In December she received notice of a bond debt of 100*l.* due from him, and had his goods valued. In January, 1837, she gave a promissory note to a creditor, to whom he owed for goods 240*l.*, for that amount, payable twelve months after date; in March she

took out administration: held, in an action on the note, that this was not evidence to charge her as executrix *de son tort* (Serle v. Waterworth, 4 M. & W. 9; 2 Jur. 745).

Deflt. pleaded no assets, and *plene administravit*; replication of assets in hand. It was proved that the testator, before his death, purchased certain articles of furniture which were seen in his house shortly before he died: held, in the absence of any proof that the goods were lost, *prima facie* evidence of assets (Britton v. Jones, 3 Bing. N. C. 676; 4 Sco. 393). An executor, after payment of all the debts of which he had notice, invested the residue of the testator's estate in the funds, in his own name, received the dividends, and paid them over to the legatees in satisfaction of the legacies given by the will. Held, that he was still liable as for assets in hand and the executor could not sustain a plea of *plene administravit* to an action brought against him fifteen years after the testator's death, for a specialty debt of the testator, of which he had no notice (Smith v. Day, 2 M. & W. 684). An executor who pays legacies six months after probate, cannot show such payment in discharge of his testator's liability on a covenant (Davies v. Blackwell, 9 Bing. 5). In covenant against the personal representative of A. B., for breaches of a lease made by the assignor of the plt. to A. B., and which took place many years after the testator's (A. B.'s) death, the deflt. pleaded *plene administravit*, upon which issue was joined: held, that evidence of payment of legacies will not support this issue (Pearson v. Archdeaken, 1 Ale. & Nap. (Ir.) 23).

An executor *de son tort* may, after action brought by a simple-contract creditor, pay a specialty debt and plead the payment of that debt in bar of the action (Oxenham v. Clapp, 2 B. & Ad. 309). And having afterwards taken out administration he may repudiate an agreement made by him as executor *de son tort*, to surrender a term of years vested in his intestate (Doe d. Hanly v. Glenn, 1 Ad. & E. 49). A., supposing herself to be executrix, proves B.'s will, and employs C., an *auctioneer, [*1180] to sell the goods of B. They are sold to C., who, as an inducement to C. to permit him to remove them, expressly promised to pay C. as soon as the bill should be made out. The real executrix takes out probate and gives notice to D. not to pay the price to C. Notwithstanding the express promise, C. cannot sue D. for the price (Dickenson v. Maule, 1 Nev. & M. 721).

As to joining the rightful executor or administrator, in an action against an executor *de son tort*, see 1 Ch. Pl. 41; 1 Moo. & M. 146.

Evidence for Defendant.

Evidence in Disproof of Deflt.'s being Executor.] Deflt. may prove for the purpose of rebutting evidence of his being executor *de son tort*, that he took possession of the deceased's goods under a fair claim of right (Femings v. Jarratt, 1 Esp. 385; Com. Dig. Admon. C, 2); or that he acted under the authority of the rightful executor or administrator (Hall v. Elliott, Pea. 86); but this will not constitute a defence, unless the executor have proved the will, or the administrator taken out letters of administration (Cottle v. Aldrick, 1 Stark. 37; 4 Moo. & S. 175). *Quare*, whether there can be an executor *de son tort* while there is a lawful executor in being (Hall v. Elliott, Peak. Ad. Ca. 87; Read's case, 5 Rep. 24 a). Where there are several defts. who plead *ne unques executors*, the plt. may recover against the real executors on the counts denying the promises by the testator, and the other defts. must be discharged (Griffiths v. Franklin, Moo. & M. 146); and the plt. cannot recover on counts upon promises by all the defts. as executors (Ib.). When one appointed under a will proves it, and deals with the estate, he cannot say that he acts under a delegated

power from the other executors, or in any other character than as executor (Graham v. Keble, 2 Dow. 24). A creditor of an intestate who received goods of an intestate after his death from the widow in payment of the debt, cannot protect his possession in an action of trover against the rightful administrator on the ground of such delivery having been made by one who had by such intermeddling made herself executrix *de son tort*, no fact appearing to give colour to her having acted in that respect in her character of executrix, except the single act of wrong complained of in which deft. participated (Mountford v. Gibson, 4 East, 441). An executor *de son tort* cannot discharge himself from an action brought by a creditor by delivering over the effects to the rightful executor after the action is brought (Curtis v. Vernon, 3 T. R. 587).

In Answer to Proof of Assets.] To rebut any *prima facie* evidence of assets which the plt. may have given, the deft. may prove even on a plea of want of assets without any averment of *plene administravit* (Reeves v. Ward, 2 Bing. N. C. 235) that those assets have been exhausted by payment, before action brought, of other debts of the deceased, of as high, or of higher degree than the plt.'s debt, viz.: 1. Charges of funeral, of proving the will, or taking out letters of administration; and deft. may retain money for that purpose, and he will be allowed it, though he have not actually paid it (Gillies v. Smither, 2 Stark. 528; 2 Wms. Exors. 1550; 2 Stark. 3rd ed. 449; Atwood v. Dandridge, 1 C. & K. 455); or he may show the payment of debts even of inferior degree without notice of the plt.'s demand (Chelsea Waterworks Company v. Cowper, 1 Esp. 277). But then payments without notice must be pleaded (Hickey v. Hayter, 6 T. R. 388;

Lawrence, J.); and in the reasonable charges of collecting the [*1181] debts of the deceased (Giles v. Dyson, 1 Stark. 32). But he *cannot be allowed for disbursements in the schooling, &c., of the children of the testator after his death (Ib.). 2. Debts of record, or by specialty, due to the king. 3. Debts under particular statutes, such as poor-rates, &c. 4. Debts of record, as judgments, statutes, and recognizances; but, unless such debts be docketed according to 4 & 5 Will. & Mary, c. 20, registered 2 & 3 Vict. c. 11, they are only to be classed as simple contract debts (see Hickey v. Hayter, 6 T. R. 384; see *post*). 5. Debts by specialty, as bonds, rent reserved, either by lease or parol. 6. Simple contract debts, first to the king and then to the subject, as bills, notes, money lent, goods sold, &c. (Toller, 258, 278; Com. Dig. Admon. C, 2).

The payments are to be proved by witnesses; as by the parties themselves, to whom the payments have been made, and who can establish the existence of the debts due to them, as well as the payments (B. N. P. 143). Where there were any written securities of the testator, as bonds or notes, paid by the executor or administrator, they should be produced, and proved to be paid in the regular way; but they must be shown to be valid securities, and entitled to preference (1 Esp. 286). When a bond, paid by an executor, has been lost or destroyed, and, on *plene administravit* pleaded to another debt, he wants to avail himself of the payment made of it, he must call the subscribing witness to that bond to prove its former existence, and then prove its destruction, in addition to the proof of payment of it (Gillies v. Smither, 2 Stark. 528; see *ante*, "DEED"). Where, however, the deft. is sued in assumpsit on a simple contract it will be sufficient, it is said to prove the payment (B. N. P. 143). For though no bond, it is yet a good consideration (2 Wms. Exors. 1553). Where the executor shows payments by him to the extent of the assets proved by the plt. to have come to his hands, the plt. may show in answer that the funds so applied did not come to the deft. as

executor, but were handed to him in trust to pay the testator's debts, and were not part of the assets at first proved to have come to his hands (*Mars-ton v. Downes*, 1 Ad. & E. 31 ; 6 C. & P. 381).

Deft. may prove his *retainer* under a plea of *retainer* or under a plea of *plene administravit*. But he must establish his own debt by the same evidence which would be requisite to establish the demand as a debt against the testator. But he cannot retain for his own debt, only as against debts of the same degree (1 Saund. 333. n.) An executor may retain for payments which he has made out of his own moneys before the issuing of the writ, in discharge of debts of the deceased, of equal or higher degree than the plt.'s (*Co. Lit.* 283 a ; B. N. P. 141). An executor *de son tort* is not entitled to retain, even though the rightful executor has consented, after action brought (*Curtis v. Vernon*, 3 T. R. 587), but to rebut evidence of retainer, the plt. may produce the will, and show who are the rightful executors (B. N. P. 143). If the deft. pleads a retainer, and also a judgment recovered, which together cover the assets, it is sufficient for the plt. to falsify either claim (*Campion v. Bentley*, 1 Esp. 344). The deft. cannot under a plea of *plene administravit* give evidence of the existence of outstanding debts of a higher nature, such defence must be specially pleaded (B. N. P. 141 ; 1 Saund. 323 a, n. 8). It is said that deft. may prove under *plene administravit* subsisting judgment debts, and retain assets to the full amount (2 Ph. Ev. 1350) ; but this seems not to be correct, and the authority cited, *Bond v. Green*, 1 Brownl. 75, applies merely to the retainer of a debt due to the deft. himself (2 Wms. Exors. 1557, n. (y)). Deft. may show payment of the expenses of the funeral, if reasonable, and suited to the rank and circumstances of the deceased (*Edwards v. Edwards*, 2 Car. & M. 612 ; see *Brice v. Wilson*, 8 Ad. & E. 349 n.) ; and an administrator is liable as [*1182] such even where he sanctioned them before he administered (*Lucy v. Walrond*, 3 Bing. N. C. 841).

Under *plene administravit* the deft. may prove the expenses of administration, and show that he retained money to that amount (*Gillies v. Smither*, 2 Stark. 528). A. being indebted in his individual capacity to the house in which he was a partner, in a sum whose amount was not ascertained, covenanted to pay the firm all his then debts, and such other debts as should subsequently accrue. A. dies without having satisfied the original debt, and having contracted further debts since the execution of the deed : held, that his executors, two of whom were his partners, could not plead either of these debts by way of retainer, or as an outstanding specialty debt (*De Tastet v. Shaw*, 1 B. & Ad. 664).

If an executor plead *plene administravit*, and the plt. reply that he sued out his original such a day, and that the deft. had assets then, and the deft. in his rejoinder take issue that he had not assets, then, the plt. need not give in evidence a copy of the original to prove the time of its being taken out, because the deft. admits it by his rejoinder ; but, if the plt. reply assets at the time of exhibiting the bill, viz. such a day, and conclude his replication to the country (which he may), though the plt. lay his bill to be exhibited on the first day of the term, if in fact it were exhibited afterwards, the deft. shall have advantage thereof on the evidence, so that he shall not be bound for what he paid before (B. N. P. 144). But the day of issuing the writ must now be stated on the nisi prius record (R. G. 4 Will. IV., Form, No. 1). An executor *de son tort* may pay a specialty debt after action brought by a simple contract creditor, and may plead the payment of that debt in bar of the action (*Oxenham v. Clapp*, 2 B. & A. 309).

The deft. cannot show in answer to proof of assets, that he has applied them in payment of debts since the commencement of the suit ; for, under

plene administravit, no payments made after action commenced can be given in evidence (Dy. 32; Com. Dig. Admon. C, 2; Nightingale v. Lee, 1 Free. 110). If, therefore, the executor has paid other creditors of superior degree, after action commenced, he must plead it specially; and, if he have paid other creditors of equal degree since the writ issued, without having had notice of the suit, he ought to plead specially *plene administravit* before notice (Ib.; Parker v. Dee, 3 Swanst. 531). A question may arise as to what is notice of the suit, viz. where the writ of summons omits to describe the deft. as executor (see Went. Off. Exors. 282; Com. Dig. Admon. C, 2; Judgment in Parker v. Dee, *supra*). Since the passing of 2 Will. IV. c. 42, which directs that all personal actions, when it is not intended to hold the deft. to bail, &c., shall be commenced by writ of summons, an executrix pleaded to an action of assumpsit, *plene administravit*, and no assets *on the day of exhibiting the bill* of the plt., on which issue was tendered in the words of the plea: held, that the words "exhibiting the bill" upon these pleadings, meant the commencement of the suit by writ of summons, and not the filing of the declaration; and, therefore, that evidence of payment made by the executrix between the times of suing out the writ and filing the declaration was inadmissible (Rees v. Morgan, 5 B. & Ad. 1034).

Where there are *outstanding* debts of a higher nature, they must be pleaded, and proved accordingly. Where the deft. pleads a judgment obtained against him for 100*l.*, and that he has not goods, except of [*1183] the value of 5*l.*, and the plt. proves that he has 100*l.*, yet *he gains nothing, for the substance of the issue is, that the deft. has not more than will satisfy the judgment (Moor v. Andrews, Hob. 133; 1 Saund. 133, n.). In answer to proof by the plt., that the debt was not a just one, or that less is due than the sum for which the judgment was given, and which is *prima facie* evidence of fraud, the deft. may show that the judgment was entered for more by mistake (Pease v. Naylor, 5 T. R. 802; 1 Saund. 50, n.). Where the deft. pleaded a judgment recovered, and the plt. replied it was obtained and kept on foot by fraud, the judgment creditor was called by the deft. to prove that the debt was a fair one; his testimony was, however, rejected, on the ground of interest (1 Esp. 343; see "WITNESS"). It should seem that if in the distribution of assets, a creditor misleads an executor by laches, or, by express authority so as thereby to induce him to pursue a course he would not otherwise have done, the creditor is precluded from complaining of an insufficiency of assets (Richards v. Brown, 3 Bing. N. C. 499; per Tindal, C. J.).

Mode of enforcing Judgment.] When the plt. has obtained judgment against an executor *de bonis testatoris*, there are two modes of enforcing it; 1st, by *fieri facias* or *scire fieri* inquiry; 2d, by action of debt on the judgment suggesting a *devastavit*. In the former case, if the sheriff return *nulla bona*, and a *devastavit* to a *fi. fa. de bonis testatoris* sued out on a judgment obtained against the executor, the plt. may sue out execution immediately against the deft. by *capias ad satisfaciendum* or *fi. fa. de bonis testatoris* (1 Saund. 219, n. 8; Tidd, Pr. 1025, 1113; see Wms. Exors. 1694). But if he do not return a *devastavit*, a writ is sued out which is called a *sci. fa.* inquiry, which recites the judgment, *fi. fa.*, and return *nulla bona*, and suggesting a *devastavit*, commands the sheriff to cause the debt, or damages and costs, to be made of the goods of the testator or intestate, if, &c.; and if not, then if it shall appear by inquisition that the deft. had wasted the goods of the deceased to give notice to the deft. to appear in court at the return of the writ, to show cause why the plt. ought not to have execution *de bonis testatoris*, &c. (Wm. Exors. 1694).

But the most usual course has been by action of debt, suggesting a *devastavit*, or in the proceeding by *sci. fa.* inquiry the plt. was not entitled to costs, unless the executor appear to it and pleaded (1 Saund. 219). But now by 3 & 4 Will. IV. c. 42, s. 34, in all writs of *sci. fa.*, the plt. obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded, or demurrer joined.

The executor cannot plead *plene administravit* to the *sci. fa.* inquiry, because the judgment against him is conclusive that he had assets to satisfy it (2 Wms. Exors. 1695); nor can he, upon the taking of the inquisition, give in evidence the want of assets (1 Saund. 219 c). The jury are therefore bound upon the judgment being put in evidence, together with the *fi. fa.*, and return to find a *devastavit* as suggested in the writ, unless the executor can show that there were goods of the testator which might have been taken in execution, and that he showed them to the sheriff (Ib.; Leonard v. Simpson, 3 Bing. N. C. 179); and, therefore, when the under-sheriff directed the jury that the plt. was bound to give evidence that the executor had property of the testator in his hands, and subsequently returned *nulla bona testatoris*, the court quashed the return, and awarded a new *sci. fa.* inquiry (Palmer v. Waller, 1 M. & W. 689). And the executor may traverse the return of a *devastavit* in either case by denying it, and taking issue upon it

*(1 Saund. 219 c. 306; Blackmor v. Mercer, 2 Saund. 402). [*1184]

And he may show that he had not wasted the goods of the testator, but was ready to give them to the sheriff; so that it was the sheriff's fault that he did not make the debt out of them (1 Saund. 219 c; Leonard v. Simpson, 2 Bing. N. C. 180, 181; 2 Wms. Exors. 1696). Where the inquisition found that the executors had sold, eligned, converted, and disposed to their own use divers goods of the testator, the defts. traversed this finding, and the plt. maintained the inquisition as it was found, and tendered an issue to which the defts. demurred, and it was objected that neither the inquisition nor the replication were sufficient to charge the deft. *de bonis propriis*, for no *devastavit* was found, nor indeed alleged by the plt.; but by Hale, C. J., perhaps the defts. had not actually wasted the goods of the testator, but had them in their hands in *specie*, and kept them so secretly that the deft. could not find them to levy the plt.'s debt upon them; therefore, it is reasonable the defts. should be charged *de bonis propriis*, although there is no *devastavit* in the case; it was therefore adjudged for the plt. (Blackmor v. Mercer, 2 Saund. 402; Merchant v. Driver, 1 Saund. 307). The action of debt on the judgment suggesting a *devastavit*, was substituted instead of the *sci. fa.* inquiry (Berwick v. Andrews, 2 Ld. Raym. 974; 1 Saund. 219 a, n.; 2 Wms. Exors. 1696). The foundation of this action is the judgment obtained against the executor, which is conclusive upon him to show that he has assets to satisfy such judgment. If, therefore, upon a *fi. fa. de bonis testatoris* on a judgment obtained against an executor, either no goods can be found which were the testator's, or not sufficient to satisfy the demand, or if the executor will not expose them to the execution; this is evidence of a *devastavit*, and therefore it is very reasonable that the deft. should become personally liable, and chargeable *de bonis propriis* (1 Saund. 219 b, n. 8; 2 Saund. 403; Erving v. Peters, 3 T. R. 686; Farr v. Newman, 4 T. R. 637; 2 Wms. Exors. 1697); and the mode of proceeding is immaterial, for the executor is entitled to the same defence, as in debt upon the judgment, suggesting a *devastavit*, as on the *sci. fa.* inquiry (1 Saund. 219 b, n.; 2 Wms. Exors.). This action may be brought upon the judgment against the executor upon a bare suggestion of a *devastavit* without any writ of *fi. fa.* first taken out upon the judgment (Wheatley v. Lane, 1 Sid. 397; 1 Saund. 219

c, n.; 3 Wms. Exors. 1697). But the usual course is first to sue out a *fi. fa.* upon the judgment, and upon the sheriff's return of *nulla bona* to bring the action; and state the judgment, the suit, and return in the declaration; and on the trial, the record of the judgment, the *fi. fa.*, and the return will be sufficient evidence to prove the case (Challoner v. Challoner, cited; Skelton v. Hawling, 1 Wils. 259; Erving v. Peters, 3 T. R. 685; 1 Saund. 219 c; see Leonard v. Simpson, 2 Ring. N. C. 176; 2 Wms. Exors. 1698). The action is in form, an action of debt in the *debet* and *detinet*, and the judgment is *de bonis propriis* (Warren v. Consett, 2 Ld. Raym. 1502; see Hope v. Bague, 3 East, 2). The executor or administrator may plead that he did not waste, &c., in manner, and form, &c., and under this issue may give in evidence that there were goods of the testator which might have been taken in execution, and that he showed them to the sheriff (1 Saund. 219 c, n.; 2 Wms. Exors. 1679). This defence might formerly have been set up under the plea of *nil debet* (Coppin v. Carter, 1 T. R. 462). But see R. G. H. T. 4 Will. 4; *ante*, "DEBT"). But the executor cannot plead *plene administravit*, or any other plea which puts his defence upon want of assets, for that would be contrary to what is admitted by the judgment, and that defence he ought to have set up to the original action, and having *neglected to do so, he cannot now (1 Saund. 219 c, n.; 2 Wms. Exors. 1698); and if he pleaded *plene administravit* on the original, and the judgment was had upon a verdict finding that he had assets, he is equally concluded from saying that he had no assets (2 Wms. Exors. 1698, citing Hare v. Lloyd, 1 T. R. 693); and for the same reason he cannot give in evidence the want of assets on the trial of the *devastavit* (Rock v. Leighton, 1 Salk. 310; Cooper v. Taylor, 6 Man. & G. 989; 2 Wms. Exors. 1699). Nor upon a writ of inquiry after judgment by default in the original action (Treil v. Edwards, 6 Moo. 308; Wharton v. Richardson, 2 Stra. 175). If a man obtain judgment against an executor, and die, his executor may, without first suing out a *sci. fa.*, bring an action of debt upon the judgment suggesting a *devastavit* for the action is brought against the same person against whom the judgment was had, and by that judgment assets were admitted (Berwick v. Andrews, 2 Ld. Raym. 971); and if a judgment be obtained against an executor who afterwards dies, an action may since 30 Car. II. c. 7, be brought against his executor or administrator upon the judgment suggesting a *devastavit* by the first executor, and the judgment is as conclusive upon the representative of the executor, as it is upon the executor himself; therefore, if an action of debt suggesting a *devastavit* by the first executor in his lifetime he brought against his executor or administrator, he cannot plead that the first executor fully administered the goods of first testator, or any other plea purporting that the first executor had no assets to satisfy the judgment any more than the executor himself could have done (Skelton v. Hawling, 1 Wils. 258; 1 Saund. 219 d, n.; 2 Wms. Exors. 1700); but the executor, &c., of the executor, &c., may plead, that he the deft. has fully administered all the estate of his own testator or intestate (Ib. c, n.; ib.). Moreover, the action when brought against the executor, &c., of the executor, &c., against whom the judgment was obtained, must be in the *detinet* only, and the judgment is *de bonis testatoris intestati* (Ib.; 1 Wms. Exors. 1700). But no action of debt suggesting a *devastavit* by the executor lies against him upon a judgment obtained against his testator, because that is no admission of assets by the executor, and therefore in such cases it is requisite to sue out of a writ of *sci. fa.* against the executor, to make him a party to the judgment (Crosby v. Geering, cited in Berwick v. Andrews, 2 Ld. Raym. 972; 2 Wms. Exors. 1700). With respect to the pleas which an executor or administrator may plead in

his defence to a *sci. fa.* upon a final judgment obtained against his testator or intestate it is said that if an executor or administrator plead *plene administravit*, it is bad on a special, though good on a general demurrer; but he ought to plead that he had nothing in his hands at the time of the death of the testator or intestate, or that no goods came to his hands except so much, if any did, and show how he administered them (*Harecourt v. Wrenham*, Moo. 858; *Ordway v. Godfrey*, Cro. Eliz. 575; *Petchet v. Woolston*, Al. 47; *Newton v. Richards*, 1 Salk. 296; Comb. 298; 2 Saund. 72 *t*, n. 4. But see *Newton v. Richards*, per Ld. Holt; and *Noell v. Nelson*, 2 Saund. 220; *Hall v. Tupper*, 3 B. & Ad. 655). If the judgment on which the *sci. fa.* was brought were not docketed pursuant to 4 & 5 Will. & Mary, c. 20, the executor or administrator may give in evidence under a plea of *plene administravit*, the payment of other debts before action brought, which exhausted all the assets (*Hickey v. Hayter*, 6 T. R. 384). But see 2 & 3 Vict. c. 11; and it is not necessary for the deft. to allege in his plea that there was no docket (*Hall v. Tupper*, *supra*). If the executor plead to the *sci. fa.* that a writ of error is pending on the judgment, it is bad; for the object is to make *the executor a party, and in awarding execution the court does not say that it shall be immediately enforced (*Snook v. Mattock*, 5 [*1186] Ad. & E. 239). No damages for delay of execution can be given on *sci. fa.*, and the 3 & 4 Will. IV. c. 42, s. 34, enacts that in all writs of *sci. fa.* the plt. obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded or demurrer joined. After the plt. has obtained judgment of execution against the executor in *sci. fa.*, he may bring an action of debt in the *debet* and *detinet* on the latter judgment suggesting a *devastavit*, and in such action the judgment in *sci. fa.*, is conclusive against the deft. that he has assets, 2 Wms. Exors. 1704). He, therefore, cannot plead *plene administravit*; and the judgment shall be *de bonis propriis* (*Hope v. Bague*, 3 East, 2). But there is nothing to prevent the plt. bringing his action in the *detinet* and recovering judgment *de bonis testatoris* (Ib.).

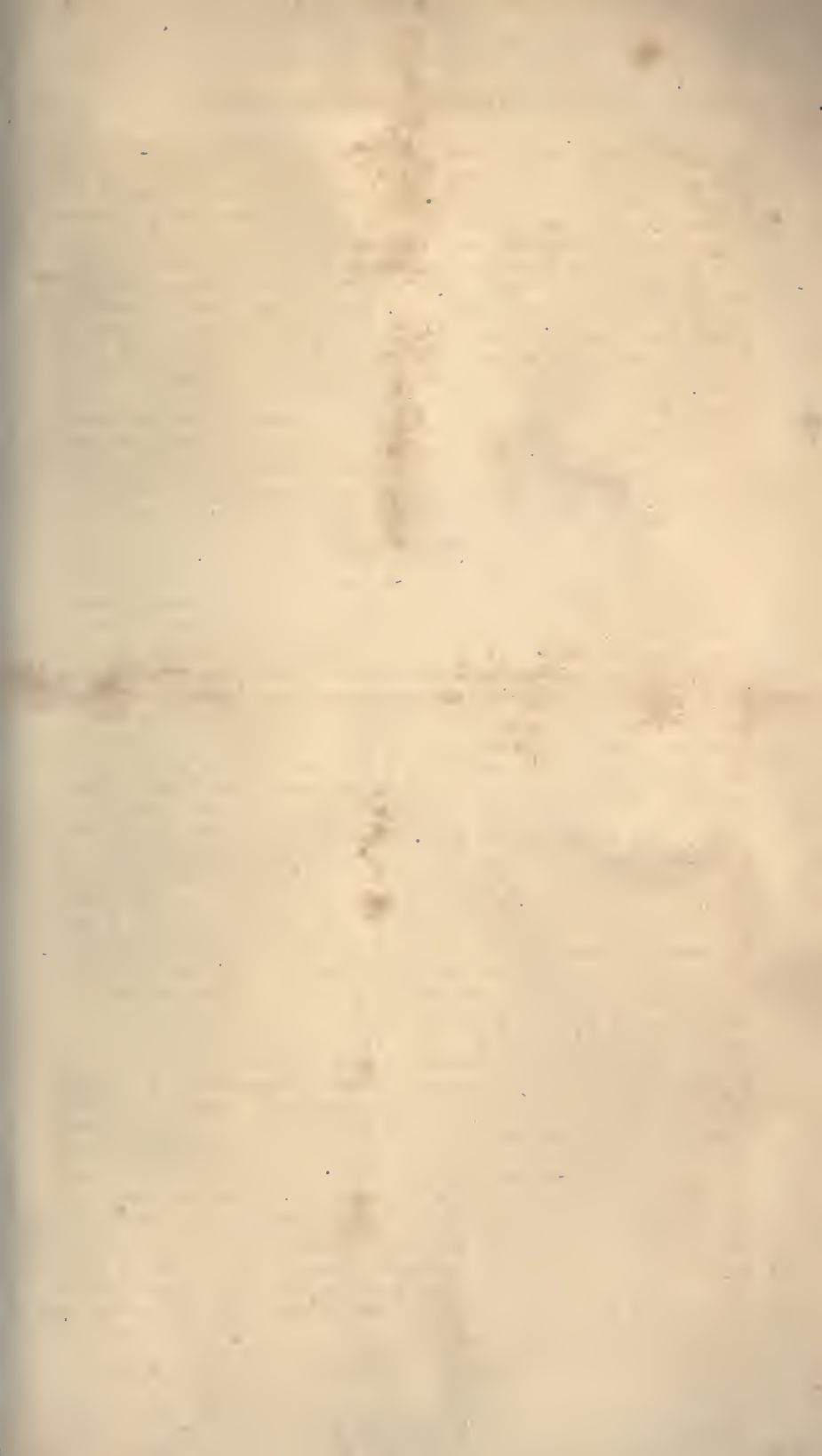
Where the plt. has taken judgment of assets *quando acciderint* against the executor or administrator, as soon as assets come to his hands the plt. may bring an action of debt upon the judgment, or sue out a *sci. fa.* (see *Noell v. Nelson*, 2 Saund. 219; *Mara v. Quin*, 6 T. R. 1; see *Smith v. Talchum*, 17 Law J. 198, Exch.); and the writ should state that the assets came to the executor's hands *after* the judgment, for the writ must pursue the terms of the judgment; and where the writ stated that divers goods, &c., of the testator, sufficient to pay, &c. had come to and were in the hands of the deft. to be administered, &c., without stating that these goods had come to the hands of the deft. *since the judgment*, and prayed execution against the deft. to be levied of those goods according to the form and effect of his said recovery, &c.; the deft. pleaded that after the plt.'s judgment no goods, &c., of the testator had come to the deft.'s hands, to be administered, &c.; to which the plt. replied, that divers goods, &c., had come to the deft.'s hands, without adding, *since the judgment*; and, on demurrer, it was adjudged that the *sci. fa.* was wrong for want of the words, "*after the judgment*." For, when the deft. pleads *plene administravit*, the plt. may either deny or admit that allegation, and if he admit it, he takes judgment, and prays that his debt may be levied of such assets as may *afterwards* come to the hands of the executor to be administered, the praying of judgment is an admission that there are no assets in the deft.'s hands at that time (*Taylor v. Holman*, B. N. P. 169; 2 Saund. 219 *a*, n.; 2 Wms. Exors. 1705).

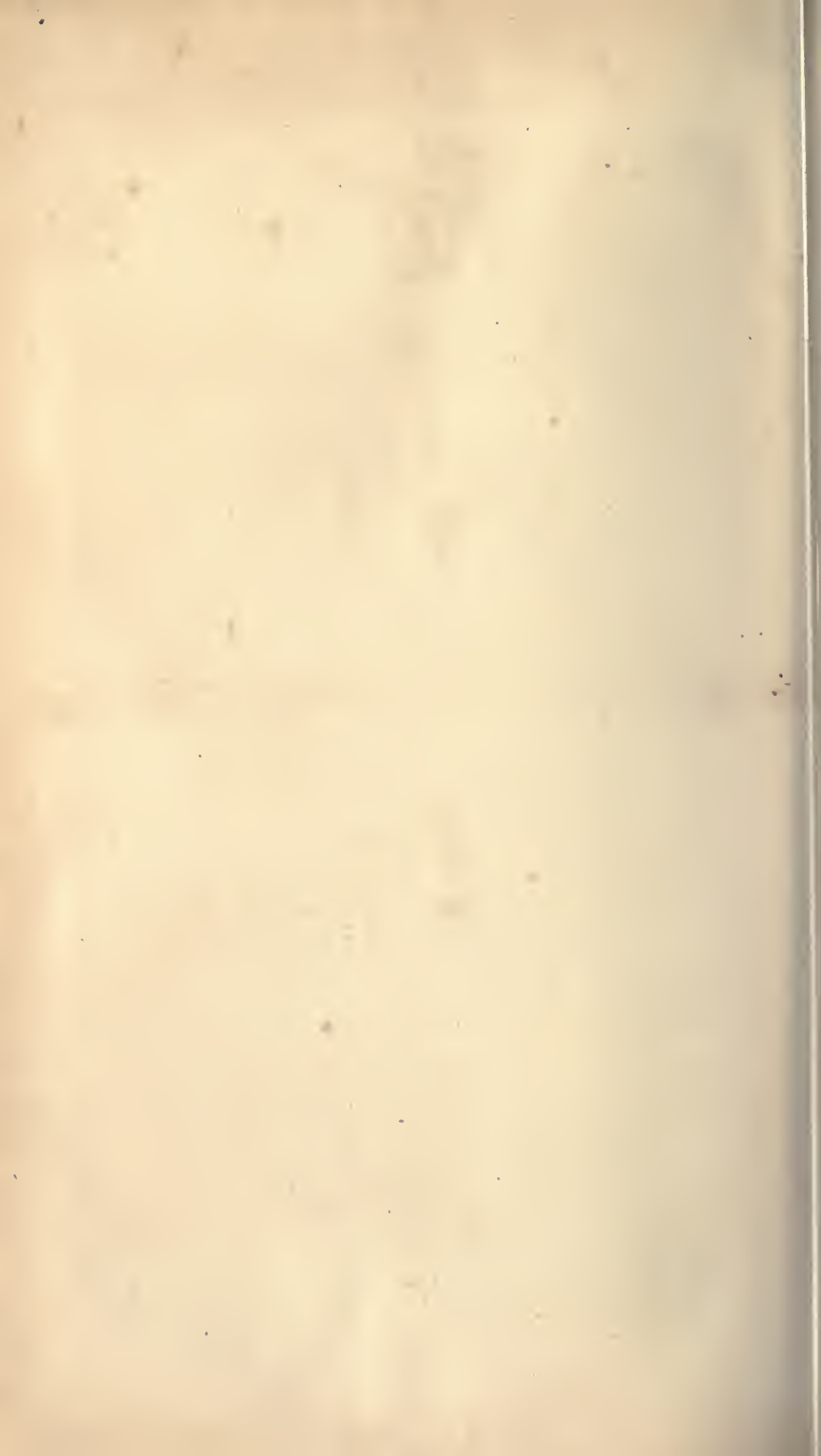
Where the deft. dies after interlocutory and before final judgment the plt. must sue out two writs of *sci. fa.* to entitle him to execution, one before final

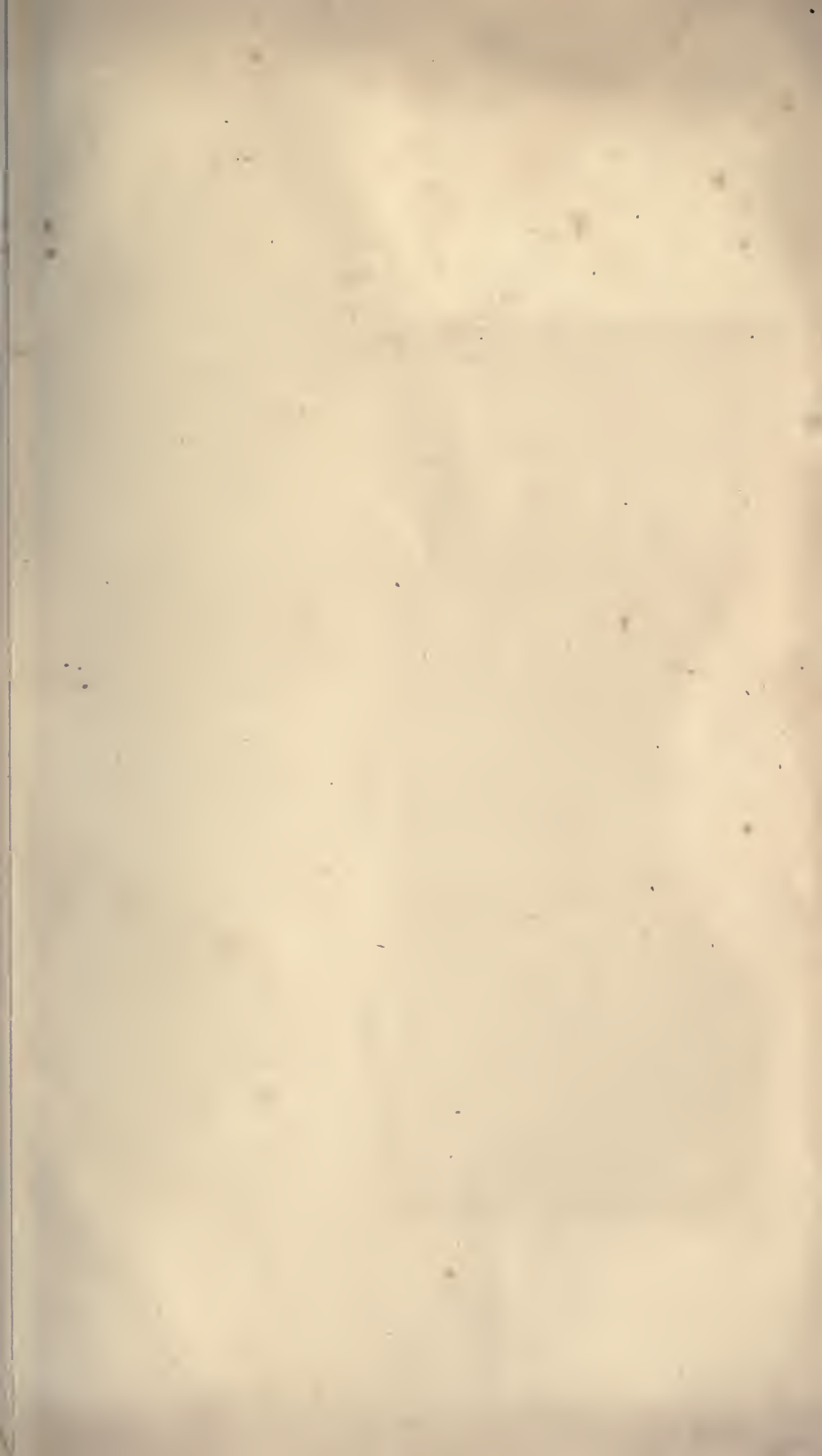
judgment, to make the executors, &c., parties; the other after final judgment to give them an opportunity of pleading (*Tompkins v. Grattan*, Say. 266; 2 Saund. 72 *m*; see *Poulett v. Wrightman*, 1 Bli. N. S. 138). To the *sci. fa.* upon the interlocutory judgment the deft. executor cannot plead a judgment obtained against him on a bond due to the testator, and no assets ultra, or any plea of a similar nature, for the stat. did not intend that the executor should be in a better situation as to assessing damages upon the inquiry than his testator, who could have pleaded nothing but a release, or other matter in bar arising *puis darrien continuance* (*Smith v. Harman*, 1 Salk. 315; see note on this case, 2 Saund. 72 *v*). But to the *sci. fa.* after final judgment the executor, &c., may plead *plene administravit* (2 Wms. Exors. 1708).

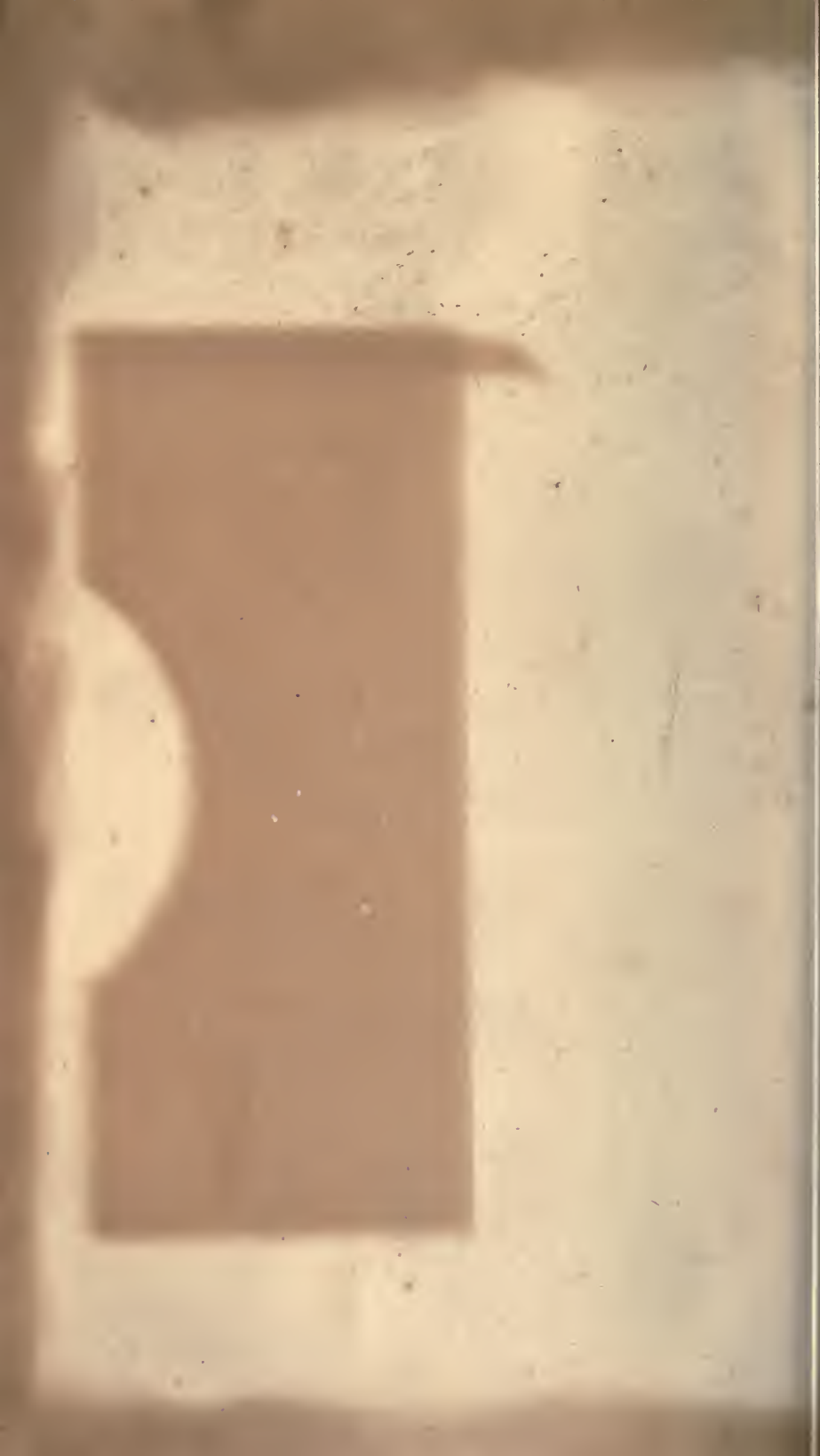
In an action for use and occupation against the deft. in his own character, he being administrator of the original lessee, for rent due at the intestate's death: held, that although the deft. had taken *possession, yet [*1187] having proved that the premises had been productive of no profit to him, and that eight months after the death of the intestate he had offered, by parol, to surrender them to the plt., such proof was a good defence to the action (*Remnant v. Brembridge*, 2 Moo. 94). One of two executors of a deceased tenant for years entered into the demised premises and occupied them: held, that such entry did not enure as the entry of two executors, so as to make them both liable in this action (*Nation v. Tozer*, 1 C. M. & R. 172; 4 Tyrw. 561). Where an administrator has occupied premises demised to the intestate, it is no plea to an action of covenant to pay rent and taxes, and for non-repair, to say that the premises yield no profit (*Tremeer v. Morrison*, 1 Bing. N. C. 89). The lessee of a term of years underleased for a term longer than his own, the sub-lessee covenanting to pay rent to lessee: held, that the executor of lessee might sue the under-lessee for rent accruing during the continuance of lessee's term (*Baker v. Gosling*, 1 Bing. N. C. 19). To an action for use and occupation for a quarter's rent, from Lady-day to Midsummer, 1841, the deft. pleaded that, by an agreement made between the plts., executors of T., and the deft., the deft. agreed to take of the plts., executors as aforesaid, the premises in question; that it was afterwards agreed between them and W. that W. should become tenant to the plts. from Lady-day, 1841, and that the defts. should be discharged from all liability to subsequent rent; that the deft. accordingly gave up possession to W., and the plts. accepted him as tenant: held, that this plea was not proved by evidence that one of the plts. had so agreed to accept W. as tenant, &c. (*Turner v. Hardey*, 9 M. & W. 770; see "USE AND OCCUPATION").

In covenant against two executors upon a covenant of testator for quiet enjoyment against all claiming under him, the breach assigned was, that the two defts., having at the time when the indenture was made lawful title in their own right, entered and evicted the covenantee, the entry and eviction by the two were proved, but the only evidence showing that it was under lawful title was a declaration by one deft. after the entry, that the two had lawful title through the testator, under a deed prior to that now sued upon. *Quære*, whether the declaration was at all admissible as evidence of the title, without production of the deed (*Fox v. Waters*, 12 Ad. & E. 43). But held, that assuming it to be admissible as against the party making it, the declaration was not evidence against the other deft., as it did not relate to the affairs of the executorship, and, therefore, that no proof had been given to support the action of covenant (*Ib.*).









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